

# **Morocco's Sovereignty over Natural Resources in Saharan provinces**

## **- Taking Cherry Blossom Case as an Example -**

—

Shoji Matsumoto

# About Policy Center for the New South

The Policy Center for the New South (PCNS) is a Moroccan think tank aiming to contribute to the improvement of economic and social public policies that challenge Morocco and the rest of the Africa as integral parts of the global South.

The PCNS pleads for an open, accountable and enterprising «new South» that defines its own narratives and mental maps around the Mediterranean and South Atlantic basins, as part of a forward-looking relationship with the rest of the world. Through its analytical endeavours, the think tank aims to support the development of public policies in Africa and to give the floor to experts from the South. This stance is focused on dialogue and partnership, and aims to cultivate African expertise and excellence needed for the accurate analysis of African and global challenges and the suggestion of appropriate solutions.

As such, the PCNS brings together researchers, publishes their work and capitalizes on a network of renowned partners, representative of different regions of the world. The PCNS hosts a series of gatherings of different formats and scales throughout the year, the most important being the annual international conferences «The Atlantic Dialogues» and «African Peace and Security Annual Conference» (APSACO).

Finally, the think tank is developing a community of young leaders through the Atlantic Dialogues Emerging Leaders program (ADEL) a space for cooperation and networking between a new generation of decision-makers and entrepreneurs from the government, business and social sectors. Through this initiative, which already counts more than 300 members, the Policy Center for the New South contributes to intergenerational dialogue and the emergence of tomorrow's leaders.

## Policy Center for the New South

Suncity Complex, Building C, Av. Addolb, Albortokal Street, Hay Riad, Rabat, Morocco.  
Email : [contact@policycenter.ma](mailto:contact@policycenter.ma)  
Phone : +212 5 37 54 04 04 / Fax : +212 5 37 71 31 54  
Website : [www.policycenter.ma](http://www.policycenter.ma)

©2020 Policy Center for the New South. All rights reserved  
The views expressed in this publication are those of the authors and do not reflect those of their institutions.



# **Morocco's Sovereignty over Natural Resources in Saharan provinces**

## **- Taking Cherry Blossom Case as an Example -**

Shoji Matsumoto

## About the Author, Shoji Matsumoto

Professor Shoji Matsumoto is currently working in NGOs, namely as the President of Sapporo Institute for International Solidarity (Sapporo, Japan); Japan Center for Moroccan Studies (Sapporo, Japan); and the International Center on Separatism (Tokyo, Japan). He was previously professor of international law at Sapporo Gakuin University, and has recently retired. Dr. Shoji continues to teach international law and other related subjects at the university as a lecturer. Shoji was the visiting fellow at the SOAS, University of London and also visiting professor at Mohamed VUniversity.

## Summary

The challenges against Morocco's sovereignty over natural resources in Saharan districts will be thoroughly examined and criticized. First, the inaccurate interpretation by the EU court of the phrase "a status separate and distinct from an administering State" in the Declaration on Friendly Relations. Second, the unreasonable concept of a 'de facto' administering State in the decisions of the EU courts and the warlike concept of 'military occupation' over the territory under ceasefire, or peaceful territory, where the UN Secretary-General reiterates in his reports to be generally calm and the military agreements are largely observed, in the decision of the UE court. Then, imposition of international responsibility on the OCP, held as private by the South African court in Cherry Blossom Case, is fundamentally criticized. Finally, it is suggested that non-application of State immunities to the phosphate cargo of the NM Cherry Blossom constitutes an internationally wrongful act of 'denial of justice'.



# Morocco's Sovereignty over Natural Resources in Saharan provinces - Taking Cherry Blossom Case as an Example -

## 1. Introduction

When I first learned about the capture of the NM Cherry Blossom vessel in Port Elizabeth, I was at home in Japan, away from Morocco and South Africa. I was not interested in this news, simply because, after more than twenty years of research on the Saharan issue, I find myself convinced that Morocco's legitimacy over the Saharan provinces, or “Western Sahara”, is a fact strongly confirmed by history and law. In fact, competitive geopolitical maneuvers amongst States in the region were behind the artificial fabrication of the issue. Morocco, which was struggling to liberate its territories from French and Spanish colonialism, had - under duress - to go to international institutions to defend, once more, its sovereignty over the Saharan provinces<sup>1</sup>. My previous detachment from the issue stemmed from the aforementioned process, as the harassing and unfair tactics employed against Morocco did not appear unusual to me.

However, when I learned that the phosphate cargo being transported by the ship had been sold back to its owners for one dollar only, I suddenly wanted to know what had happened in more details. As I read the ruling of the South African court, it resembled political propaganda to me. Not only did the plaintiff – the Polisario, and the South African court seem to have arbitrarily taken to redefine the right to self-determination on the NM Cherry Blossom Case. They conceived their perception of this right to self-determination as a backward-looking negative and static dogma, depriving it of its possible constructive roles in our confused world of terrorism, extreme nationalism and separatism.

In Morocco's view, self-determination can occur in the constant exercise of daily human rights in pursuit of economic, social, and cultural development<sup>2</sup>. That view coincides with the conclusion of the UNESCO International Conference of Experts held in Barcelona in 1998 that finds that “[s]elf-determination should not be viewed as a one-time choice, but as an ongoing process which ensures the continuance of a people's participation in decision making and control over its own destiny”<sup>3</sup>. Morocco's Economic, Social, and Environmental Council has put forward the development plan for the Saharan provinces in industries such as agriculture, tourism, fishing and phosphates. In 2015, the UN Special Rapporteur on the right to food reported that she had witnessed Morocco's efforts to develop infrastructure and that many populations of the Saharan provinces were benefiting from its agriculture and fisheries<sup>4</sup>.

Despite the fairness of the Moroccan position, and its sovereignty based in international law that

---

1. In Morocco, the territory of 'Western Sahara' is usually called Southern provinces or Saharan provinces, and 'the Western Sahara conflict' as the Saharan issue. In the UN, 'Western Sahara' is also referred to as the Sahara regions. Hereinafter, natural resources in the Saharan provinces will be called the Saharan natural resources.

2. Report of the Secretary-General on the situation concerning Western Sahara, UN Doc S/2017/307, 2017, para. 21. Hereinafter cited as “2017 SG Report”, for example.

3. Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, UNESCO International Conference of Experts, held in Barcelona, from 21 to 27 November 1998, organised by the UNESCO Division of Human Rights Democracy and Peace and the UNESCO Centre of Catalonia. <https://unpo.org/article/446>. Hereinafter cited as ‘Barcelona Conference 1998’.

4. 2016 SG Report, UN Doc S/2016/355, 2016, para. 72.

has been assumed for a long time over the Saharan provinces; the warring interests have caused panic amongst some of the commercial traders, and pushed a few foreign companies to postpone importing phosphates from the Saharan provinces. This commercial war has been mobilized by the Polisario Separatist Organization. Their campaign has been advocating for all States to reject receiving the phosphate cargoes shipped from the Saharan provinces<sup>5</sup>.

The Cherry Blossom Case has posed a variety of legal, political and other diverse problems, whether explicitly or implicitly<sup>6</sup>. However, only a few of them will be discussed below.

The first one concerns the territorial status of the populations in the non-self-governing territory of the 'Western Sahara' or the Saharan provinces, and the issue of the administering State, and therefore all the responsibilities of said State – de jure and de facto, taking into account the dwindling differences in responsibility between administering States and other Member States, as well as its alternative, 'military occupation', despite the ceasefire arrangements largely observed.

The second is related to the regular pattern of the rebuttals against the denial of Morocco's sovereignty over natural resources in Saharan provinces, with special reference to the Western Sahara Opinion,<sup>7</sup> the Corell Letter<sup>8</sup>, and the EU court decisions. In particular, the EU courts are anachronistically constrained by a stereotypically classic definition of 'people' in people's right to self-determination in a non-self-governing territory as a people having "not yet achieved independence", presupposing independence as if it were the only – or the most ideal form of exercising this right. In this regard, it should be pointed out that the above mentioned regular pattern is not always based on the correct interpretation of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States adopted by the UN General Assembly in 1970. An issue to be carefully considered with respect to this UN General Assembly resolution is the territorial status of the people in a non-self-governing territory.

The third problem addresses the non-extremist contemporary broader concepts of people, prevailing in post-colonial Africa, and people in the Saharan provinces after the end of referendum process. It also addresses the intrinsic relationship between the right to self-determination in a non-self-governing territory, and achieving a political solution to self-determination issues. In order to further along the process of achieving a political solution, "a measure of international legal personality" is granted to the populations in the non-self-governing territory of "Western Sahara" or the Saharan provinces, allegedly represented by the Front Polisario, under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. As such, the UN General Assembly has recommended that the Polisario, as "the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara"<sup>9</sup>. This UN grant of status for these populations, and subsequently the Polisario, is what has enabled their participation in the search for a political solution at the UN level. However, "a measure of international legal personality" does not involve any territorial status recognition on the

---

5. Rod Donald, "New Zealand's Phosphate Trade with Western Sahara and why it is wrong", 28 July 2005, [http:// www.greens.org.nz/searchdocs/other9018.html](http://www.greens.org.nz/searchdocs/other9018.html).

6. Polisario v NM Cherry Blossom, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, Case No. 1487/17, June 15, 2017. paras. 36-43. Hereinafter cited as 'Cherry Blossom Case'.

7. International Court of Justice Report 1975. hereinafter cited as 'ICJ Rep'.

8. Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc. S/2002/161. Hereinafter cited as 'Corell Letter'.

9. UN Doc A/RES/34/37, 1979, para. 7.



part of the populations in the Saharan provinces, or for the self-proclaimed Polisario, in conformity with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, as will be elaborated below.

The final problem is one that was implicitly raised by the decision of the South African court itself in the Cherry Blossom Case in finding with respect of the OCP and Phosboucraa that “they conduct their activities as incorporated legal entities wholly separate from the state of Morocco”<sup>10</sup>. The concern here is whether private persons may be held internationally responsible or not. Is the Front Polisario, for example, entitled to impose international responsibility on private persons in the Saharan provinces in order to seize their natural resources by means of exercising their right to self-determination? Such an answer would be vital in the midst of the ongoing “lawfare”, a parody of warfare, aggressively weaponizing laws and judicial courts<sup>11</sup>.

The first three problems have already been extensively and profoundly examined, and their consideration is a prerequisite to reconfirm Morocco’s sovereignty over its natural resources in the Saharan provinces, with respect to international law, so that the outcomes construct the basis required for discussing the fourth problem, which is expected to bring about a different perspective.

## 2. Non-Self-Governing Territory without an Administering State

By virtue of the prolonged Saharan issue, or ‘the Western Sahara conflict’, the UN system of non-self-governing territory has survived the post-colonial era as a topic for discussion. First of all, the status of the populations in a non-self-governing territory in international law should be revealed. On this aspect, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States should be first referred to<sup>12</sup>. The International Court of Justice (ICJ) holds that the aforementioned Declaration “reflects customary international law”, although such a statement is questionable<sup>13</sup>. It declares that a non-self-governing territory has ‘a status separate and distinct’ from the territory of the State administering it”. The meaning of a status “separate and distinct” has been inaccurately interpreted and enforced – consciously or unconsciously.

On the basis of this Declaration, it is highly doubtful whether the legal status of non-self-governing territory grants the populations, or in this case the self-proclaimed Front Polisario, some form of territorial sovereignty<sup>14</sup>. Therefore, it is equally doubtful whether the EU trade agreements with Morocco are not applicable to natural resources in the Saharan provinces because of its status as a non-self-governing territory. These doubts are caused by an inaccurate interpretation of the phrase “a status distinct and separate” for a non-self-governing territory in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>15</sup>

10. Cherry Blossom Case, para. 84. Hereinafter OCP and Phosboucraa are cited together as ‘OCP’.

11. See Orde F. Kittrick, *Lawfare: Law as a Weapon of War*, 1st edition, Oxford Scholarship Online, 2016, pp. 4-7.

12. UN GA Res 2625, 1970.

13. Kosovo Advisory Opinion, ICJ Rep 2010, para. 80.

14. It is partly because the General Assembly is not entitled to impose responsibility on the relevant Member States to transfer part of their territories to the populations in a non-self-governing territory, even in the form of a Declaration. Besides, no sufficient information is produced to prove the existence of a State practice and *opinio juris* for establishing the customary international law in this respect on the part of administering States.

15. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States will hereafter be referred to as the Declaration on Friendly Relations.

Accurately, the phrase has been interpreted to signify that the territory enjoys “a separate legal status, i.e. a measure of international legal personality<sup>16</sup>, and not necessarily a separate territorial status”. Eva Kassoti elucidates that “neither Chapter XI of the UN Charter (dealing with non-self-governing territories), nor the Friendly Relations Declaration address matters of territorial title as such”<sup>17</sup>. Territory would be relevant only in defining the ‘people’ or populations who are granted ‘a measure of international legal personality’. Thus, with regard to the Western Sahara Opinion, Alejandro Schwed reconfirms, “[a]t no point in the opinion did the Court recognize an absolute right to self-determination for the population of Western Sahara”<sup>18</sup>.

Furthermore, so long as the territorial status is concerned, the factual difference of the relevant culture and language is obviously irrelevant, implied, for example, in a statement that “[t]he Sahrawi people are a distinct people. They have their own culture and customs. They speak Hassaniya Arabic, which is closer to the Arabic spoken in Mauritania than to the Arabic spoken in Morocco”<sup>19</sup>. The difference concerns, not the territorial status of the populations, but the determination of a Member State as an administering State. In fact, Principle IV of the Principles which should guide Members in determining whether or not an obligation exists to transmit the information provides that “[p]rima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”<sup>20</sup>. In short, the difference is recommended to be taken into account in determining which Member State may as well be an administering State. However, the difference cannot be invoked to assert the territorial status of the ‘people’ or populations. This would be quite a different matter, although the wording is similar.

Since the ‘people’ or populations in a non-self-governing territory do not enjoy a separate territorial status, “[n]othing in the foregoing paragraphs”, prescribed in the Declaration on Friendly Relations, “shall be construed as authorizing or encouraging any action which would dismember or impair ... the territorial integrity or political unity of sovereign and independent States”.

As such, a report of the New York City Bar Association should be criticized as inaccurate when it argues that “there is a geographic separateness of the territory and a distinctive social identity of the people living within or originating from the territory that distinguishes them from the colonial administering power, have a right to self-determination that includes ... the right to form an independent self-governing state”<sup>21</sup>. The same inaccuracy was repeated by the EU court when it found that “[i]n view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words ‘territory of the Kingdom of Morocco’ set out in Article 94 of the Association Agreement cannot ... be interpreted in such a way that Western Sahara is included within the territorial scope of

---

16. Non-self-governing territories now have international legal personalities distinct from those of the administering states”, Alejandro Schwed elaborates, in “Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute”, *Fordham International Law Journal*, Vol. 6, 1982, p. 452.

17. va Kassoti, “The Council v. Front Polisario Case: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation (Second Part)”, *European Papers*, Vol. 2, No. 1, 2017, pp. 32-33, quoting from James Crawford, *The Creation of States in International Law: the Law and Practice of Decolonization*, Clarendon Press, 2006, pp. 618-619.

18. A. Schwed, loc. cit., supra n. 15, p. 452.

19. Cherry Blossom Case, para. 18.

20. U GA Res 1541, 1970, Annex.

21. The Committee on the United Nations, Report on Legal Issues Involved in the Western Sahara Dispute: Use of Natural Resources, New York City Bar Association, 2011, p. 57.

the agreement”<sup>22</sup>.

In respect of international personality of the populations in a non-self-governing territory, J. Crawford explains that the Declaration on Friendly Relations has served as the basis for allowing separate representation of the peoples in non-self-governing territories by the OAU, later AU, or the UN.<sup>23</sup> While the Polisario might be able to obtain a legal position to engage in a dialogue with Morocco for finding a political solution at the UN level, it does not necessarily enjoy any territorial status in the Saharan provinces. As a result, Morocco’s sovereignty over the Saharan natural resources would neither be affected nor impaired by its status as a non-self-governing territory.

In *Council v Polisario Front*, nevertheless, “[i]n view of the separate and distinct status accorded to the territory of Western Sahara”, it is held inaccurately that “the words ‘territory of the Kingdom of Morocco’ ... cannot ... be interpreted in such a way that Western Sahara is included in the territorial scope of that agreement”<sup>24</sup>. This passage is later quoted in the Court’s decision for the *Cherry Blossom Case* as is<sup>25</sup>.

It should be remembered that the General Assembly is not entitled to impose responsibility on Member States, specifically here on Morocco in respect of the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces, to transfer that part of its territory to the populations, allegedly represented by the Polisario. A. Schwed elucidates that “[t]here is a general consensus that resolutions of the General Assembly were never meant to be international law by virtue of their mere passage”, and he concludes that “[t]he wording of the Charter never grants the General Assembly legislative powers; instead it consistently limits it to an exhortatory capacity”<sup>26</sup>.

Although under the Declaration on Friendly Relations all Member States are recommended to assume responsibilities in order to promote self-determination efforts and support the UN in implementing a principle stating that any legal right is not accorded to the populations of a non-self-governing territory. As such, the populations of the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces, or allegedly the Polisario, are not entitled to directly claim the enforcement of such responsibilities before the UN. These responsibilities are addressed only to the Member States, and are expected to be implemented within the framework of the friendly relations among the neighboring States<sup>27</sup>.

What the Polisario is accorded, by virtue of the status of ‘Western Sahara’ or the Saharan provinces as a non-self-governing territory, thus, is not a territorial status. Accordingly, there is no legal obstacle

22 Council of the EU v *Front Polisario*, the Court of Justice of the EU, Grand Chamber, judgment of 21 December 2016, Case C-104/16 P, para. 92. The same inaccuracy is repeated in ‘the Joint Written Statement’ submitted by American Association of Jurists et al to the Secretary-General. UN Doc A/HRC/37/NGO/X, 2018, p. 3. On the other hand, absence of reference to the “distinct and separate” status seems almost common to the advocates of ‘remedial secession’, justifying the right to secession ‘as the last resort’. Glen Anderson, one of such advocates, for example, does not refer to it at all in his elaborate discussion on the Declaration on Friendly Relations, in *idem.*, “A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession”, *Vanderbilt Journal of Transnational Law*, Vol. 49, 2016, pp. 1215-1229. For them whether the territory concerned has a “distinct and separate” status would not matter, let alone for a non-colonial secession. To the problem of secession or the right to external self-determination will be returned later.

23. J. Crawford, *op. cit.*, supra n. 16.

24. Council of the EU v *Front Polisario* [GC], para. 92.

25. *Cherry Blossom Case*, para. 42. But the phrase “distinct and separate” was not referred to by the British court in “The status of Western Sahara”, *R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another* [2015] EWHC 2898 (Admin), paras. 12-22.

26. A. Schwed, *loc. cit.*, supra n. 15, p. 449, n. 33.

27. C. Don Johnson, “Toward Self-Determination – A Reappraisal as Reflected in the Declaration of Friendly Relations”, *Georgia Journal of International and Comparative Law*, Vol. 13, 1973, p. 148.

at all for Morocco to assume sovereignty over the non-self-governing territory of 'Western Sahara' or the Saharan provinces and to exercise its sovereignty over Saharan natural resources, and see its agreements with the EU applied to the non-self-governing territory.

The next problem concerning the UN system for a non-self-governing territory is related to the question regarding which State is to act as the administrator for 'Western Sahara' or the Saharan provinces, under article 73 of the UN Charter - which prescribes that the interests of the inhabitants of the territory are paramount, with the article beginning with the phrase "Members of the United Nations which have or assume responsibilities for the administration of territories".

As such, does Morocco have to assume all responsibilities for the administration of the Saharan provinces under the UN Charter? While it is widely conceived that there is no de jure administering State with regard to 'Western Sahara' or the Saharan provinces<sup>28</sup>, it is also argued that Spain is its administering State. Hans Morten Haugen argues, "Spain formally withdrew from the territories on 26 February 1976. Spain however, according to the UN Under-Secretary-General on Legal Affairs, never did in a legal way '... transfer sovereignty over the territory...', as this can only be done in accordance with the procedures set down by the United Nations. Hence, Spain is still the 'administering power' of Western Sahara"<sup>29</sup>.

It may take less time and effort to begin with a question on the possibility of a 'non-self-governing territory without an administering State' than focusing on the legal effects of Spain's unilateral declaration as such. The answer to the question depends on who is entitled to determine an administering State. The question is rooted in the limits of the General Assembly's competences to legally bind the Member States, either in forcing them to grant territorial status to a non-self-governing territory, or in prompting them in assuming responsibilities as its administering State. With regard to non-self-governing territories, questions have been raised on the elements used as a basis for their list<sup>30</sup>, and on "what this means for territories such as Palestine, Kosovo, Taiwan and Tibet", for instance<sup>31</sup>. Though the basis is not a problem here, the competence to determine a territory as non-self-governing - according to the ICJ, the General Assembly reserves to itself the right to determine the territories which have to be regarded as non-self-governing<sup>32</sup>. This explains how the General Assembly could remove Hong Kong and Macau from the UN list of non-self-governing territories, while notwithstanding that these were arguably "territories whose peoples have not yet attained a full measure of self-government", as prescribed in article 73<sup>33</sup>. In this respect, the General Assembly is invested with a strong power.

---

28. In the AU Legal Opinion, "after the withdrawal and abandonment of responsibilities by Spain on 26 February 1976, Western Sahara has not had any other administering power". The Office of the Legal Council and Directorate for Legal Affairs of the AU Commission, Legal Opinion, 2015, para. 28. And in United Nations Juridical Yearbook 2007, "the powers and responsibilities of Spain, as the administering power of the Territory, were transferred to a temporary tripartite administration", UN Publications, 2010, p. 456. On the other hand, neither Morocco nor Mauritania assumed the responsibilities.

29. Hans Morten Haugen, "The Right to Self-determination and Natural Resources: The Case of Western Sahara", LEAD, Vol. 3, 2007, p. 73.

30. B. K. Sen explains that "[i]nitially these territories were identified by a voluntary listing process by the states responsible for their administration: Australia, Belgium, France, Great Britain, the Netherlands, New Zealand, and the United States". Problems arose when Spain and Portugal refused to bring any of their colonial territories within the system of non-self-governing territory. Idem., "Secession and Self-Determination in the Context of Burma's Transition", Legal Issues on Burma Journal, No. 10, 2001, p. 13.

31. Myrthe Hanckmann, "The European Union as a Contributor to Customary International Law: A Question of Self-Determination in Western Sahara", Universiteit van Amsterdam, January 7, 2019, p. 37. [www.scriptsionline.uba.uva.nl/document/669646](http://www.scriptsionline.uba.uva.nl/document/669646).

32. East Timor Case, ICJ Rep 1975, para. 31.

33. UN GA Res 2908, 1972.

Thus, it is argued, in inaccurate ways, that “in order to be truly free from its responsibilities in the international order, Spain needed approval from the UN General Assembly. As Administering Power, Spain had no sovereignty over Western Sahara. It simply acted as a delegate from the international community. Consequently, it could never dispose of the non-self-governing territory without the authorization of the United Nations”<sup>34</sup>. Regardless of the detailed differences between ‘governing’ in “non-self-governing” and ‘administering’ in “administering State”, however, these concepts are divorced from sovereignty in international law<sup>35</sup>. A State may assume sovereignty over a non-self-governing territory, leaving aside the issue of Spain’s sovereignty. In fact, the ICJ has clearly found that the administering power retained sovereignty over the non-self-governing territories in the Right of Passage Case<sup>36</sup>.

With regard to the responsibilities for an administering State, the General Assembly is not competent to impose responsibilities on the Member States, which differentiates it from the Security Council. Although H. M. Haugen insists, incorrectly, that Spain’s unilateral declaration to withdraw is invalid because it is not in conformity with the relevant General Assembly resolutions<sup>37</sup>, the resolutions cannot legally bind Spain. Thus, the status of an administering State cannot be imposed, and the General Assembly cannot forcibly keep on imposing these responsibilities on Spain. On the contrary, Spain would be legally bound under international law by its own unilateral statement in public of its clear intention to withdraw<sup>38</sup>.

Because of the voluntary rule, the transmission of technical and statistical information on the territory under Article 73 has been called ‘voluntary transmission’<sup>39</sup>. Therefore, the list of administering States that is included in the UN list of non-self-governing territories only serves as a sort of archives. As such, Spain is still put in the relevant UN lists as the administering State for ‘Western Sahara’ or the Saharan provinces, as a trace of past record<sup>40</sup>. However, these UN lists do not have any normative implications<sup>41</sup>.

Consequently, whether a territory is non-self-governing, or not, is determined by the General Assembly, on the one hand. On the other hand, whether a Member State would assume responsibilities or not is determined by the Member State itself. In that sense, ‘a non-self-governing territory without an administering State’ is not unexpected from the beginning. Accordingly, Latifa Haboula called it “the legal loophole”. As a result, “[t]he Moroccan exploitation of the Western Sahara natural resources

34. Eduardo Trillo de Martín-Pinillos, «Spain as Administering Power of Western Sahara», *International Law and the Question of Western Sahara*, Karin Arts and Pedro Pinto Leite (eds.), IPJET, 2007, p. 81. It is added that a “Non-Self-Governing Territory will not be amenable to provisions, in case there is an absence of voluntary adherence to the administering power”, *Ibid*.

35. Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 2003, pp. 106-108. Cf. Michael Foucault, *Security, Territory, Population*, Palgrave Macmillan, 2009, pp. 96, 99.

36. ICJ Rep 1960, para. 39.

37. H. M. Haugen, “Western Sahara – Reviewing the UN Charter”, *A. E. D. I.*, Vol. 35, 2009, pp. 361-362.

38. *Nuclear Test Cases (Merits)*, ICJ Rep 1974, paras. 43-51.

39. UN Doc A/RES/637, 1952, preamble.

40. Report of the Secretary General of the 1 February 2016, *Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations*, UN Doc A/71/68, Annex. It is noted in its footnote that, in 1976, Spain informed the Secretary-General that St “definitely terminates its presence in the Territory of the Sahara and deems it necessary to place the following on record: (a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory”.

41. Although E. Kasseti argues that “[t]he UN still recognizes Spain as the de jure administering power of Western Sahara, and Spain relies on this status in order to extend its international jurisdiction in criminal matters to crimes committed in Western Sahara” partly based on Wathelet’s opinion (Wathelet, *infra* n. 60, para. 191), it would be thus inaccurate. E. Kasseti, *loc cit.*, *supra* n. 16, p. 33. Besides, “[n]ational courts can exercise universal jurisdiction when the State has adopted legislation recognizing the relevant crimes and authorizing their prosecution”, “Universal Jurisdiction”, *International Justice Resource Center*, n. d., [https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#Domestic\\_Laws\\_Incorporating\\_Universal\\_Jurisdiction](https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#Domestic_Laws_Incorporating_Universal_Jurisdiction).

is not governed by any pre-established legal category"<sup>42</sup>.

Hans Corell was accurate, when he wrote in the Corell Letter that “[t]he Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory”<sup>43</sup>. Indeed, Spain could not transfer sovereignty over the Saharan provinces because it did not assume the sovereignty, and Spain could neither confer nor transfer the status of an administering State because the responsibilities due to the status should be voluntarily assumed. Since Morocco has not declared to voluntarily assume the responsibilities, the principles enshrined in article 73, including “the principle that the interests of the inhabitants of these territories are paramount” are not applicable to Morocco.

Alternatively, the concept of ‘de facto administering State’ has been advocated for from time to time. Martin Dawidowicz views that the UN and EU treat Morocco as a de facto administering State<sup>44</sup>. In the Legal Opinion of the European Parliament Legal Service, ‘Western Sahara’ is a non-self-governing territory and that Morocco is its de facto administrator<sup>45</sup>. As one of the reasons, it was speculated that “the Council and Commission had tried arguing that Morocco might be regarded a ‘de facto administrative power’, thus extending ‘waters falling within the jurisdiction of Morocco’ to Western Saharan waters”<sup>46</sup>. Even if Morocco was not regarded as a de facto administering State, however, its exercise of sovereignty over the waters in the Saharan provinces would be neither disturbed nor restricted by the status of ‘Western Sahara’ or the Saharan provinces as a non-self-governing territory, because the populations of these provinces, allegedly represented by the Polisario, do not enjoy a separate territorial status.

In the Cherry Blossom Case, possibly with a different motive, it is described, again inaccurately, that “Morocco exercises de facto administrative control” over ‘Western Sahara’<sup>47</sup>, where it is “still subject to colonial rule”<sup>48</sup>. Although its true motive is not hard to discern, it should be reiterated that in order to prove “the colonial rule” of ‘Western Sahara’ the existence of a colonial power would become indispensable, and, as a historical fact, colonial powers have generally assumed their responsibilities as administering States.

Based on the argument defining Morocco as a de facto administering State, another question has been raised regarding on whether Morocco’s exploitation of Saharan natural resources is done for

---

42. Latifa Haboula, “Western Sahara: the Issue of the Natural Resources Exploitation”, Sahara Question, November 16, 2015, <https://sahara-question.com/en/opinions/western-sahara-issue-natural-resources-exploitation>.

43. Corell Letter, para. 6. It is one of the most frequently quoted paragraphs in Corell Letter in different decisions of judicial courts, except British court decision, and such legal opinions as Legal Opinion of the European Parliament Legal Service and AU Legal Opinion.

44. Martin Dawidowicz, “Trading Fish or Human Rights in Western Sahara?”, *Statehood and Self-Determination*, Duncan French (ed.), Cambridge University Press, 2013, p. 250-276, cited in R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another [2015] EWHC 2898 (Admin), para. 18.

45. Legal Opinion of the Legal Service in European Parliament on the Proposal for a Council Regulation on the Conclusion of the Fisheries Partnership Agreement between the EC and Morocco – Compatibility with the Principles of International Law, SJ0085/06, February 20, 2006, para. 37. Hereinafter cited as ‘EU Legal Opinion’.

46. Anne-Carlijin Prickartz and Sandra Hummelbrunner, “EU-Morocco Trade Relations, Western Sahara and International Law: The Saga Continues in C-226/16, Western Sahara Campaign, UK”, *European Law Blog*, March 28, 2018, <https://europeanlawblog.eu/2018/03/28/eu-morocco-trade-relations-western-sahara-and-international-law-the-saga-continues-in-c-266-16-western-sahara-campaign-uk/>.

47. Cherry Blossom Case, para. 58.

48. *Ibid.*, para. 1.

the benefit of the populations of the Saharan provinces or not. According to an interpretation by the General Assembly, article 73 does not prohibit the administering State from exploiting the natural resources in a non-self-governing territory, albeit on condition that the revenues from the exploitation is allocated to the development of the territory. The General Assembly affirms “the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes”<sup>49</sup>. However, Morocco has not accepted to assume these responsibilities as an administering State, *de jure* or *de facto*, with respect to ‘Western Sahara’ or the Saharan provinces.

At this stage, the limitation for the Polisario in resorting to consent-based treaty obligations, under article 73 of the UN Charter, in unilaterally imposing responsibilities on Morocco has become apparent. So, what is expected next would necessarily be international customary law, which consists not of consent of the parties, but of State practice and *opinio juris*, and would be universally applied without the consent of the party concerned, i.e. Morocco in this case<sup>50</sup>. The legal ground of *de facto* administering State may be sought only in customary international law.

Thus, according to the Corell Letter, “[t]he recent State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligations”<sup>51</sup>. In the Corell Letter, responsibilities of an administering State and those of other Member States seem to have come close to establishing a new international customary law on non-self-governing territories. The direction is understandable if the difficulty is taken into account to differentiate *de facto* administering States from other Member States under customary international law.

In the EU Legal Opinion, in fact, it is proclaimed that the compliance of the Morocco-EU fisheries agreement with international law would depend on the way Morocco implemented the agreement and the extent to which it foresaw benefits to the people of the Saharan provinces<sup>52</sup>. The concept of *de facto* administering State may have been propounded, in part, to unilaterally impose international responsibilities on Morocco in respect of the Saharan provinces, so as to infringe Morocco’s sovereignty over its Saharan natural resources for political motives, despite the voluntary rule prescribed in article 73. This customary law strategy may have been expected to go through in compatibility with the UN Charter, maintaining the imposition of responsibilities on Morocco. Inevitably, however, as a by-effect of transformation from *de jure* to *de facto*, or from treaty to customary law, the difference in responsibility between an administering State, *de jure* or *de facto*, and other Member States would become blurred. On the extreme, all Member States would be treated virtually as *de facto* administering States. However, whether the third States, other than administering States, are really imposed virtually the same responsibilities as the administering States is not a matter of interpretation of the existing international law. It would remain a matter for the future.

Even if third States, other than the administering States – as Morocco, assumed the hypothetical or political responsibilities under the proposed international customary law, it is clear and unequivocal in

---

49. UN Doc A/RES/50/33, 1995, para. 2. See Corell Letter, para. 12.

50. North Sea Continental Shelf Cases, ICJ Rep 1969, para. 77.

51. Corell Letter, para. 24.

52. EU Legal Opinion, para. 49, Conclusions (b)-(d).

respect of Morocco that “a paramount progress has been noticed in the Western Sahara, abandoned as a desert and arid area by Spain” and “the contracts concluded by Morocco with private investors were crucial for the economic progress in the Western Sahara”<sup>53</sup>. It is declared, moreover, that revenues from the mineral-rich Saharan provinces will continue to be invested there<sup>54</sup>. Thus, it is reported that the local populations in the Saharan provinces petitioned against the Polisario’s allegations, emphasizing the benefits of the agreement with the EU on their development, appealing that “[t]he southern provinces are now ranked above the national average for human development indicators”<sup>55</sup>.

Just as the Advocate General Wathelet concludes, the concept of ‘de facto administering State’ does not exist in international law, because the responsibilities must be voluntarily assumed under the UN Charter. The concept of ‘de facto administering State’ would be, therefore, in breach of the UN Charter, so that the way for a new international customary law would be closed because of the absence of *opinio juris*, one of the two indispensable constituents for an international customary law. Even so, however, politically it seems that the border wall between administering States and other Member States is, for better or worse, getting lower. However, it should not be forgotten that what is expected of the UN system of non-self-governing territory is not political strategies, but the well-being of the populations.

Margaret Hughes Ferrari conclusively proclaims that “there is no magic formula of ‘one-size fits all’” for non-self-governing territories, because different territories have different needs and should be considered on a case-by-case basis”<sup>56</sup>. The populations in the non-self-governing territory of New Caledonia, for example, have rejected outright political independence and preferred to make ‘unique status arrangements’ with the administering State, France<sup>57</sup>. ‘Western Sahara’ or the Saharan provinces may be one of the ‘different territories for different purposes’<sup>58</sup>.

For the purpose of sovereignty, it is Moroccan territory, while for the purpose of finding a political solution in the UN, it is a ‘non-colonial’ non-self-governing territory. It is ‘non-colonial’ on the basis of the phrase “[t]he territory of a colony or other Non-Self-Governing Territory” in the Declaration on Friendly Relations. ‘A or other B’ signifies ‘A is included in B’, leaving room for ‘B other than A’, namely ‘non-self-governing territories other than a colony’. The phrase ‘A or other B’ signifies, as a legal term, extension, rather than limitation<sup>59</sup>. Thus, there may be a ‘non-colonial’ non-self-governing territory, without its colonial power or administering State. As a result, a determination on which State is an administering State, whether *de jure* or *de facto*, would not always be indispensable.

Instead of the failed concept of *de facto* administering State, Wathelet introduced another concept, ‘the occupied territory’. He called the Saharan provinces ‘the occupied territory’ and Morocco ‘the

---

53. L. Haboula, *loc. cit.*, *supra* n. 41.

54. “Morocco King Vows No Compromise on Sovereignty on Visit to Western Sahara”, *The Arab Weekly*, November 6, 2015. <https://theArabweekly.com/morocco-king-vows-no-compromise-sovereignty-visit-western-sahara>.

55. Safaa Kasraoui, “Polisario Wants to Appeal EU-Morocco Agriculture Agreement Again”, *Morocco World Today*, January 23, 2019. <https://www.morocoworldnews.com/2019/01/264213/polisario-eu-morocco-agriculture-agreement/>.

56. Margaret Hughes Ferrari, “Most of World’s Population No Longer Lives Under Colonial Rule, but United Nations Decolonization Mission Still Unfulfilled, Fourth Committee Told as Debate Begins”, *UN General Assembly, Fourth Committee*, October 8, 2007.

57. Godfrey Baldacchino, “Islands, island studies, island studies journal,” *Island Studies Journal*, Vol. 1, 2006, p. 3.

58. Cf. The concept of “different boundaries for different purposes” is submitted in Gidon Gottlieb, *Nation Against State*, Council for Foreign Relations Press, 1993, pp. 4, 44-47, 75.

59. See J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2005, pp. 95-96.



occupying power<sup>60</sup>, complaining that “the manner in which the Fisheries Agreement was concluded does not comply with the rules of international humanitarian law applicable to the conclusion, by an occupying power, of international agreements applicable on the occupied territory”<sup>61</sup>. To that effect, Bob Saul submits, a territory is held as ‘occupied’ if the local authority is displaced and “when it is placed under the authority of the hostile army”<sup>62</sup>. In fact, however, there have been ‘civilian’ local authorities in the Saharan provinces, under the sovereignty of Morocco, although the authorities may be considered “hostile” by the Polisario.

It had already been proposed, though inaccurately, to apply international humanitarian law to the alleged ‘military occupation’ in the Saharan provinces. It is further suggested that certain commercial dealings with natural resources from these provinces should be prohibited by the international law of occupation, extending even to individual criminal responsibility as war crimes<sup>63</sup>.

Could it be considered a war crime to eat fish food at a restaurant in Laayoune, Dakhla or Tan Tan? Almost all the tourists there would have committed the crime. However, any charges of criminal responsibility that are arbitrarily pressed against the specified persons, not in conformity with *nullum crimen sine lege*, would constitute a violation of international human rights. At the same time, a ban on commercial dealings of Saharan natural resources by criminal punishment would be typically in breach of “the obligation to promote to the utmost ... the well-being of the inhabitants of these territories” under article 73 of the UN Charter. Any economic sanctions may be imposed, furthermore, only by a decision of the Security Council in conformity with the provisions stipulated in chapter VII of the UN Charter. Furthermore, should there be any conflict between the obligations under international humanitarian law and the obligations under the UN Charter, the Charter shall prevail under its article 103.

As Ben Saul himself affirms, the Security Council - the only organ assuming primary responsibility for the maintenance of international peace and security in the UN, has never characterized ‘Western Sahara’ or the Saharan provinces as ‘occupied’<sup>64</sup>. Although the 2019 SG Report refers to the phrase “an illegal military occupation”, it is not the result of the Secretary-General’s legal analysis, but it is a direct quotation from the Polisario’s remarks<sup>65</sup>. Possibly, the quotation may be made for the only purpose of warning the Polisario of its imprudent and unproductive remarks. Although Morocco’s ‘belligerent occupation’ of ‘Western Sahara’ or the Saharan provinces, was referred to twice in the General Assembly resolutions in 1979 and 1980, they were adopted more than ten years before the UN brokered a ceasefire between Morocco and the Polisario in 1991. According to Ben Saul, from 1980 on, the General Assembly has not referred to it as ‘occupation’<sup>66</sup>. However, M. Dawidowicz insists that “this is not decisive as belligerent occupation is largely a matter of fact dependent on

60. “‘Occupation’ being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession”, found in *Western Sahara Opinion*, though in *terra nullius*. ICJ Rep 1975, para. 79. The word ‘occupation’ used in the context of the Saharan issue would signify ‘military occupation’ under international humanitarian law.

61. Opinion of Advocate General Wathelet, delivered on 10 January 2018 (1), R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another [2015] EWHC 2898 (Admin). Also, AU Legal Opinion refers to “the occupied territories”, para. 68.

62. Ben Saul, “The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources”, Sydney Law School, Legal Studies Research Paper, No. 15/81, 2015, p 5, <http://ssrn.com/abstract=2663843>.

63. Gerald del Caz, “The Legal Status of Western Sahara and the Laws of War and Occupation”, GEES, 15 de enero de 2008, <http://gees.org/articulos/the-legal-status-of-western-sahara-and-the-laws-of-war-and-occupation>.

64. Christine Chinkin, ‘Laws of Occupation’, Conference Proceedings, Conference on Multilateralism and International Law with Western Sahara as a Case Study, hosted by the South African Department of Foreign Affairs and the University of Pretoria, 4-5 December 2008, Pretoria, cited in B. Saul, *supra* n. 37, p. 1.

65. 2019 SG Report, UN Doc S/2019/282, 2019, para. 10.

66. B. Saul, *loc. cit.*, *supra* n. 61, pp. 1-2.

effective authority and control over a territory to which the occupying state holds no legal ties"<sup>67</sup>, notwithstanding not only that Morocco's legal ties with the Saharan provinces are recognized in the Western Sahara Opinion, but also that Morocco has long assumed sovereignty over Saharan provinces and entitled to exercise "effective authority and control" over the territory, as Dawidowicz himself affirms.

Although it is submitted in a strategical review on the EU court decision that "[a]pplying the law of occupation ... instead could have opened a window for EU-Morocco trade in natural resources from the Western Sahara insofar as Moroccan exploitation benefits the indigenous inhabitants"<sup>68</sup>, the application of a Morocco-EU trade agreement to Saharan natural resources cannot be legally prevented by the Polisario because it does not enjoy any territorial status to claim Saharan natural resources, and as such, Morocco is entitled to exclusively exercise its sovereignty over these natural resources. There are no other legal personalities entitled to claim territorial status over the Saharan provinces other than Morocco.

Moreover, the argument of military occupation does not correspond to the reality of these provinces. According to Peter M. R. Stirk, 'military occupation' must imply a 'definite end' and cannot continue indefinitely<sup>69</sup>. It is stipulated in the Geneva Convention, that its application to the occupied territory "shall cease one year after the general close of military operations"<sup>70</sup>. Morocco has insisted on its sovereignty over the Saharan provinces consistently and without a 'definite end'. In the 2019 SG Report, moreover, "[s]ince MINURSO's inception in 1991 no exchange of fire between the parties has taken place" and MINURSO's "efforts have been successful in de-escalating tensions, in resolving violations of the military agreements and in maintaining the parties' confidence in the ceasefire arrangements"<sup>71</sup>. On analysis, the report concludes that "[t]he overall security environment in Sahara regions remains relatively stable"<sup>72</sup>. On the argument of 'occupied territory', however, its relations with the effective cease-fire supervised by MINURSO is not explained - a lack fateful for the argument of 'military occupation', because the concept of "occupied territory" requires, as a matter of principle, the existence of "military operations", even if there are exceptive clauses in the Convention which are almost common to any international agreements. Those who seek in good faith, not in 'lawfare', for a peaceful political solution to the Saharan issue would not utter "occupied territory" in such an imprudent warlike manner, so as not to disturbingly provoke the unfortunate situation to which the laws of war are to be inevitably applied.

### 3. Morocco's Sovereignty over Saharan Natural Resources

More importantly, Morocco's arguments should be heard, for debemus autem auditis partibus et in opinion, or 'both parties should be heard'. Morocco has categorically denied that it is an administering State or occupying power with respect to the Saharan provinces<sup>73</sup>. If Morocco's argument on its

---

67. M. Dawidowicz, loc. cit., supra note 43, p. 272.

68. Cedric Ryngaert, "The Polisario Front Judgment of the EU Court of Justice: a Reset of EU Morocco Trade Relations in the Offing", Reinforce Blog, January 15, 2017, [blog.reinforce.eu/.../the-polisario-front-judgment-of-the-eu-court](https://blog.reinforce.eu/.../the-polisario-front-judgment-of-the-eu-court).

69. Peter M. R. Stirk, *Politics of Military Occupation*, Edinburgh University Press, 2009. p. 44.

70. Geneva IV Convention, art. 6.

71. UN Doc S/RES/2468, 2019, para. 77.

72. Ibid., para. 49.

73. Lotte Leicht, "MEPs: Seek European Court's Opinion on EU-Morocco Fisheries Agreement's Compatibility with International Law", Human Rights Watch, February 11, 2019, <https://www.hrw.org/news/2019/02/11/meps-seek-european-courts-opinion-eu-morocco-fisheries-agreements-compatibility>.

sovereignty over these provinces is reaffirmed, in principle there would be no limits under international law on Morocco's exploration and exploitation of Saharan natural resources<sup>74</sup>. In reality, however, Morocco has been obliged to deal with a variety of legally unfounded allegations by the Polisario. To make matters worse, the Polisario refused to discard already debunked propositions, with inaccurate assertions repeated again and again without hesitation on plenty of pro-Polisario websites.

One of the most frequently repeated, almost familiar, allegations against Morocco's sovereignty over 'Western Sahara' or the Saharan provinces has been made as follows: "as recognized by the International Court of Justice in its Western Sahara Advisory Opinion"<sup>75</sup>. In the Cherry Blossom Case, it is held that "[t]he ICJ's judgment is clear: Morocco has no claim to sovereignty over Western Sahara" in the first sentence of a section entitled "[t]he Position of Morocco"<sup>76</sup>. Thereafter, the relevant paragraphs of the Corell Letter on the exploitation of Saharan natural resources would be cited, though "the opinion is an opinion of a legal adviser on a difficult topic and not a judgment of the ICJ", as commented in the British court's judgment<sup>77</sup>. In that sense, the reasoning of the British court decision is different from other decisions by the EU and the South African courts.

Following these occurrences, the EU court decisions on the applicability of trade agreements to the Saharan provinces and part of the UK court decision on the applicability of preferential trade tariffs would be quoted in sequence<sup>78</sup>. These court decisions are largely based on the Western Sahara Opinion and the Corell Letter, which is again in line with the Western Sahara Opinion, so long as Morocco's sovereignty over the Saharan provinces is concerned, though the decision of the UK court is much more prudent than the EU court decisions from the perspectives of international law.

In the decisions of the EU and South African courts, on the other hand, the same phrases with no criticism come across occasionally, as if they were simply 'copied and pasted'<sup>79</sup>. In the court rulings, no other reasoning could be found in denying Morocco's sovereignty over the Saharan provinces than the presumably 'copied and pasted' phrases from the Western Sahara Opinion and the Corell Letter. As both the aforementioned documents are not legally binding, their contents should have been critically examined from the perspectives of international law in reaching fair and impartial court rulings<sup>80</sup>. Furthermore, that is unfortunately no less true of the EU Legal Opinion and the AU Legal Opinion. While the critical analysis of the Corell Letter in the decision of the British court should be highly regarded, on the other hand, the golden opportunity of criticism should hopefully have been applied to the equally non-binding and 'familiar' instrument of the Western Sahara Opinion<sup>81</sup>.

74. The Committee on the United Nations, loc. cit., supra n. 20, p. 23, n. 70.

75. B. Saul, loc. cit., supra n. 61, p. 29. Based on that proposition, Rodney Pails inconsiderately argues for the use of force in Saharan provinces as a collective intervention with the authority of the Security Council, in idem., "Self-Determination, the Use of Force and International Law: An Analytical Framework", University of Tasmania Law Review, Vol. 20, 2001, pp. 80-82.

76. Cherry Blossom Case, para. 40.

77. R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another [2015] EWHC 2898 (Admin), para. 45.

78. Cherry Blossom Case, paras. 36-43.

79. Maribeth Hunsinger, "Self-determination in Western Sahara: A Case of Competing Sovereignties?", Berkeley Journal of international law Blog, February 21, 2017, <http://berkeleytravaux.com/self-determination-western-sahara-case-competing-sovereignties/>. See also, Alan Brown, "Western Sahara: Self-determination", House of Commons Hansard, vol. 608, 20 April, 2016, <https://hansard.parliament.uk/commons/2016-04-20/debates/16042045000002/WesternSaharaSelf-Determination>.

80. Corell Letter is comprehensively and adequately criticized by the British court in R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another [2015] EWHC 2898 (Admin), paras. 45-50.

81. "In an Advisory Opinion", it is simply referred to, the ICJ declared that "there were no ties of a nature to affect the application of the principle of decolonization and the principle of the free and genuine expression of the will of the people of the territory". Ibid., para. 14.

Setting aside the non-binding legal force of the ICJ's advisory opinions, one of the two questions asked by the General Assembly concerning 'Western Sahara' or the Saharan provinces was on the legal ties between Morocco and these provinces in 1884, which was affirmed in the Western Sahara Opinion<sup>82</sup>. A. Schwed views that "the Court engaged in an extensive exploration of Morocco's, Mauritania's, and Spain's historical ties to the territory"<sup>83</sup>. On the other hand, the General Assembly did investigate on the issue of territorial sovereignty as such. Nevertheless, the ICJ declared its opinion on the territorial sovereignty almost abruptly. "In the light of the indeterminacy surrounding questions of territorial sovereignty over non-self-governing territories", E. Kasseti aptly points out, "it is submitted that more by way of evidence should have been furnished by the Court"<sup>84</sup>.

Besides, any question on the right to self-determination was neither asked by the General Assembly nor relevant to the historical legal situation in 1884. The ICJ has thus confused, willingly or unwillingly, the historical legal situation in 1884 with the future status of 'Western Sahara' or the Saharan provinces. However, it should not be forgotten that during the early years of the decolonization process in the UN, 'Spanish Sahara' was regarded by the General Assembly as part of the territories that Spain had to return to Morocco<sup>85</sup>.

Although the Western Sahara Opinion does not recognize Morocco's territorial sovereignty, it confirms Morocco's legal ties to 'Western Sahara' or the Saharan provinces. At the same time, it is found that the Saharan provinces were not terra nullius. Given these two findings, then, whose territory was it before Spanish colonization, other than Morocco's and Mauritania's?<sup>86</sup>

On the history of Moroccan sovereignty over the Saharan provinces<sup>87</sup>, Samuel Paciencia elucidates that these provinces had never been a distinct territory from other regions of Morocco and invites 'skeptics' to read the true history, not the abundant political propaganda websites or incorrect stories written by expertly disguised pro-Polisario NGOs<sup>88</sup>.

Karen Knop views that European States might put much weight in territory before continuing that Morocco was in tribal and religious connections in its nomadic Saharan context<sup>89</sup>. In the same vein, George Joffé describes that, unlike the Western Sahara Opinion, "in pre-colonial times, the Moroccan state based its concept of state sovereignty on quite different assumptions than those which inform its modern counterpart"<sup>90</sup>.

---

82. Western Sahara Opinion, ICJ Rep 1975, para. 163.

83. A. Schwed, loc. cit., supra n. 15, p. 458.

84. E. Kasseti, loc. cit., supra n. 16, p. 33.

85. Samir Bennis, "Facts about Western Sahara Conflict that You Should Know", Morocco World News, November 6, 2013, <https://www.morocccoworldnews.com/2013/11/111413/polisario-morocco-western-sahara-green-march/>.

86. Jacob Mundy asserted for the Polisario that the Saharan provinces had belonged to the indigenous Saharan inhabitants at the time of the Spanish colonization, quoting from the Western Sahara Opinion that peoples were socially and politically organized in tribes and under chiefs competent to represent them (ICJ Rep 1975, para. 81). If the criteria for territorial sovereignty that were applied to Morocco and Mauritania are equally applied to them, however, the result would be disappointing for him. Besides, in the Western Sahara Opinion, the following sentence is added in that Spanish colonial officials had made agreements with indigenous inhabitants: "differing views were expressed concerning the nature and legal value of agreements between a State and local chiefs" (Ibid., para. 82). Nothing may be cited from the Western Sahara Opinion to prove their territorial sovereignty. He should have produced materials and information to prove his own allegation. Idem., "Western Sahara: The 'question' of sovereignty", Western Sahara Conference Proceedings, 2008, p. 151. [http://arso.org/mundy2008\\_canaries\\_conference.pdf](http://arso.org/mundy2008_canaries_conference.pdf).

87. Generally, see Robert Rézette, *The Western Sahara and the Frontiers of Morocco*, Nouvelles Éditions Latines, 1975.

88. "UN: African Petitioners Defend Morocco's Sovereignty Over Western Sahara", Morocco World News, October 9, 2017. <https://www.morocccoworldnews.com/2017/10/230552/un-african-petitioners-defend-moroccos-sovereignty-over-western-sahara/>.

89. Karen Knop, *Diversity and Self-Determination in International Law*, Cambridge University Press, 2002, pp. 134-135.

90. George Joffé, «Sovereignty and the Western Sahara», *Journal of North African Studies*, Vol. 15, No. 3, September 2010, pp. 375-384.

It is thereafter elaborated as ‘Morocco’s position’ that “historical economic, religious, and military ties between the Moroccan sultan and the Saharawi tribal councils prove that Morocco has always exercised authority over the Western Sahara”, and “there are numerous cultural and historic bonds between the people of southern Morocco and the people of the Western Sahara”<sup>91</sup>. According to Attilio Gaudio, moreover, in 1884 the local tribes in the Saharan provinces refused to accept Spain’s territorial claim. Instead, they determined to fight over control of the land. As Spain maintained control over the Saharan provinces after the independence of Morocco’s northern territory in 1956, Morocco’s Liberation Army had begun actions along with two major Saharan tribes, Tekna and Reguibat, who fought against Spain’s colonial rule to allow Saharan provinces to return to Morocco<sup>92</sup>.

Given the historical ties of allegiance of Sahrawi leaders to the Moroccan Sultanate, Morocco considers the Saharan provinces as an integral part of its territory, and concluded trade agreements with the EU to exploit Saharan natural resources for the benefit of the populations living and working in these provinces.

Therefore, what would happen out of the duplicate legal situation of Morocco’s historical legal ties and a measure of international legal personality on the part of the populations in the non-self-governing territory of the Saharan provinces, allegedly represented by the Polisario? The duplicate legal conundrum resulted, as expected, in the confusion of the General Assembly.

This result in the adoption of two contradictory General Assembly resolutions at once, on December 10th 1975, only two months after the Western Sahara Opinion. In Resolution 3458 (A), on the one hand, Spain is still referred to as “the administering Power”, premising that the Saharan provinces were not yet decolonized. Resolution 3458 (B), on the other hand, stands on the premise that the Saharan provinces were already decolonized. ‘Western Sahara’ or the Saharan provinces instigated confusion in the UN. Instead, the General Assembly should have made it clear as to the difference between the international legal personality and the territorial status of the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces.

In the EU, Moroccan sovereignty over natural resources in the Saharan provinces was implicitly recognized through concluding the fishery agreements, in the phrase that ‘the waters under the sovereignty or jurisdiction of the Kingdom of Morocco’ would not exclude the waters off the coast of the Saharan provinces<sup>93</sup>. In the same vein, the EU Legal Opinion affirmed that the agreement would be legal if not carried out in disregard of the interests and of the wishes of the local population, adding that it cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara.

After that, however, as A. El Ouali expounds, the EU courts have moved in the opposite direction<sup>94</sup>, notwithstanding the fact that the Polisario does not enjoy a separate territorial status in the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces, based on the Declaration on

91. “Morocco’s Position”, p. 1, <http://statehoodandfreedom.org/en/conflict-viewpoints/moroccos-position?format=pdf>.

92. Attilio Gaudio, *Allal El-Fassi ou l’histoire de l’Istiqlal*, Edition Alain Moreau, 1972, pp.195-205, quoted in Yasmine Hasnaoui, “Morocco and the African Union: A New Chapter for Western Sahara Resolution?”, Arab Center for Research and Policy Studies, 2017, p. 4, [https://www.dohainstitute.org/en/lists/ACRPS-PDFDocumentLibrary/Morocco\\_and\\_the\\_African\\_Union\\_Hasnaoui.pdf](https://www.dohainstitute.org/en/lists/ACRPS-PDFDocumentLibrary/Morocco_and_the_African_Union_Hasnaoui.pdf).

93. H. M. Haugen, loc. cit., supra n. 28, p. 78.

94. A. El Ouali, «L’Union européenne et la question du Sahara : entre la reconnaissance de la souveraineté du Maroc et les errements de la justice européenne», *European Papers*, Vol. 2, No. 3, 2017, pp. 923-951. Cf. Jed Odermatt, «Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)», *American Journal of International Law*, Vol. 111, 2017, pp. 731-738.

Friendly Relations. In interpreting and applying the said declaration, the duplicate situation of legal personalities on the one hand and the asymmetric territorial status in the non-self-governing territory on the other should not be confused.

On the conflicting attitudes toward the interpretation and application of the right to self-determination by the EU Council and the EU court, Aurora Rasi views that while the Council only precluded States from explicitly violating or accepting a violation of the right itself, the court, turning from a self-restraint to activist approach<sup>95</sup>, banned all conduct resulting in an implicit acceptance of an infringement of the right<sup>96</sup>. It is now pointed that “the practical issues relating to the exclusion of Western Sahara and its products are ever-present. Matters such as product labelling, effective control of products, and preferential tariffs remain to be solved, particularly by the Commission”<sup>97</sup>.

As opposed to the Council and Committee, practically, the EU courts appear to be reluctant to recognize Morocco's sovereignty over the Saharan provinces and its natural resources, probably in political consideration of the Polisario's legally unfounded territorial status claims in the non-self-governing territory. But, ‘Sahrawis’ or the populations in these provinces are not granted a separate territorial status over the legally ‘distinct and separate’ territory. Accordingly, the Polisario does not own natural resources in these provinces. Thus, it is proclaimed that “Polisario is not recognized by the international community as a representative of the commercial interests of the population of the Sahara, although it is considered as a party in the political process to find a solution to the Sahara conflict”<sup>98</sup>. In judging Morocco's sovereignty over Saharan natural resources, the EU courts should have investigated whether the Polisario represents the economic interests of the Saharan natural resources from international legal perspectives, in conformity with the correct interpretation of the Declaration on Friendly Relations.

With regards to the application of international law, it is revealed that the applicable international law is not quite clear and “much depends on how one assesses Morocco's status in relation to Western Sahara”<sup>99</sup>. It remains to be seen The effects the court's activist judgment on the EU-Morocco trade relations remain to be seen, as concludes Sandra Hummelbrunner and Anne-Carlijn Prickartz<sup>100</sup>.

## 4. Self-Determination and Political Solution

The focus of different court decisions has been drawn to the normative status of the right to self-determination such as erga omnes and jus cogens, as well as its status as an international customary

---

95. Giorgio Gaja, “Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements”, *The European Union as an Actor in International Relations*, Enzo Cannizzar (ed.), *Lower Law International*, 2002, pp. 117-133.

96. Aurora Rasi, “Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?”, *European Papers*, Vol. 2, 2017, pp. 972- 974.

97. A.-C. Prickartz and S. Hummelbrunner, loc. cit., supra n. 45. As regards the right to self-determination in respect of the separatist claims in Europe, Christopher K. Connoll concludes that “[t]he right to self-determination as currently understood in international law provides little in the way of guidance for addressing separatist claims in Europe's stateless nations or, for that matter, in other parts of the world”, in idem., “Independence in Europe: Secession, Sovereignty, and the European Union”, *Duke Journal of Comparative and International Law*, Vol. 24, 2013, p. 104.

98. “South Africa's Seizure of Moroccan Phosphate, ‘Political Matter Disguised as Legal Claim’”, *The North Africa Post*, 2017, <http://northafricapost.com/18352-south-africas-seizure-moroccan-phosphate-political-matter-disguised-legal-claim.html>.

99. S. Hummelbrunner and A.-C. Prickartz, “It's Not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union”, *Utrecht Journal of International and European Law*, Vol. 33, 2016, p. 35.

100. Idem., loc. cit., supra n. 45.

law<sup>101</sup>. One of the consequences of such normative status would be to legally bind Morocco without its consent, and another would be to get the third States involved.

Before getting third parties involved, one of the more essential and controversial questions pertaining to the right to self-determination should be considered, as it pertains to determining who is entitled to exercise the right to self-determination<sup>102</sup>. Thus, a problem is posed in the British court that “who it is who must benefit from the exploitation of Western Sahara’s natural resources: the whole population of the territory, assessed in 2000 to be some 250,000 or so, or the 86,000 original inhabitants and their descendants”<sup>103</sup>, with then that “the answer to who represents the people for the purpose of self-determination may prove decisive”<sup>104</sup>.

After the end of the referendum process, especially, the questions about who might the ‘people in Western Sahara’ or ‘Sahrawi’ be, and how they were identified have become more and more pertinent. As one of the international legal persons, the EU is entitled to determine for itself who the people of ‘Western Sahara’ are, but that is only for the purposes of the organization’s internal relations, in so long as it does not affect or impair the interests of other international legal persons such as Morocco and the UN.

In a particular case, like the Saharan issue, it is natural that the conflicting parties would not agree on the exercise of the right to self-determination without proper identification of the ‘self’. When the phrase “the consent of the people of the territory” is referred to in the context of the exploitation of natural resources in the Saharan provinces, therefore, the questions regarding the ‘people’ and how they were identified are prerequisite for its implementation<sup>105</sup>. Therefore, those who claim permanent sovereignty over Saharan natural resources would be required to substantiate their claim with evidence on who they are, and how they would be identified as the ‘people’.

When it is asserted that the Polisario represents the populations in the Saharan provinces, thus, its evidence must be produced, though it that would be practically. In other words, without such evidence, any judicial court should not hold the Polisario as the representant for natural resources in said provinces. In fact, it has been reiterated that the Polisario is not recognized by the UN and is not entitled to represent the interests of the populations in the Saharan provinces<sup>106</sup>. In the context of the UN efforts to search for a political solution, it is factual that the Front Polisario was once recognized as “the representative of people of Western Sahara” in 1979<sup>107</sup>, as referred to above. The General Assembly resolution, however, did

101. Cherry Blossom Case, paras. 33-39. Matthew Saul, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?”, *Human Rights Law Review*, Vol. 11, 2011, pp. 609-644.

102. Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations*, Martinus Nijhoff, 1982, p. 1. UNESCO once attempted to define ‘people’ (UN Doc SNS-89/CONF. 602/7, 1990). The African Commission accepted it as a guide in *Kevin Ngwanga Gunme et al v Cameroon* (Comm No. 266/2003, EX. CL/529(XV) 2009, para. 170). It appears, however, like an anthropological description, having no legal basis.

103. The population in the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces is reported as account for 567,000 people, as of 11 March 2019, in the UN. <https://www.un.org/en/decolonization/nonselvgovterritories.shtml>.

104. *R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another* [2015] EWHC 2898 (Admin), paras. 46-47.

105. Cherry Blossom Case, para. 48. In the cases of Namibia and East Timor there was a political agreement on “who should vote, how the vote should be carried out and what questions should be asked at the ballot box. That agreement is what is critically missing in the case of Western Sahara”. Jacques Roussellier, “Concluding Remarks on MEI’s Western Sahara Series”, Middle East Institute, January 15, 2013, <https://www.mei.edu/publications/concluding-remarks-meis-western-sahara-series>.

106. “Morocco Rejects South Africa’s Seizure of Sahara Phosphate Cargo”, *The Maghreb Times*, June 16, 2017, <https://themaghrebtimes.com/06/16/morocco-rejects-south-africas-seizure-of-sahara-phosphate-cargo/>.

107. UN Doc A/RES/34/37, 1979, para. 7.

not recognize the Polisario as 'the only' legitimate representative, thus leaving room for other legitimate representatives of the populations in the non-self-governing territory of 'Western Sahara' or the Saharan provinces, though the Front itself has inaccurately insisted repeatedly, and without grounds, that it was recognized as 'the sole' representative<sup>108</sup>. On the basis of the General Assembly resolution, the only purpose of recognizing it as one of the representatives of the populations in the non-self-governing territory was to motivate it to "participate fully in any search for a just, lasting and definitive political solution of the question of Western Sahara" in the UN<sup>109</sup>. Morocco affirms that the only legitimate representative of the populations of 'Western Sahara' or the Saharan provinces is the Kingdom<sup>110</sup>.

If it were not for an agreement by the parties on who are the 'people', then the phrase "the consent of [its] people" would be degenerated into a mere slogan, especially in the post-referendum era. This is also applicable to the EU Legal Opinion, when it insists that the fisheries agreement and related protocols should be implemented in a way that will bring about benefits "for the Sahrawi population", and likewise true of the need to acquire the "consent of the people of Western Sahara and its representatives" in the EU Council v. Polisario as well as "the consultation and consent of the Saharawi people and their recognized representatives" in the British court decision<sup>111</sup>.

The EU has been criticized for not employing another criteria to define a people than those having "not yet achieved independence", and consequently with other categories of the right to self-determination than the classic 'all-or-nothing' right to external self-determination<sup>112</sup>. However, it has been emphasized that "the ability of a Non-Self-Governing Territory to reach a full measure of self-government does not require the territory to become an independent State"<sup>113</sup>. In fact, different categories of people's right to self-determination have been considered and discussed<sup>114</sup>. On the other hand, the EU's conception of people having 'not yet achieved independence' seems, on the surface, to be largely based on the criteria submitted in the Reference Re Secession of Quebec Case for the exercise of the right to external self-determination.

The Canadian Supreme Court holds in the Secession of Quebec Case that the right to external self-determination is generated not only in situations of colonies, but where a people is oppressed, as for example under foreign military occupation, or where a definable group is denied meaningful access to government<sup>115</sup>. "In all three situations", the Canadian Supreme Court declares, "the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination"<sup>116</sup>.

---

108. As for an example of 'the only' legitimate representative, see UN GA Res 2758, 1971.

109. Since then, the General Assembly has not reiterated it. Thus, in sum, Polisario is regarded as one of the representatives of the populations of the non-self-governing territory, only as long as the process for a political solution of the Saharan issue is concerned, in conformity with the Declaration on Friendly Relations.

110. Amjad Hemidach, "Morocco Slams Switzerland for allowing Polisario to Join the Geneva Convention", Morocco World News, August 25, 2015, <https://www.moroccoworldnews.com/2015/08/166414/morocco-slams-switzerland-for-allowing-polisario-to-join-the-geneva-convention/>.

111. Council of the EU v Front Polisario, the Court of Justice of the EU, General Chamber, judgment of 21 December 2016, case C-104/16 P, para. 106. R (on application of Western Sahara Campaign UK) v Revenue Commissioners & another [2015] EWHC 2898 (Admin), para. 57.

112. M. Hanckmann, loc. cit., supra n. 30, p. 37.

113. Christopher Ward, Vaughan Lowe, Stephen Tully and Richard Hoyle, "In the Matter of the Status of Norfolk Island as a Non-Self-Governing Territory", Joint Opinion, 6 May 2016, p. 3. <http://www.norfolkschoice.com/loweandwardopinion.pdf>.

114. Peter Hilpold, "'Self-Determination at the European Courts: The Front Polisario Case' or 'The Unintended Awakening of a Giant'", European Papers, Vol. 2. 2017, p. 908. See also, the Committee on the United Nations, op. cit., supra n. 20, p. 57.

115. L.S.F. Lawalata, "The Current EU-Morocco Fisheries Partnership Agreement through the Perspective of the Saharawi People Right to Self-Determination & Permanent Sovereignty over Natural Resources: Exploitation of Natural Resources in Western Sahara", Tilburg University, February 22, 2012, p. 16, <http://arno.uvt.nl/show.cgi?fid=127390>.

116. International Legal Materials, vol. 37, 1998, para. 138.



The criteria for the exercise of external self-determination in the Secession of Quebec Case are, however, far from unequivocal, because the relations between the specific rights to internal self-determination and the above-mentioned requirements for the exercise of the right to external self-determination are not correlated. In particular, it calls into question whether the situation denying “the ability to exert internally their right to self-determination” would justify the exercise of the right to external self-determination as ‘the fourth situation’. In fact, Anthony Cassese adds ‘the fourth situation’, arguing that “a racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate”<sup>117</sup>. There is no guarantee that the fifth and sixth situations will not come out.

Furthermore, whether the criterion “where a definable group is denied meaningful access to government” applies evenly to non-self-governing territories, including ‘non-colonial’ self-governing territory would pose difficult problems. There would emerge a serious possibility that “non-self-governing” as such is construed as tantamount to the denial of “meaningful access to government”, justifying automatically the exercise of the right to external self-determination in any non-self-governing territory, *de jure* or *de facto*, and in every self-defined ‘occupied territory’. Such a recourse may well be abused by terrorists and separatists.

In reality, it would be impossible to dissuade ‘a definable group’ from insisting on their own *de facto* non-self-governing territory, for example in Palestine, Kosovo, Taiwan and Tibet, on the basis of the concept of the *de facto* administering State. Likewise, the ‘people’ in domestic conflict zones may get an advice that it is “an illegally occupied territory”. Actually, for such new theories as *de facto* administration and ‘occupied territory’ to be presented, their ripples, indirect and side effects should be fully taken into account beforehand.

Moreover, under the existing discretionary system of State recognition, discretionary in the stage of fact-finding or policy-making on Statehood, under the ‘declaratory’ or ‘constitutive’ doctrine respectively, it is inconceivable that all States in the international society would agree on the granting of State recognition to ‘definable’ terrorist or separatist groups.

As such, the Arbitration Commission of the Peace Conference on Yugoslavia has declared in Opinion No. 2 that “it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possiditis*) except where the states concerned agree otherwise”<sup>118</sup>; then, in the Kosovo Advisory Opinion, a unilateral declaration of independence is practically held as one of the domestic matters of a State<sup>119</sup>.

Consequently, “it is difficult to resist the conclusion that respect for the territorial integrity of a State by other States is a norm of *jus cogens*”, proclaims Judge Dugard in the Nicaragua Case. “Based on the norm *erga omnes* to respect the territorial integrity of a State,” Dugard continues, “even peoples are not, without exception, entitled to disrupt the territorial integrity”<sup>120</sup>.

In the face of controversy on the substantive concept of people, ‘the Committee of 24’ was

---

117. Anthony Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge University Press, 1995, p. 120.

118. *International Law Reports*, Vol. 92, 1993, p. 168.

119. ICJ Rep 2010, paras. 79, 123.

120. ICJ Rep 2011, Dugard, para. 15.

established in the UN to supervise the final stages of the self-determination process<sup>121</sup>. As regards 'Spanish Sahara', the General Assembly called on Spain, in 1966, to hold a referendum under UN supervision<sup>122</sup>. In 1979, implementation of a referendum was proposed for the first time in the OAU<sup>123</sup>. After Morocco's walkout from the OAU, the leadership of a referendum was returned back to the UN. In 1993, MINURSO's Identification Committee was established to identify the eligible voters, and made efforts in the next year to fulfill its duty.

In spite of their efforts, however, it already proved futile - for the UN, to continue making efforts in identifying who counts as 'Sahrawi'<sup>124</sup>. Therefore, the Polisario's rigid insistence on resuming the referendum process would result only in prolonging the Saharan issue. Any Front Polisario's proposals that have already been definitely rejected by Morocco would result in time consumption. The situation is not true of the Front, however, because Algeria, the Polisario's patron, may have a different opinion from it.

Intrinsically, moreover, based on John Waterbury's proposition on 'the iron cage of legislated identity', institutionalized differentiation of a part of the populations as eligible voters from other non-eligible populations in the Saharan provinces may lead to an immobilized discriminatory 'legislated identity'. It is said to have been historically illustrated by the institutional differentiation of the Tutsi from the Hutu after a 1933 census by Belgium, allegedly having contributed to the Rwandan Genocide in 1994<sup>125</sup>.

Although the term 'referendum' is kept intact in the nominal designation of MINURSO, its Identification Committee has appropriately determined to give up identifying eligible voters. At this point already, the phrase 'people of Western Sahara' or 'Sahrawi people' has lost its normative meaning. Normative options left at that time for the definition of 'people' in the Saharan provinces were only two: (i) there are no 'people' at all in Saharan provinces; or (ii) all the populations in said provinces count as part of the 'people'. In respect of the Serbian population of Bosnia-Herzegovina, Rosalyn Higgins has commented that 'people' is to be understood in the sense of all the people of a given territory<sup>126</sup>. As regards this option, it should be kept in mind that "[a]s long as self-determination means everything to everyone, the concept will continue to evoke passions, expectations and fears that are, for the greatest part, unnecessary, unhelpful and unjustified"<sup>127</sup>.

As if to respond to the difficulty, in 2004, the Security Council changed its strategy for resolving the Saharan issue from a referendum to a political solution through dialogue between Morocco and the Polisario<sup>128</sup>. In line with the UN political solution strategy, the Kingdom underscored the need to draw lessons from failed past attempts, in the context of the round-table meetings launched in 2018. Among them may well be a referendum. The 2019 SG Report on the activities of MINURSO does not

---

121. UN Doc A/RES/1654, 1961. Cf. Thomas Franck, "The Stealing of the Sahara", *American Journal of International Law*, vol. 70, 1976, pp. 699-701.

122. UN GA Res 2229, 1966.

123. OAU Doc AHG/IMP-C/WS/DEC. 1 (1), Rev. 1, para. a), V, 1979.

124. After the unreasonable implementation of a referendum in Gibraltar in 1967, the General Assembly requested the parties to reach a negotiated settlement. GA Res 2353, 1967.

125. John Waterbury, "Avoiding the Iron Cage of Legislated Identity", *Self-Determination and Self-Administration*, W. Danspeckgruber and A. Watts (eds.), Lynne Rienner, 1997, pp. 375-387.

126. Quoted in *Cases and Materials in International Law*, D. J. Harris (ed.), Sweet & Maxwell, 1998, pp. 120-121.

127. Barcelona Conference 1998, op. cit., supra n. 3.

128. UN SC Res 1541, 2004.

refer to a referendum at all<sup>129</sup>. Besides, there is also no reference to a referendum in the latest Security Council resolution on MINURSO<sup>130</sup>. However, this development does not mean an exit from the right to self-determination.

The sustainable roles of the right to self-determination in the post-colonial/cold war era have been widely discussed, normally attaching more importance to internal self-determination than external self-determination<sup>131</sup>, different from the current classic conception of the EU courts, still constrained to independence without worrying about bloodshed and confusion.

As the decolonization process has virtually ended, and almost all existing States would not accept the right to unilaterally secede from an independent sovereign State, in a comprehensive study in 1980 on the right to self-determination in the General Assembly resolutions, the UN Special Rapporteur, Hector Gros Espiell, concluded that “international law has not recognized a general right of peoples unilaterally to declare secession from a State”<sup>132</sup>.

Furthermore, Gregory H. Fox points out that “the legal norm of self-determination appears to have been deprived of much of its content”<sup>133</sup>. That is factually true, as in the 1960s’ decolonization process, the right to self-determination was almost tantamount to the ‘all or nothing’ right to independence based on the Declaration on the Granting of Independence in 1960, just like the conception of the EU courts.

In broader perspectives, on the other hand, a lot of foresight was shown by Ved P. Nanda in his pessimistic, but accurate prediction, in 1981, that “the international community will, in the future, be faced with claims for territorial separation in non-colonial settings and that the absence of institutions, procedures, and strategies to implement the right of secession will leave few alternatives to violence”<sup>134</sup>.

Indeed, as Gerry J. Simpson criticizes, “the decolonization model is a demonstrably unwieldy and inflexible device” particularly in the post-colonial context of “indigenous, nationalist, secessionist, democratic, and devolutionary self-determination”<sup>135</sup>. Wolfgang Danspeckgruber warns of the dangerous characters of the right to self-determination in his most frequently quoted passage that “[n]o other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination”<sup>136</sup>. Thus, because self-determination “evokes emotions, expectations and fears which often lead to conflict and bloodshed”, it is noted, “the best approach is to view the right to self-

129. 2019 SG Report, UN Doc S/2019/282, 2019.

130. UN SC Res 2468, 2019. See “UN-Sahara: Resolution 2468 Drops Definitely Options of ‘independence’ & ‘referendum’”, Sahara Question, May 10, 2019, <https://jp.mg5.mail.yahoo.co.jp/neo/launch?.rand=6ar356lomod9j#tb=eise8vtz>.

131. Vadim Anatolyevich Godorozha, “On the Development of the Law of Self-Determination from External to Internal Aspects”, Golden Gate University School of Law, Theses and Dissertations, Paper 68, 2016, p. 211. <http://digitalcommons.law.ggu.edu/theses>.

132. UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions: Study*, UN Doc E/CN.4/Sub.2/405/Rev.1, 1980, para. 6.

133. Gregory H. Fox, “Self-Determination in the Post-Cold War Era: A New Internal Focus?”, *Michigan Journal of International Law*, Vol. 16, 1995, p. 733.

134. Ved P. Nanda, “Self-Determination under International Law: Validity of Claims to Secede”, *Case Western Reserve Journal of International Law*, Vol. 13, 1981, p. 280.

135. Gerry J. Simpson, “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age”, *Stanford Journal of International Law*, Vol. 32, 1996, pp. 256-257.

136. Wolfgang F. Danspeckgruber (ed.), *The Self-Determination of Peoples – Community, Nation, and State in an Interdependent World*, Lynne Rienner, 2001, quoted in Mahmoud Abbaker Suleima, *Darfur, a Crisis of Identity & Governance*, AuthorHouse Publishing, 2011, p. 342.

determination in its broad sense, as a process providing a wide range of possible outcomes dependent on the situations, needs, interests and conditions of concerned parties”<sup>137</sup>.

As Robert McCorquodale sustains, the right to self-determination is “not an absolute human right”<sup>138</sup>. Michla Pomerance makes a definitive statement that “a rigid absolute right to external self-determination in the form of independence may need to be precluded, even if desired by the ‘self’ concerned”<sup>139</sup>. Otherwise, in practice, the role of the right to self-determination would be reduced to a large degree, and finally the right may be abused in favor of terrorism, extreme nationalism, separatism, populism and far-right wing. As such, the African Commission on Human and Peoples’ Rights has ruled in *Congrès du Peuple Katangais v Zaire* that “Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire”, and in *Kevin Mgwanga Gunme et al v Cameroon* that “autonomy within a sovereign state, in the context of self-government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised”<sup>140</sup>.

The 1998 UNESCO Barcelona Conference of experts on self-determination “felt it imperative to explore ways to transform the perception of self-determination as a contributing factor or even cause of conflict into the notion of self-determination as a foundation and instrument for the effective prevention and resolution of conflicts”, and declared in its conclusion that “the increased acceptance of self-determination in the broad sense, as a right which can be exercised by democratic means and through dialogue and which does not in most cases necessitate the break-up of a state, would be a major contribution to the prevention and resolution of conflicts”<sup>141</sup>.

From such background, Hurst Hannum suggests to redefine the right to self-determination so that it “will support creative attempts to deal with conflicts ... before they escalate into civil war and demands for secession”<sup>142</sup>. Patricia Carley agrees with the suggestion of a redefinition, stating that “there is a need to establish a more concise and workable definition of the right to self-determination”<sup>143</sup>. Based on Hannum’s new vision, the right to self-determination should be exercised “as a means to an end rather than an end in itself”<sup>144</sup>. In respect of the “a means to an end” conception, from a different perspective, Simpson coincides with Hannum in his conclusion that “self-determination has become « a principle without a purpose » a right bereft of potential beneficiaries”<sup>145</sup>.

With regard to the Saharan issue, as Samuel J. Spector proclaims, “[a]n arrangement rooted in a realistic vision of autonomous self-government that would incorporate reasonable guarantees of cultural expression, political freedoms, and human rights for the inhabitants of Western Sahara might

---

137. The Unrepresented Nations and Peoples Organization, “UNPO Principles”, UNPO, <http://unpo.org/section/2/2>.

138. Robert McCorquodale, “Self-Determination: A Human Rights Approach”, *International and Comparative Law Quarterly*, Vol. 43, 1994, p. 883.

139. M. Pomerance, *op. cit.*, supra n. 102, pp. 73-74. Given the independence option is precluded, the third States would be obliged not to recognize a seceding entity in terms of its legal consequence, and the legal effect of the recognition, even if granted, would be invalid.

140. ACHPR, Comm No. 75/92, 1995, para. 6; Comm No. 266/03, 2009, para. 191.

141. Barcelona Conference 1998, *op. cit.*, supra n. 3.

142. H. Hannum, “Self-Determination in the Twenty-First Century,” *Negotiating Self-Determination*, H. Hannum and E. Babbitt (eds.), Lexington, 2006, p.473.

143. Patricia Carley, “Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession”, Report from Roundtable held in Conjunction with Department of State’s Policy Planning Staff, *Peaceworks* No. 7, United State Institute of Peace, 1996, p. 18.

144. H. Hannum, *loc. cit.*, supra n. 142, p. 474.

145. G. J. Simpson, *loc. cit.*, supra n. 135, p. 259.

then be given a chance to take shape”<sup>146</sup>. Abdelhamid El Ouali has submitted and comprehensively expounded on the breakthrough concept of ‘territorial autonomy as a right to democratic self-determination’ in the Saharan provinces<sup>147</sup>.

Thus, in the 2019 SG Report, the word “local populations” has come to be used instead of “people”<sup>148</sup>. The word “people” is used only once in a quotation<sup>149</sup>. Recently, the president of Mauritania, one of the parties in the round-table meeting, proclaimed that “[t]he West, Europe and the US, do not want another state geographically separating Morocco and Mauritania”<sup>150</sup>.

At the same time, looking at the Saharan issue with a broader view, Ali El Aallaoui points out that “[t]he question of Western Sahara falls within a conflict of interests between the USA, France, Russia, Spain and the United Kingdom”<sup>151</sup>. Now, cooperation amongst the Security Council permanent members would be vital even with respect to the right to self-determination in the Saharan provinces. In connection with the cooperation, in an anticipatory analysis of the Chagos Archipelago Case at the ICJ<sup>152</sup>, James Summers has found that “despite self-determination often being thought of as a direct expression of the wishes of a people, decolonization can be pursued and shaped through inter-governmental agreements”<sup>153</sup>. Setting aside decolonization here, in the post-colonial era, the matter of self-determination should not be confined only to the internal relations of two parties, because its impact on peace and security cannot be locked in them any longer, let alone if based on obligations erga omnes under customary international law or jus cogens. Besides, in the era of globalization, even the matter of self-determination cannot be isolated from the international society. The Security Council is expected to play major roles in these matters, for the maintenance of international peace and security. This would open a gate for ‘a political solution as an exercise of the right to self-determination’.

Despite the ongoing UN efforts to achieve a political solution on the Saharan issue, however, the Polisario has gotten into poorly-thought tactics, such as seizing natural resources from the foreign maritime vessels departed from the Saharan provinces.

## 5. Hidden Issue in the Cherry Blossom Case

In response to the Polisario’s application before Panama’s court, the Ultra Innovation bulk carrier was detained at the Panama Canal under its order on May 17, 2017<sup>154</sup>. The vessel was carrying phosphates

146. Samuel J. Spector, “Western Sahara and the Self-Determination Debate”, *Middle East Quarterly*, Summer 2009, p. 43

147. Abdelhamid El Ouali, *Saharan Conflict: From Self-Determination/Independence to Territorial Autonomy as a Right to Democratic Self-Determination*, Stacey International, 2008. Cf. V. G. Coupeau, “The (European) Empire Strikes back?: Applying the Imperial Paradigm to Understand the European Court of Justice’s Imbroglia in Western Sahara”, London School of Economics and Political Science, European Foreign Policy Unit Working Paper No. 2017/1, April 2017, [www.lse.ac.uk](http://www.lse.ac.uk).

148. 2019 SG Report, para. 11.

149. *Ibid.*, para. 83.

150. Tamba F. Koundouno, “Mauritanian President: Europe, US, Favor Morocco in Western Sahara”, *Morocco World News*, April 12, 2019, <https://www.moroccoworldnews.com/2019/04/270422/mauritanian-president-europe-us-morocco-western-sahara/>.

151. Ali El Aallaoui, “Negotiating Western Sahara: between International Law and Geopolitical Interests,” *openDemocracy*, March 28, 2017, <https://www.opendemocracy.net/en/north-africa-west-asia/western-sahara-united-nations-international-law-and-geopolitics/>.

152. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Rep 2019.

153. James Summers, “Decolonization Revisited and the Obligation not to Divide a Non-Self-Governing Territory”, *Questions of International Law*, Vol. 55, 2018, p. 176.

154. Patrick Markey, “Morocco Phosphate Ship held in Panama over Western Sahara Challenge: Official”, *Reuters*, May 19, 2017, <https://uk.reuters.com/article/us-westernsahara-morocco-idUSKCN18E2YA>.

from the Saharan provinces to Canada<sup>155</sup>. Besides, the NM Cherry Blossom, carrying phosphates from Saharan provinces destined for New Zealand, was halted by the Eastern Cape Local Division of the High Court, in Port Elizabeth, South Africa - one of the strongest supporters of the Polisario<sup>156</sup>.

However, the call for a court order to seize the phosphate cargo of the Ultra Innovation was soon dismissed. The Panama court held reportedly that a local court was an inappropriate venue to exercise jurisdiction over an international dispute and there was no evidence that the phosphate cargo belonged to the Polisario, putting into question its role as a representative of the populations of the Saharan provinces<sup>157</sup>.

Morocco's Minister of State in charge of Human Rights criticized the decision of the Cherry Blossom Case, stating that "[t]his decision contradicts completely the ruling of the Panama Court which declared itself that it is not the appropriate venue to consider purely political matters"<sup>158</sup>.

Finally, the cargo of the NM Cherry Blossom was returned to the OCP Group. On February 23, 2018, the South African High Court ordered the sale of the cargo<sup>159</sup>. Since its ownership was vested in the Polisario, however, no buyers were attracted. In order to release the NM Cherry Blossom, the ship-owner filed an application for its judicial sale. The ship-owner acquired it and sold it to OCP for a symbolic one dollar<sup>160</sup>.

The Polisario has reportedly declared to continue its judicial tactics, and that "any monies raised would be ... used to pursue similar cases", and that "[t]his is just the beginning and we plan to target anyone that deals illegally with our resources"<sup>161</sup>. It would be necessary for the international society to respond to such tactics.

Some of the major issues in the Cherry Blossom Case are different from those in the courts of the EU and the UK, except for the common underlying issues concerning Morocco's sovereignty over Saharan natural resources by virtue of the same real litigant parties, i.e. Morocco and the Polisario. As regards the current stance of the EU on Morocco's sovereignty over Saharan natural resources, A. El Ouali elaborates on the contradiction between the EU courts and such political organs as the EU Council and Commission. The Council and Commission have long recognized Morocco's sovereignty over Saharan natural resources through concluding international trade agreements, but the courts have recently taken opposite stance *ultra vires*.<sup>162</sup>. In the same vein, Enrico Milano concludes that,

---

155. Dominic Dudley, "International Courts Order Pause in Disputed Exports of Phosphates from Western Sahara", *Forbes*, May 20, 2017, <https://www.forbes.com/sites/dominicdudley/2017/05/20/phosphates-exports-western-sahara/#5fb77fec235b>.

156. OCP, "Timeline, Myths vs. Facts, Resources, In the News", n. d., <http://phosphateshippingtruth.com/>. M. Rubin, "Why does South Africa embrace piracy and reward terror?", *AEIdeas*, 2017, <http://www.aei.org/publication/why-does-south-africa-embrace-piracy-and-reward-terror/>. M. Loulichki, "When Politics Darkens the Independence of South African Justice", *Policy Brief*, PB 17/26, OCP Policy Center, July 2017, pp. 1-2.

157. P. Markey, "Panama court dismisses Western Sahara phosphate claim: Morocco's OCP", *Reuters*, June 9, 2017, <https://af.reuters.com/article/topNews/idAFKBN1900VR-OZATP>.

158. "Moroccan Phosphate Cargo: The Court's Decision «Contradicts International Laws»", *En Yabiladi*, June 16, 2017, <https://en.yabiladi.com/articles/details/54678/moroccan-phosphate-cargo-court-s-decision.html>.

159. Order, Case No. 1487/2017, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, February 23, 2018. See also, OCP, "South Africa – NM Cherry Blossom: OCP Group recovers its phosphate cargo", May 8, 2018, <http://www.ocpgroup.ma/en/south-africa-nm-cherry-blossom-ocp-group-recovers-its-phosphate-cargo>.

160. Hassania Chelkaoui, "The Law of Politics?: The Strange Case of NM Cherry Blossom", *Ajot Insights*, May 18, 2018, <https://www.ajot.com/insights/full/ai-the-law-or-politics>.

161. Wendell Roelf, "Auction starts for seized Western Sahara phosphate cargo in S. Africa", *Reuters*, March 19, 2018, <https://af.reuters.com/article/africaTech/idAFKBN1GV1FS-OZATP>.

162. A. El Ouali, loc. cit., supra n. 93, pp. 923-951.

in the Front Polisario Case<sup>163</sup>, “the Court of Justice adopted a very activist approach in performing the judicial review of Council acts related to the area of EU foreign relations”<sup>164</sup>. Peter Hilpold had to admit, though unwillingly, that the findings by the EU courts on the right to self-determination are “not always really convincing from the viewpoint of the international legal order”<sup>165</sup>.

Leaving aside its propriety here, the South African court held the OCP as a private person<sup>166</sup>, even after confirming that 94.12% of its shares were owned by the Moroccan government<sup>167</sup>. As such, the court faced the unusual problem of exercising jurisdiction over the acts committed by foreign private persons in a foreign State. However, the problem was not among the issues in the proceedings. Though this problem would go beyond the scope of the decision of the Cherry Blossom Case, the Polisario’s judicial tactics and the unreasonable findings of the South African court would justify such deviation.

The Cherry Blossom Case has been discussed from different perspectives, even limited to the international law perspectives. For instance, it is pointed out that the capture of the NM Cherry Blossom constituted a breach of articles 17, 18 and 19 of the UN Convention on the Law of the Sea, which guarantees to all State parties, whether public ship or private, the right to traverse the territorial waters of other States. That is generally known as the right of innocent passage<sup>168</sup>. Furthermore, the South African judicial decision was criticized for the “serious breach to the basic principles of the freedom of international trade”<sup>169</sup>. The OCP accused, in a comprehensive manner, that the decision disregarded the established international law principles and the ongoing UN process for finding a political solution<sup>170</sup>.

Can there be such a case so that international responsibility is imposed on private persons who privately own the cargo of natural resources from the Saharan provinces destined for a foreign State, like the phosphate cargo of the NM Cherry Blossom? In the first place, can international law impose international responsibility on private persons? Is the Polisario entitled to invoke against private persons the permanent sovereignty over natural resources in the non-self-governing territory of ‘Western Sahara’ or the Saharan provinces in order to seize their property?

This kind of issues have not been taken seriously in international law. With regard to private persons, their rights have been predominantly discussed, for example, in the context of diplomatic protection

163. Front Polisario v. Council of the EU, judgment of 10 December 2015, the General Chamber, case T-512/12.

164. Enrico Milano, “Front Polisario and the Exploitation of Natural Resources by the Administrative Power”, *European Papers*, Vol. 2, 2017, p. 975.

165. P. Hilpold, loc. cit., supra n. 114, p. 908.

166. Cherry Blossom Case, para. 59.

167. Ibid., para. 10.

168. S. Bennis, “Moroccan Phosphates: Why South Africa’s Move Violates International Law”, *Morocco World News*, May 4, 2017. <https://www.morocoworldnews.com/2017/05/215724/moroccan-phosphates-south-africas-move-violates-international-law/>.

169. “Cherry Blossom Seizure Ends with the Victory of OCP”, *The North Africa Post*, May 8, 2018, <http://northafricapost.com/23544-cherry-blossom-seizure-ends-victory-ocp.html>.

170. OCP, “OCP Group disputes the decision of the South African court to hear the case on its merits”, n. d., <http://www.phosboucraafoundation.org/sites/default/files/2018-05/17%2006%2015%20Press%20Release%20OCP.PDF>.

for the citizens abroad, and for international human rights and humanitarian law<sup>171</sup>. Traditionally, such rights used to be understood as a reflection of State responsibility to protect private persons.

Outside of these, international responsibility of private persons has been discussed only from the perspective of international criminal law. It is the only exception to the general principle of non-applicability of international responsibility to private persons, though the structure of the litigant parties is different, in that plaintiff, in an international criminal case, is the international society as a whole and not a single State. Thus, pirates have been held internationally responsible through the ages on suspicion of committing a crime against the international society. Accordingly, article 100 of the United Nations Convention on the Law of the Sea provides that all States shall cooperate to the fullest possible extent in the repression of piracy, and under article 105 every State has universal jurisdiction on the high seas to seize a pirate ship or aircraft. International crimes have been conceived not against a particular single State in the specified relations between two parties, like the case of the Saharan issue. This structural distinction corresponds to the distinction of criminal law from civil law in the domestic society. Thus, private persons may stand in the International Criminal Court (ICC), or the competent domestic courts, on suspicion of international crimes such as crimes against humanity, genocide and war crimes<sup>172</sup>.

The reason why non-punitive international responsibility of private persons has not become one of the usual subjects in international law may not be simple. Suffice it to say here that even the draft treaties on international responsibility of States and international organizations are yet to be concluded.

Now, the issue will be considered taking the Cherry Blossom Case as an example. Generally, companies may be State-owned or private. There is that double possibility. When a company is State-owned, as asserted by the OCP relating to the Cherry Blossom Case, for example, State immunity would be applied<sup>173</sup>, leading to the denial of jurisdiction of the domestic court concerned, though the South African court rejected to apply State immunity, holding that “[n]o legal right or interest in the phosphate cargo is asserted on behalf of the state of Morocco”<sup>174</sup> and “[a] finding ... cannot in any legal sense affect the rights of Morocco at international law”<sup>175</sup>.

Politically, the South African court could not help but hold the OCP as private, arguably for the

171. Concerning the international responsibility of such private persons as private military or security contractors under European human rights law, for example, Ineta Ziemele concludes, the development of the scope of positive ‘State responsibilities’ that the State parties are obliged to implement under each international human rights agreement is preferred, in idem., *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies*, EUI Working Paper AEL 2009/8, Academy of European Law, 2009, pp. 24-25. Also, on ‘the international responsibilities of States and international organizations’ for using private military and security companies in general, see Elzbieta Karska, “Human Rights Violations Committed by Private Military and Security Companies: An International Law Analysis”, *European Journal of International Law*, Vol. 17, 2016, pp. 753-765. And on the State responsibility for environmental damage caused by private persons, see Günther Handl, “State Liability for Accidental Transnational Environmental Damage by Private Persons”, *American Journal of International Law*, Vol. 74, 1980, pp. 525-565. International responsibilities related to private persons in the above contexts are ultimately conceived in terms of State responsibilities.

172. Anthony J. Colangelo, “What is International Criminal Law?”, *Cornell Law Review*, Vol. 99, 2014, pp. 1303-1352. On the ‘punitive’ international responsibilities of individuals, such as terrorists, in the context of safety of the UN peace-keepers, see Vincent-Joël Proulx, «International Civil Individual Responsibility and the Security Council: Building the Foundations of a General Regime», *Michigan Journal of International Law*, Vol. 40, 2019, pp. 385-409. On the international criminal responsibilities of multinational enterprises, see Giuseppe Tinello, *Liability of Private Legal Persons Under International Criminal Law*, Pisa University, 2019.

173. Tom Ruys, “The Role of State Immunity and Act of State in the NM Cherry Blossom Case and the Western Sahara Dispute”, *International and Comparative Law Quarterly*, Vol. 68, 2019, pp. 69-90.

174. Cherry Blossom Case, para. 75.

175. Ibid., para. 84.



only purpose of avoiding the application of State immunity, therefore, the application of Moroccan sovereignty, to the territory of ‘Western Sahara’ or Saharan provinces, pushing aside the so-called ‘SADR’<sup>176</sup>. In a sense, that is politically understandable, though not acceptable. Legally, however, that political bias or prejudice in the decision of the Cherry Blossom Case may well be regarded as “so egregiously wrong” that it would constitute an internationally wrongful act of ‘denial of justice’<sup>177</sup>.

While it is natural to hold the OCP as State-owned, the Cherry Blossom Case may be differently conceived as an opportunity to review the difference between private persons and a State in international responsibility. From the court’s own finding of the OCP as private, the issue on the applicability of international responsibility to private persons has loomed. With regards to fishery, agriculture and tourism in the Saharan provinces<sup>178</sup>, in particular, the goods for sale may be produced by private persons.

Although the South African court focuses on the right to self-determination as such<sup>179</sup>, the problem is in the ‘lawfare’ waged by the Polisario. The problem is rather on whether the right to self-determination entitles to impose international responsibility on private persons or not. If the answer is negative, the next problem would focus on the applicable domestic law, here either the Moroccan or South African.

As a set of rules which are accepted and applied between States, international law does not usually impose international responsibility on private persons<sup>180</sup>, unless otherwise provided<sup>181</sup>, let alone such organizational law as the UN Charter. In the Cherry Blossom Case, however, the Polisario and the South African court invoked customary international law, allegedly developed from the articles on self-determination and non-self-governing territory in the UN Charter, to justify the Polisario’s ownership of the ship’s phosphate cargo<sup>182</sup>. The Moroccan government’s spokesperson has stated that the country flatly rejected the court decision to seize the phosphate cargo, noting that “the South African court’s decision has a very political nature and run counter international law”<sup>183</sup>. It turns out, then, that South Africa might have violated international law by means of its court’s act in infringing on the property of Moroccan private persons.

The UN Charter is applied to the Member States, not to private persons, as long as responsibilities are concerned. That is derived from the principles and purposes of the UN Charter. Thus, the provisions

176. South Africa has recognized so-called ‘SADR’ as a State in the Moroccan territory of Saharan provinces in 2004. Thus, T. Ruys views that the South African court may have been driven by “ulterior motives” in consideration of so-called ‘SADR’. *Idem*, loc. cit., supra n. 173, n. 36.

177. Even Jan Paulsson, well-known as process-oriented, precluding the substantive ‘denial of justice’, had to admit, may e unwillingly, that “[t]here may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state’s failure to provide a decent system of justice”. *Idem*, *Denial of Justice in International Law*, Cambridge University Press, 2005, p. 98.

178. Toby Shelley, “Natural Resources and the Western Sahara”, *The Western Sahara Conflict: The Role of Natural Resources in Decolonization*, Current African Issues No.33, Claes Olsson (ed.), Nordiska Afrikainstitutet, 2006, pp. 17-21.

179. Cherry Blossom Case, para. 34.

180. Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, 9th ed., Vol. 1, Oxford University Press, 1992, p. 4.

181. For example, the Statute of International Tribunal for the Law of the Sea allows in article 20. 2 “entities other than the State Parties” to access the Tribunal. Thereby a problem is posed. Is the Tribunal competent to deal with conflicts between private persons? Cf. Miguel García García-Revilla, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, Nijhoff, 2015, pp. 288-294. Such specifically agreed exceptions as the above case, however, would not affect the general principle of non-responsibility of private persons in international law, because the general principle is implicitly reconfirmed when the exceptions are specifically or exceptionally agreed.

182. Cherry Blossom Case, paras. 45-48.

183. “South African Court’s Decision to Submit Moroccan Phosphate Ship Seizure Case for Judgement on Substance ‘Runs Counter International Law’”, Govt. Spokesperson”, *Saharan Question*, July 16, 2017, <https://sahara-question.com/en/news/south-african-courts-decision-submit-moroccan-phosphate-ship-seizure-case-judgement-substance>.

on non-self-governing territory and the principle of self-determination cannot be invoked to impose international responsibility on private persons<sup>184</sup>. Nothing changes even if the provisions have already become international customary law, except that in general a group of private persons, like the Polisario, are not in a position to internationally invoke the rights and obligations of the Member States prescribed in the UN Charter.

Different from domestic laws which are applicable to private persons, not only the UN Charter in particular but also international law in general would not be able to impose international responsibility on private persons<sup>185</sup>. Therefore, under the UN Charter and other international law, the Polisario is not entitled to invoke the right to self-determination and permanent sovereignty over Saharan natural resources to impose international responsibility on private persons in the Saharan provinces. Needless to say, moreover, such group of private persons as the Polisario, which is not a party to the UN Charter, is not entitled, as a matter of course, to invoke the right to self-determination, whether as a right in customary international law with obligations *erga omnes* or as a *jus cogens*, to make the property of the OCP, held as private, its own. In the future, the right to self-determination and the permanent sovereignty over Saharan natural resources would not be invoked to seize the resources owned by private persons living and working in the aforementioned provinces.

The rights of a State and those of private persons are different under the law of international responsibility and the philosophy of human rights, though there is a controversial borderline. As regards the cases of international commercial arbitration on investment disputes between States and private persons, Christoph Schreuer points that “investment arbitration lies at the border line of international and domestic law”. Thus, article 42 (1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) referring to “such rules of international law as may be applicable” is construed as supplemental and corrective to the host State’s law<sup>186</sup>. Besides, it is pointed out, by Andreas Kulick, that “in many investment disputes the investors had previously concluded an investment contract” of a private law character with the host States<sup>187</sup>.

In any field, a private person – such as an investor, would not be convinced if international responsibility is unexpectedly imposed in application of a rule of international law to which that person is not given an opportunity to express a willingness or with which that person does not generally agree in advance<sup>188</sup>, though not a few European States and experts seem to prefer conceptualization of international investment law as public law<sup>189</sup>, arguably standing in the position of the investor.

---

184. “We are satisfied ... that the charter provisions ... were not intended to supersede existing domestic legislation”, *Sei Fujii v California*, Supreme Court of California, 38 Cal. 2D, 1952, p. 718.

185. Even in the case of so-called ‘self-executing treaties’, which becomes judicially enforceable upon ratification, not through the implementation of specific legislation, the effectiveness of treaties is usually articulated in a constitution or legislation. In the US, for example, “self-executing treaties become part of US federal law automatically upon ratification. If a human rights treaty, such as the 1951 Refugee Convention, is self-executing, the treaty is the equivalent of US federal law”, “Human Rights Treaties Becoming Part of US Law: Q & A”, University of Nebraska Lincoln, [http://www.unlhumanrights.org/01/0105/0105\\_04.htm](http://www.unlhumanrights.org/01/0105/0105_04.htm). Cf. generally, Carlos Manuel Vázquez, “The Four Doctrines of Self-Executing Treaties”, *American Journal of International Law*, Vol. 89, 1995, pp. 695-723.

186. Christoph Schreuer, “The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes”, 2016, pp. 21-22. [https://www.univie.ac.at/intlaw/pdf/csunpublpaper\\_1.pdf](https://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf). Giulia Cappa notes that, in drafting the ICSID Convention, “legal experts from developing countries argued in favour of the primacy of the law of the host State, which had to apply exclusively unless the parties had otherwise agreed”. *Idem.*, “The role of Public International Law as the law applicable to Investment Arbitration”, *Nomodos il Cantone delle Leggie*, 2017, <http://nomodos-ilocantoredelleleggi.it/2017/06/24/the-role-of-public-international-law-as-the-law-applicable-to-investment-arbitration/>.

187. Andreas Kulick, “International Investment Law as Public Law?”, *European Journal of International Law*, Vol. 22, 2011, p. 918.

188. Cf. Moshe Hirsch, “Investment Tribunals and Human Rights: Divergent Paths”, in P. M. Dupuy, F. Francioni, and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford Scholarship Online, 2009, p. 97.

189. Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, 2010.

Thus, it is commented in the context of the Cherry Blossom Case that the trade issues should be separated from the political status of the Saharan provinces, and that the two matters should not be conflated<sup>190</sup>. To similar effect, it is also commented that “[i]n the absence of a permanent resolution, a distinction must be made between political issues and the legal and other responsibilities placed on companies operating in the region”<sup>191</sup>. The traders and companies may well be private. From a different perspective, Á de Elera maintains, in criticizing the EU court decision, that the EU’s economic agreement with Morocco can hardly affect a group of private persons like the Polisario which acts by political and military means<sup>192</sup>. As such, responsibilities imposed on economic activities are distinguished from those on politics<sup>193</sup>.

These comments for differentiation would help draw attention to the differentiation of private persons from public officials, and to the issue of the applicability of international responsibility to private persons, though trade agreements as such are accepted and applied between States, not officially allowing private persons to take part in the decision-making. The international responsibility of private traders and companies are apparently different from that of public officials of the Ministry of International Trade and Industry, for instance.

Under the law of international responsibility, only States and international organizations assume responsibilities. While the acts committed by public officials are held as the State’s own acts, the acts committed by private persons are not. Even when an ostensibly internationally wrongful act was committed by a private person in a foreign State, the person’s State is not held responsible for the act<sup>194</sup>. On private persons, responsibilities are imposed usually by application of the appropriate domestic laws. Hence, international responsibility of a State has been distinguished from that of private persons. Nevertheless, the problem on the applicability of international responsibility to private persons has not received broad attention. In a sense, however, that may be natural because a State would be hardly held internationally responsible in its relations with private persons, so as not to worry about them.

As the Cherry Blossom Case has shown, however, a State may be held internationally responsible in respect of private persons when its State organ wrongfully imposed international responsibility on them, like the South African court. Traditionally, a State has been held responsible for the protection of the life and property of foreign private persons within its own territory under the international law of diplomatic protection of citizens abroad, as referred to above<sup>195</sup>.

The general principle of non-applicability of international responsibility to private persons may well be rooted in the nature of international law as such, agreed and applied between States. Even if based on the doctrine of the social contract, international responsibility of private persons would

---

190. “Western Sahara Consultations”, What’s Blue: Insights on the Work of the UN Security Council, January 2019, <https://www.whatsinblue.org/2019/01/western-sahara-consultations-6.php>.

191. “Phosphate Rock from Western Sahara”, PotashCorp, November 2015, [https://tammyrobert.files.wordpress.com/2017/05/pot-western\\_sahara\\_11-2015.pdf](https://tammyrobert.files.wordpress.com/2017/05/pot-western_sahara_11-2015.pdf).

192. Á de Elera, «The Frente Polisario Judgments: an Assessment in the Light of the Court of Justice’s Case Law on Territorial Disputes», *The EU as a Global Actor – Bridging Legal Theory and Practice*, Jenö Czuczai and Frederik Naert (eds), Brill Nijhoff, 2017, p. 280.

193. In its communications with MINURSO and the Secretariat, Morocco has objected to the accusations that it has violated military agreement No. 1, which does not prohibit civilian activities. Morocco insists that its clearing and paving actions were an exclusively civilian operation undertaken by a civilian contractor. 2017 SG Report, paras. 5, 12. Though the issue there is whether military or civilian, it may partly overlap with the issue whether private persons or public officials. At the same time, that reminds of the difference of international responsibility in terms of the legal status of the persons concerned.

194. J. Crawford, *op. cit.*, supra n. 16, pp. 91-93.

195. *Panevezys-Saldutiskus Railway Case*, Preliminary Objections, PCIJ ser A/B, No. 76, 1939.

not be justified, for “*pacta sunt servanda*” even in the international society. In order to legally bind a party by a contract, that party should have been allowed to express its own will in the form of an offer or consent. That's true of an international agreement under the Vienna Convention on the Law of Treaties. “The standard view of international law as an essentially consensual regime is”, it has been taken for granted, “a concomitant of sovereignty”<sup>196</sup>. In fact, to this day, private persons have not been competent to take part in the making of an international agreement. So long as the legal ground of binding force of international law is based on the consent of States<sup>197</sup>, private persons would be duly left outside its binding force insofar as responsibility is concerned. Although it has been often stated that “to some extent, ... individuals may be subjects of rights conferred and duties imposed by international law”<sup>198</sup>, “duties” in this sentence should be read in the context of international criminal law, exemplified by the duties imposed on pirates. In other words, from the perspective of international responsibility of private persons, the status of rights and duties are totally different, though the phrase “the rights and duties” is commonplace in the legal discourse.

One of the reasons why only States and international organizations are held internationally responsible is certainly that only they are entitled to take part in the making of an international agreement. For the same reason, but reversely, private persons cannot be held internationally responsible.

Instead, international law usually obliges the State parties to an international agreement to take appropriate legislative, administrative or judicial measures to enforce the agreed rules in each domestic society. By this means, private persons assume domestic responsibilities originated in internationally agreed rules. However, such responsibilities are not international responsibilities. Which State, Morocco or South Africa, is, then, entitled to impose domestic responsibility on private persons, taking the Cherry Blossom Case for example?

Based on the principle of sovereign equality<sup>199</sup>, no State is entitled to apply its domestic law to the acts committed by foreigners in a foreign State<sup>200</sup>. It is a long established principle that “the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State”<sup>201</sup>. Thus, South Africa may not exercise its power in any form in the Saharan provinces, i.e. in the territory of Morocco.

Though the Canadian Supreme Court once held that the granting of fundamental rights by the UN Charter was so important that it was not restricted to acts in Canada, a “general prohibition in international law against the extra-territorial application of domestic law” was reaffirmed in the decision as a principle of international law<sup>202</sup>. The exercise of extra-territorial jurisdiction by such big powers as the US and Canada has been criticized in the international society<sup>203</sup>.

---

196. Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*, Manchester University Press, 2000, p. 133.

197. Hans Kelsen, *General Theory of Law and State*, Harvard University Press, 1945, pp. 369-370.

198. R. Jennings and A. Watts, *op. cit.*, supra n. 180, p. 4. The book was originally published in 1905, L. Oppenheim, *International Law: A Treatise*, Vol. 1, Peace, Longmans, Green, and Co., 1905.

199. Art. 2 (1), UN Charter. In 2016.

200. A. V. Lowe, “US Extra-territorial Jurisdiction”, *International and Comparative Law Quarterly* vol. 46, 1997, p. 378.

201. S. S. Lotus Case, P.C.I.J., ser. A, No. 10, 1927, p. 18.

202. In R v Cook, *International Legal Materials*, vol 38, 1999, p. 271.

203. Under scrutiny, however, the extra-territorial laws are usually punitive, such as the Iran Sanctions Act 2006 of the US. On the sanctions by the US and UN in general, see *Digest of US Practice in International Law 2017*, U. S. Department of State, Chapter 16, <https://www.state.gov/chapter-16/>. See also, A. V. Lowe, *loc. cit.*, supra n. 200.

The OCP made it clear that it acted under the principles of Moroccan law. Under Morocco's sovereignty over the Saharan provinces, the effective law applicable to the acts conducted by private persons in said provinces is unmistakably Moroccan law. As a matter of course, South Africa is not entitled to apply its domestic law to the acts conducted by Moroccans on a sovereign Moroccan territory. As such, what will happen with the right to self-determination in the Saharan provinces?

As is discussed above, since the right to self-determination in international law cannot impose international responsibilities on private persons in the non-self-governing territory of 'Western Sahara' or the Saharan provinces, the only way to ensure a practical meaning to the right to self-determination in relation to private persons in these provinces is the enactment of the Moroccan legislation.

A proposal of such legislation is the Autonomy Project in 2007<sup>204</sup>, which has been appreciated by the Security Council<sup>205</sup>. Palestinian Foreign Minister Ryad El Maliki, reiterated its support for the Autonomy Project, proclaiming that "[w]e struggle against the Israeli occupation since 1948 and Morocco struggles for the achievement of its territorial integrity"<sup>206</sup>.

In that sense also, Morocco's consent to who are eligible to exercise the right to self-determination in these provinces is absolutely necessary in achieving a political solution "which will provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations"<sup>207</sup>. As such, the arrangements on who is eligible to exercise the right to self-determination in the Saharan provinces should not infringe on Morocco's fundamental sovereign rights enshrined in the principles and purposes of the UN Charter. Moreover, the general rule of consent is reconfirmed in the Declaration on Friendly Relations when it declares that the status of a territory as a non-self-governing territory shall not be construed as authorizing or encouraging any action which would impair "the territorial integrity and political unity" of sovereign independent States.

In sum, the Polisario's act as a legal personality is restricted by "the territorial integrity and political unity" of Morocco, and it does not enjoy any territorial status in respect of the non-self-governing territory of 'Western Sahara' or the Saharan provinces, including its natural resources, over which Morocco assumes exclusive sovereignty. Judicial jurisdiction over the acts committed in the Saharan provinces is one of the attributes of the Kingdom's sovereignty.

In this way, irrespective of whether the cargo is State-owned or private, the South African court had no jurisdiction over the acts of the OCP. Thus, as the OCP appropriately notified the court that the "OCP ... will not participate in a trial relating to the seizure of a vessel transporting our phosphate cargo through South African waters"<sup>208</sup>.

The South African court is criticized by Michel Rubin insofar that it has opened the way for self-styled liberation movements to avoid dialogue<sup>209</sup>. When those eligible to exercise the right to self-

---

204. 2007 SG Report, UN Doc S/2007/206, 2007.

205. UN SC Res 2468, 2019.

206. "Palestine Supports Morocco's Sovereignty Over Western Sahara", Sahara Question, January 23, 2016, <https://sahara-question.com/en/news/palestine-supports-morocco%E2%80%99s-sovereignty-over-western-sahara>.

207. UN SC Res 2468, 2019, preamble.

208. OCP, OCP Press Release, July 13, 2017, p. 1.

209. Michel Rubin, "Western Sahara: The Cherry Blossom Affair," American Enterprise Institute, September 6, 2017, <https://amrank.info/2017/09/06/western-sahara-the-cherry-blossom-affair-aei-american-enterprise-institute-freedom-opportunity-enterprise/>.

determination are not agreed between the conflicting parties, the unreasonable exercise of the right would exacerbate the conflict. Furthermore, as Peter Hilpold warns, the post-colonial unilateral application of the right to self-determination would fuel the fire of separatism all over the world<sup>210</sup>.

## 6. Conclusion

In conclusion, lessons should be drawn from the Cherry Blossom Case. The case becoming a precedent is feared, as it “it could unleash an age of judicial piracy and undercut negotiated settlements everywhere”<sup>211</sup>. Although there is almost nothing to add to what is implied in the phrase, the following three lessons should be learnt.

First, one of the most effective countermeasures against the ‘lawfare’ launched by the Polisario with a surprise attack and ambush in the ports depends on the foreign companies. The import trading companies are expected not to succumb to the fear of the Polisario, and expected instead to cooperate with the populations in the Saharan provinces through importing more Saharan natural resources, so as to reconfirm and strengthen not only the general principle of non-responsibility of private persons in international law but also the fairness and impartiality of judicial courts. Now, the battlefield of ‘lawfare’ is not limited to these provinces. According to Olde F. Kittrie, it has already been spreading all over the world, waged by the U. S., China, Iran, Israel, the Palestinian Authority, NGOs and individuals<sup>212</sup>. Against it, export expansion of Saharan natural resources would certainly contribute to cause the Polisario to fail in its ‘lawfare’ tactics and prevent it from accelerating its globalization<sup>213</sup>. Otherwise, the tactics would gradually deprive the long established confidence in the impartiality of judicial courts, finally spoiling one of the most reliable means for the peaceful settlement of disputes in civilized societies.

Second, any judicial courts are fundamentally required to be fair and impartial. Normally, judges may be challenged and disqualified on the basis of bias or prejudice in domestic courts<sup>214</sup>. However, the court’s decision for the Cherry Blossom Case begins with “[t]he territory of Western Sahara is said to be the only African territory still subject to colonial rule”<sup>215</sup>. To make a fair and impartial decision, the concept of “colonial rule” should have been elaborated<sup>216</sup>. Since the only form of legal norm is ‘if x, then y’, evidence to meet the legal requirements x, or “colonial rule”, must have been presented before making a judgment on the legal consequences y<sup>217</sup>. If “colonial rule” is not conceived as a legal concept, then it should have not been referred to at all, not to mention being noted in the first sentence of the decision, since the decision of a court should not be a propaganda tool. Then, the reason why the ‘non-colonial’ non-self-governing territory of ‘Western Sahara’ or the Saharan

---

210. P. Hilpold, *loc. cit.*, supra n. 114, p. 921.

211. M. Rubin, “Will Local Courts Reward Terror?”, Sahara Question, June 18, 2017, <https://sahara-question.com/en/opinions/will-local-courts-reward-terror>.

212. O. F. Kittrie, *op. cit.*, supra n. 11.

213. Cf. Hamza Guessous, “OCP Group Expects Higher Demand for Phosphate in 2019”, Morocco World News, March 25, 2019, <https://www.moroccoworldnews.com/2019/03/268886/ocp-group-demand-phosphate/>.

214. Randall J. Litteneker, “Disqualification of Federal Judges for Bias or Prejudice”, *The Chicago Law Review*, Vol. 46, 1978, pp. 236-268.

215. Cherry Blossom Case, para. 1.

216. As regards the difficulties in defining ‘colonialism’ universally and exactly as a legal concept, see Tom J Farer, “The Regulation of Foreign Intervention in Civil Armed Conflict,” *Collected Courses of the Hague Academy of International Law*, Vol. 142, 1975, pp. 318-404.

217. ‘Colonialism’ was declared as an international crime in the General Assembly first in 1970, holding “the further continuation of colonialism in all its forms and manifestations a crime” (UN GA Res 2621, 1970), though it was not defined, and it is not included in crimes within the jurisdiction of the ICC. See the Statute of the ICC, art. 5 (1). For the legal purposes, however, ‘colonial rule’ should have been defined before applying it to Morocco.

provinces is felt inconvenient should have been explained before taking Morocco's presence in said provinces as 'colonial rule'.

Bias or prejudice in a court decision, as such, would arguably constitute an internationally wrongful act of 'denial of justice', followed by its resultant another internationally wrongful act through the non-application of State immunity to the OCP. Zachary Douglas argues that there has been debates on "whether a domestic judgment tainted by some manifest or perverse error of domestic law should ... attract international responsibility. Some international courts and writers have answered this question in the affirmative". At the same time, "substantive injustice can provide conclusive or strong evidence of procedural injustice". Thus, a denial of justice "would include cases relating to the immunities afforded to a respondent State or State organ"<sup>218</sup>.

Moreover, such political bias or prejudice would stand in the way of achieving a political solution in the round-table meetings. The phrase "achieving a political solution" in the Security Council resolutions would be duly construed to require the Member States, including South Africa, to have other issues than political issues detached, such as overseas trade issues, as one of its consequences.

Third, territorial sovereignty has, as corollary, a responsibility to protect "the rights which each State may claim for its nationals on a foreign territory"<sup>219</sup>, and the seizure of foreign innocent cargo is inexcusable. Any States and international organizations should refrain from supporting the Polisario's judicial tactics to dispossess the property of private persons working in mines, at a fishing place, on a farm and in tourism in the Saharan provinces. Thus, the government of South Africa assumes responsibility to "offer appropriate assurances and guarantees of non-repetition" of the internationally wrongful act of seizing the phosphate cargo without any legal basis, and for the wrongful act of 'denial of justice' caused by political bias or prejudice on the part of the South African court, in conformity with article 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

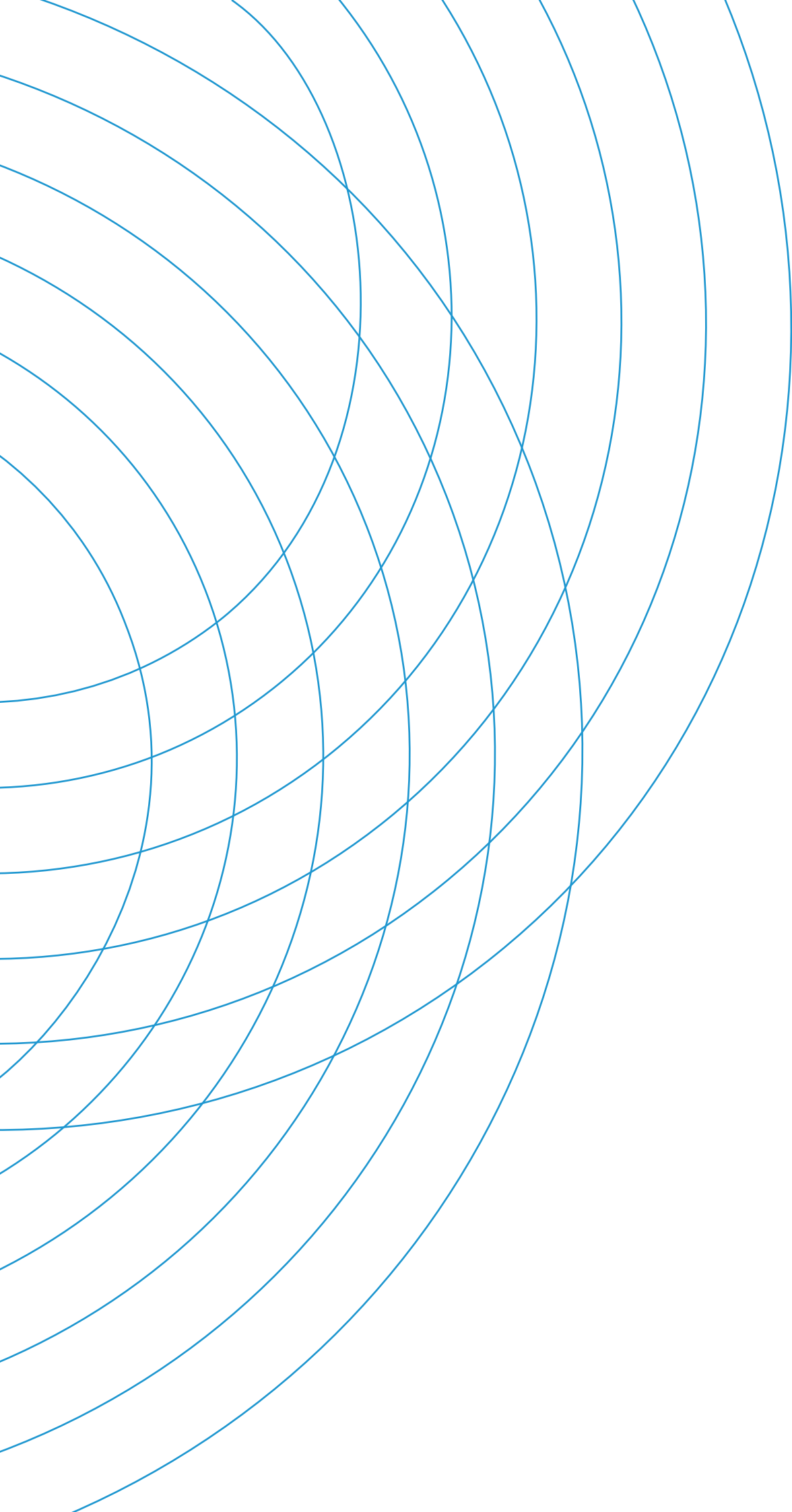
Then, with respect to the Polisario, while it cannot be held internationally responsible by virtue of its status as a group of private persons, it may be conceivable that there existed a specific factual relationship between the Front and Algeria. As such, the conduct of the Polisario would be held, as one possibility, as an act of Algeria if it was in fact acting under Algerian control in carrying out its conduct, on the basis of article 8 of the said Draft Articles<sup>220</sup>. Hereafter, in consequence, any conduct by the parties in the round-table meeting, i.e. Morocco, the Polisario, Algeria and Mauritania, should be managed in terms of achieving a political solution. In this vein, the Front Polisario would be held politically responsible to explain itself, to other parties, and in particular to Morocco and Mauritania, with regard to the Cherry Blossom Case, in order to contribute achieving "a just, lasting, and mutually acceptable political solution, based on compromise"<sup>221</sup>.

218 Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed", *International and Comparative Law Quarterly*, Vol. 63, 2014, pp. 13-16.

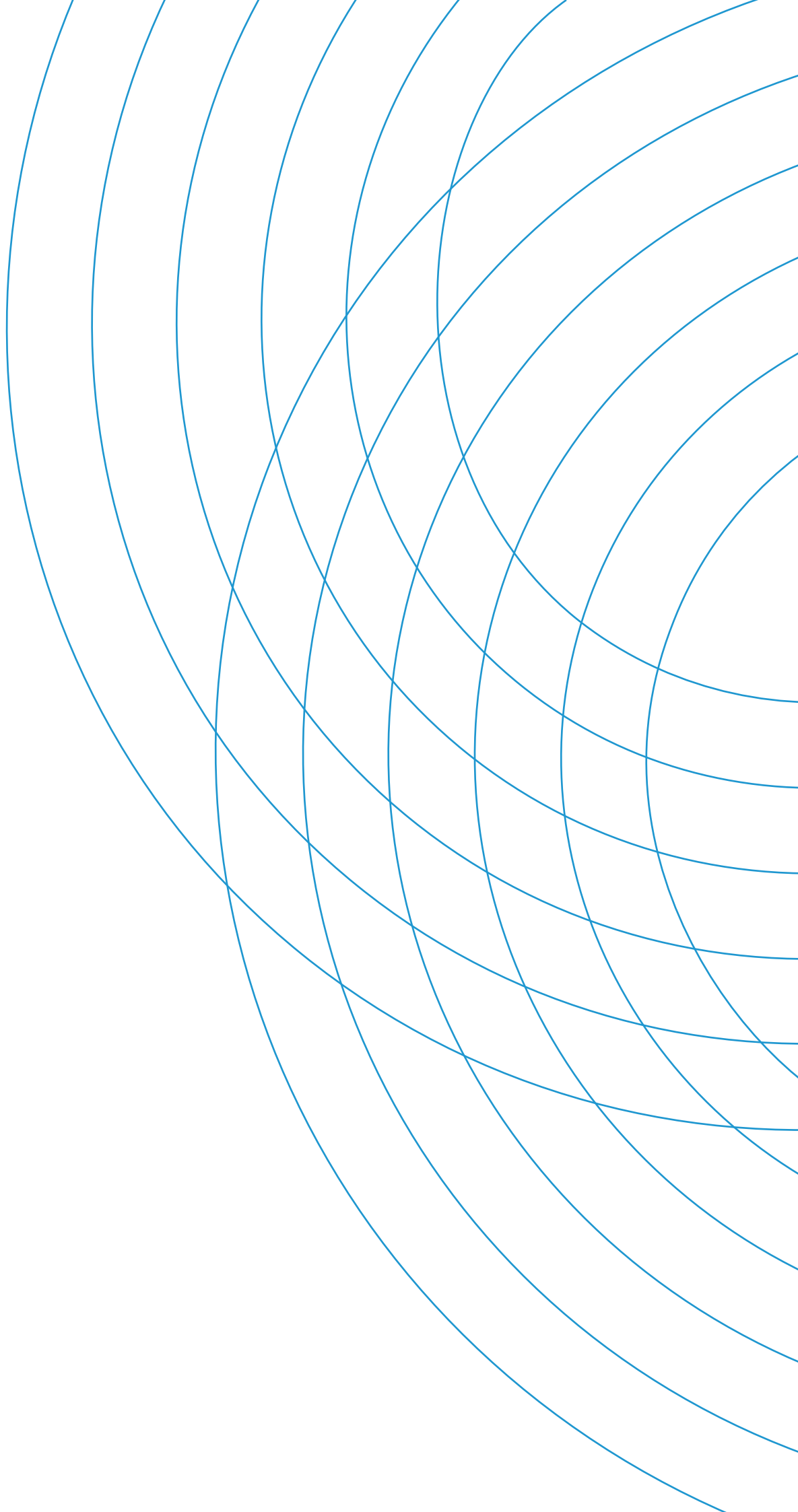
219 *Island of Palmas Case*, 2 RIAA 1928, p. 829. See also *Spanish Zones of Morocco Claims*, 2 RIAA 1924, p. 615.

220 See S. Kasraoui, "Morocco's Ambassador to the UN: Algeria Created Polisario", *Morocco World News*, May 6, 2019, <https://www.morocccoworldnews.com/2019/05/272425/moroccan-un-ambassador-algeria-created-polisario/>.

221 UN SC Res 2468, 2019, preamble.









**Policy Center for the New South**

Complexe Suncity, Immeuble C,  
Angle Boulevard Addolb et rue Albortokal,  
Hay Riad, Rabat - Maroc.

Email : [contact@ocppc.ma](mailto:contact@ocppc.ma)  
Phone : +212 5 37 27 08 08  
Fax : +212 5 37 71 31 54  
Website : [www.policycenter.ma](http://www.policycenter.ma)