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Western Sahara and the EU-Morocco Fisheries Partnership Agreement (FPA)

1 Conclusion

- A renewed FPA may make the EU and its member states liable for a violation of international law, namely as a recognition of and assistance to serious breaches of international law by Morocco.
- An FPA with Morocco that covers waters outside WS **must** conform with the following conditions:
    - o The agreement should make clear that it does not cover WS as a part of the territory of Morocco
    - o The agreement must be in accordance with the wishes and interests of the people of WS
- A negotiating mandate for the Commission – including a mandate for a short extension of the protocol to the FPA – should include the conditions related above and **must** – as an absolute minimum -- include a clause providing that the agreement shall be in conformity with international law.
- Before any new negotiations are undertaken, the Government of Morocco should provide an answer **in public** to the **two** question how the FPA has benefitted the people of WS **and** if it is according to the wishes of that people.

2 Legal analysis

2.1 The legal status of Western Sahara

In 1963 Western Sahara was listed as non-self-governing territory by the United Nations. In 1966 the United Nations General Assembly adopted its first resolution[1] on the territory, urging Spain to organize, as soon as possible, a referendum under UN supervision on the territory's right to exercise its right to self-determination. In 1975, the ICJ rendered an advisory opinion on the Western Sahara question, concluding by 14 votes to two, that while there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties did not imply sovereignty. "Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."[2] Shortly thereafter, on 6 November, Morocco occupied and later annexed Western Sahara, through the famous "Green march". The same day, the UN Security Council, in Resolution 380, called upon Morocco "immediately to withdraw … all the participants in the march." Shortly thereafter, Morocco, Mauretania and the colonial power, Spain, entered into an agreement which in convoluted terms transferred the administration of the territory to Morocco and Mauretania. The agreement did not, however, transfer sovereignty explicitly. (Mauretania later rescinded and left the whole territory to Morocco.)

Western Sahara is not a part of Morocco and Morocco has no legal title or claim on the territory The people of Western Sahara (the Saharawis) have a right to self-determination, which can be fulfilled by the creation of a fully sovereign state, if they so choose. The Moroccan occupation and annexation of the territory is a serious breach of International Law. Morocco has an obligation to respect the right of the people of Western Sahara to self-determination and to end its illegal annexation and occupation of Western Sahara.

2.2 Use of natural resources

Since Morocco has no legal right to govern the territory, she has no legal title to the natural resources of Western Sahara. Consequently, Morocco has no right as a sovereign to dispose of such natural resources for her own purposes. Furthermore, any agreement that Morocco enters into with other countries cannot cover

[1] UN General Assembly, 1966, Resolution 2229 (XXI).
[2] ICJ Reports, 1975, p. 68, para. 162.

Western Sahara as a part of Morocco.

Since the annexation is illegal it is null and void and Morocco is therefore an occupying power. The basic principles of belligerent occupation are: the occupying power may not change the legal and political framework; it should proceed from the premise that the occupation is temporary and that the occupying power may not introduce permanent changes into the occupied territory. Furthermore, Western Sahara is a non-self-governing territory, and its people has a right to permanent sovereignty over its natural resources and the right to "freely dispose of their natural wealth and resources ", as provided in Article 1(2) of the two UN Covenants on Human Rights.

Nevertheless, Morocco may under some circumstances use the natural resources of the territory. Under the law of occupation, as set out in the IV Hague Convention on Land Warfare, Morocco has a responsibility to uphold order as well as the "vie publique" -- public life and welfare. This means that Morocco must offer basic public goods to the population of Western Sahara, which entails that there must be income to pay for these goods. Consequently, Morocco may make arrangements with regard to the resources of Western Sahara, provided that they benefit the Western Sahara people. This would be particularly appropriate with regard to renewable resources, like reasonable fishing. The principle of self-determination further requires that the people of Western Sahara should be able to influence how this is done.

The rules governing the administration of non-self-governing territories point in the same direction, as provided for in Article 73 of the UN Charter and as developed in a legal opinion by the then UN Legal Counsel, Hans Corell, in 2002.[3] The opinion concluded, with regard to oil exploration, that if "further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories." Corell has later, in a presentation in Pretoria, confirmed that in his view this applies also to fishing.[4]

This entails the following consequences:

- Morocco may not dispose of the resources of Western Sahara for her own good.
- Any agreement entered into by Morocco in her own name does not cover Western Sahara, since Western Sahara is not a part of Morocco.
- Morocco may enter into agreements regarding the use of natural resources as an occupying or de facto administering power with regard to the territory of Western Sahara.
- Any such agreement must be for the benefit of the people of Western Sahara *and* according to the wishes of that people.

2.3 The Fisheries Partnership Agreement (FPA)

On 22 May 2006, the EU adopted the FPA with Morocco with one negative vote (Sweden) and one abstention (Finland). During the course of the negotiations, serious concerns with regard to Western Sahara had been voiced also by Denmark, Ireland and the Netherlands. The FPA entered into force on 28 February but the relevant protocol to the FPA will expire on 27 February 2011. While the FPA does not say so explicitly, it was meant to cover, and has indeed covered, also the waters outside of Western Sahara, which provide an important part of the total fisheries allocated to the EU (mostly Spanish ships).

The Commissioner responsible for Fisheries, Maria Damanaki, has allegedly stated that a new FPA should exclude Western Sahara. The Commission has asked Morocco for a statement of how the FPA has benefitted "the local population", and a reply has been provided on 13 December, 2010, but has not been made public. Given the urgency of the matter before the expiry of the present agreement, the Commission has proposed a one-year renewal from 28 February to give room for further discussions between the EU and Morocco on a more permanent arrangement. In late 2009, the legal service of the European Parliament provided an opinion about the FPA and Western Sahara. The legal service found that "compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefits of the people of such Territory, and in accordance with their wishes." Further, "[i] n the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resources, principles which the Community is bound to respect, the Community should refrain from

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[3] UN Doc S/2002/161.

[4] http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf

allowing vessels to fish in the waters off Western Sahara by requesting fisheries licences only for fishing zones that are situated in the waters off Morocco".

The legal service of the European Parliament has analysed the situation correctly. By contrast, it should be noted that the Commission, while purporting to proceed from Hans Corell's opinion, have distorted his conclusions. Whereas Corell rightly pointed at "the interests and wishes of the people of Western Sahara", the Commission has restricted itself to ask whether the FPA has been to the benefit of the local population.[5] Hence, the Commission has omitted the reference to the "wishes" of the people. Further, and equally serious, while the Commission should have asked about the relation between the FPA and the "people" of Western Sahara, they have instead asked about how the FPA affects "the local population", which consists mainly of Moroccan settlers, who have been transferred into occupied territory in violation of Article 49 of the IV Geneva Convention of 1949.

2.4 Duties of the EU and its member states

In case of an illegal situation, third states have the following duties, as summed up by the ICJ regarding the wall (or barrier) in Occupied Palestinian Territory:

> All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[6]

These principles apply to the current situation as well, meaning that the EU and its member states shall not recognise the annexation of Western Sahara and that they shall not assist in the continued occupation and annexation. Further, they should cooperate to bring an end to the illegal situation. Hence, it is illegal to enter into an agreement with Morocco, which explicitly or implicitly recognises the annexation of Western Sahara; any such agreement that covers Western Sahara would have to clarify that the territory is not under Moroccan sovereignty. Further, any such agreement should not strengthen the Moroccan occupation, and should hence not support measures that strengthen Moroccan control or that facilitate Morocco's transfer of settlers into the territory.

It should be pointed out in this context that this Moroccon responsibility is in addition to liability that individual Moroccon officials bear for acts in Western Sahara, which entail individual criminal responsibility, including aggression, war crimes and possibly also crimes against humanity. Such liability may attach also to individuals in third countries that assist or in other ways take part in those crimes.

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[5] See Recommendation from the Commission to the Council 11.2.2011, SEC(2011) 170 final, and see further Hans Corell's dismay expressed in his Pretoria address, cited above.

[6] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, paragraph 163