

Western Sahara and the Protocol to the EU-Morocco Fisheries Partnership Agreement (FPA) of 2013 -- a Legal Analysis

1 Summary

- A new Protocol to the FPA may make the EU and its member states liable for a violation of international law, namely recognition of and assistance to serious breaches of international law by Morocco, amounting to aggression and denial of the right of self-determination, including the right to freely dispose of their natural wealth and resources.
- An agreement with Morocco that covers waters outside Western Sahara must conform with the following conditions:
 - The agreement should make clear that it does not cover Western Sahara as a part of the territory of Morocco, but only as an occupied, non-self-governing territory.
 - The agreement must be in accordance with the wishes and interests of the people of Western Sahara.
- The current Protocol falls far short of these requirements and is therefore in violation of international law.

2 Legal background

2.1 *The legal status of Western Sahara*

In 1963 Western Sahara was listed as a non-self-governing territory by the United Nations. In 1966 the United Nations General Assembly adopted its first resolution¹ 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 International Court of Justice (ICJ) rendered an advisory opinion on the Western Sahara question, concluding by 14 votes to 2, 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". This constituted an act of aggression in violation of the UN Charter. 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, Mauritania and the

¹ UN General Assembly, 1966, Resolution 2229 (XXI).

² ICJ Reports, 1975, p. 68, para. 162.

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.)

The people of Western Sahara (the Saharawis) have a right to self-determination, which can be fulfilled through the creation of a fully sovereign state, if they so choose. Under that principle, they also have the right to “freely dispose of their natural wealth and resources”.³ The Moroccan occupation and annexation of the territory is a serious breach of International Law. Western Sahara is not a part of Morocco and Morocco has no legal title or claim on the territory. 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 Duties of third states, such as 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.⁴

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 Moroccan responsibility is in addition to liability that individual Moroccan officials bear for acts in Western Sahara, which entail individual criminal responsibility, including for 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.

³ Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, paragraph 163

2.3 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 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 (Article 43).⁵ 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 people of Western Sahara. This would be particularly appropriate with regard to renewable resources, like sustainable 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 in Article 73 of the UN Charter and as developed in a legal opinion by the then UN Legal Counsel, Hans Corell, in 2002.⁶ 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 this applies also to fishing, and he has objected to the FPA.⁷ The Legal Service of the European Parliament has based their assessments on this view in two legal opinions, including a recent one from November 2013.⁸

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 non-self-governing territory of Western Sahara.

⁵ See also a number of provisions in the IV Geneva Convention (1949) which indicate positive obligations for the occupying power, such as Articles 50, 55 and 56.

⁶ UN Doc S/2002/161.

⁷ <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>

⁸ See paragraph 18, Legal opinion, 4 November 2013, Legal Service, SJ-0665/13, accessed at http://wsrw.org/files/dated/2013-11-07/ep_legal_opinion_nov_2013.pdf

- Any such agreement must be for the benefit of the people of Western Sahara *and* according to the wishes of that people, in accordance with the right of a people to freely dispose of their natural wealth and resources

In several statements and analyses from various EU institutions, the last requirement has been watered down to “benefit the local population”. However, this formula fails in two ways to respond to what international law requires:

- 1) It uses the term “population” instead of “people”. “Local population” excludes a very large proportion of the people of Western Sahara, who live in refugee camps beyond Moroccan control. It further includes Moroccan settlers, introduced into Western Sahara in violation of Article 49 of the IV Geneva Convention.
- 2) It omits the requirement that the agreement be in accordance with the wishes of the people, which follows from the

3 The Fisheries Partnership Agreement (FPA)

On 22 May 2006, the EU Council of Ministers 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. 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.⁹

The FPA entered into force on 28 February but the relevant protocol to the FPA expired on 27 February 2011. A new protocol was negotiated and adopted by a divided Council of Ministers in 2011 but was rejected by Parliament, partly due to the problems mentioned above. The Commission has now negotiated yet another Protocol, which was adopted by the Council in mid-November and will be voted upon in Parliament in December. Unfortunately, the relevant changes in the protocol compared to 2011 are cosmetic, at best.

The explanatory memorandum to the proposal for a Council decision claims that one of the reasons for why the 2011 Protocol was rejected was “that it did not respect international law insofar as it did not prove that the local populations would benefit from the economic and social benefits of that Protocol.” As explained above, this is a misrepresentation of the problem, since international law requires that the agreement is to the benefit of *and in accordance with the wishes of the people* (not “the local population”). The alleged remedy to this misrepresented problem is that the new Protocol is

requiring Morocco to provide regular, detailed reports on the use of the financial contribution for the fisheries sector, including the economic and social benefits on a geographical basis, and providing for a mechanism for the possible suspension of the Protocol, including in the event of violations of human rights and democratic principles.

This remedy fails to address the problem even in the diminished and misrepresented form quoted above. The concrete provisions which the memorandum alludes to are set out in Articles 6 and 8:

According to Article 6, the EU’s financial contribution shall be used “to develop and implement Morocco’s sectoral fisheries policy as part of the [Moroccan] ‘Halieutis’ strategy for developing the

⁹ See paragraph 29, the Legal opinion.

fisheries sector” “on the basis of the setting up by the two parties, by mutual agreement within the Joint Committee, of the objectives to be met and of the relevant annual and multi-annual programme”. Morocco shall report including by providing “information on any social and economic consequences, particularly the impact on employment, investment and any other quantifiable repercussions of the measures taken, together with their geographical distribution.”

This provision does not prevent an implementation of the Protocol in accordance with international law. However, neither does it do much to secure such an implementation. In fact, it is highly unlikely that Morocco would accept “in mutual agreement” an implementation in accordance with the “wishes and interests of the people of Western Sahara”. Neither is it likely that the European Commission would be able to (or even try to) press the Moroccan authorities to implement the agreement in this fashion, in particular since the reporting requirement is far too general to secure reporting on the impact on the people of Western Sahara

With respect to human rights, the Protocol hence adds nothing to what was already in place. The clause on general principles in Article 1 and the suspension clause (Article 8) refer to the human rights clause in the Association agreement and the suspension clause in the FPA. There are no reports of this clause ever having been used for the protection of the rights of the people of Western Sahara during the thirteen years that have passed since the Agreement entered into force in 2000.

4 Conclusion

The conclusion is that the 2013 Protocol still does not address the failure to conform with international law that was one of the reasons that the European Parliament rejected the Protocol in 2011.

In the 2013 legal opinion to the European Parliament, the Parliament’s legal service cited its own previous opinion of 2009. The legal service here 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 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”. Since there are no records of this having been the case, before or after 2009, Parliament should reject this Protocol and let it be known to the Commission that it expects the Commission to negotiate a new agreement which fully respects international law.¹⁰

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¹⁰ See paragraphs 5 e) and 5 i), Legal opinion.

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