

# **Human Rights and Relevant Legal Aspects in Western Sahara**

Seminarium den 19 maj 2010

## **International Law and the Exploitation of Natural Resources in Western Sahara**

- Simplify – will miss some of the legal niceties – main message across.

### Slide 1

- I will start my discourse with the advisory opinion delivered in 1975 by the International Court of Justice. This advisory opinion clarified once and for all whether or not Morocco has any legitimate claim on the territory of Western Sahara.
- I will continue by presenting the conclusions made in a legal opinion by the former Under-Secretary-General for Legal Affairs, Hans Corell, pertaining to actions taken by Morocco for the exploration of oil in Western Sahara. I will also touch upon the further clarifications of this legal opinion that Hans Corell himself made at an international seminar in Pretoria in December 2008.

### **The advisory opinion by the International Court of Justice**

- In 1975 the General Assembly of the United Nations requested an advisory opinion of the International Court of Justice. The aim of the General Assembly was to be of assistance in the decolonization of Western Sahara. The colonial power at the time was Spain. When Spain was about to leave, both Morocco and Mauretania made claims on Western Sahara. In order to facilitate the process of decolonization, the General Assembly needed to clarify the status of Western Sahara and the nature of its ties to Morocco and Mauretania. The General Assembly submitted two questions to the Court:

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- Question number I: Was Western Sahara at the time of colonization by Spain a territory belonging to no one ? If no →
- Question number II: What were the legal ties between this territory and the Kingdom of Morocco and the Mauretanian entity?
- As to the first question the Court firstly stated that according to State practice at the time of colonization of Western Sahara in the 1880s, territories inhabited by tribes or peoples having a social and political organization were **not** regarded as a no man's land. The Court declared that Western Sahara **was** inhabited by peoples which, if nomadic, were socially and politically organized. The Court concluded that Western Sahara was **not** a no man's land by the time of its colonization.
- As to the second question, the Court pointed out that the outcome of the issue was depending on whether or not there were evidence of effective display of authority in Western Sahara by another State **at the time of its colonization by Spain and in the period immediately preceding** that colonization.
- Morocco requested that the Court should take into account the special structure of the Moroccan State, which was founded on Islam and the allegiance of various tribes to the Sultan. As evidence of its sovereignty, Morocco invoked, among other things, documents of appointment and the alleged imposition of taxes.
- Having considered the arguments of all parties, the Court found that **neither** the internal **nor** the international acts invoked by Morocco indicate the existence of legal ties of territorial sovereignty between Western Sahara and the Moroccan State.
- Furthermore the Court declared that **even taking into account the specific structure of the Moroccan State**, the acts invoked do not show

that Morocco displayed any effective and exclusive State activity in Western Sahara at the relevant time.

- Likewise, the Court found that there were no legal ties of territorial sovereignty between Western Sahara and Mauretania.
- I would say that this is a **clear and unambiguous** ruling. In my opinion, Morocco has **no legitimate claim** to Western Sahara, which of course is of **importance** for Morocco's possibilities to exploit the natural resources of Western Sahara.

### **Former Under-Secretary-General for Legal Affairs Legal Counsel of the United Nations**

- In 2001, the former Under-Secretary-General for Legal Affairs, Hans Corell, was asked to deliver a legal opinion to the Security Council.
- The legal opinion was requested in order to sort out the legality of two contracts for oil-reconnaissance in Western Sahara. The contracts were concluded between, on the one hand, the Government of Morocco and a United States oil company called Kerr McGee and, on the other hand, the Government of Morocco and a French oil company by the name of TotalFinaElf. Both contracts were signed in October 2001.

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- One of the starting points of the legal opinion is that Western Sahara has been included in the UN list of Non-Self-Governing Territories since 1963. The fundamental principles applicable to such Territories are laid down in Article 73 of the UN Charter.
- Although Western Sahara is a Non-Self Governing Territory, Morocco has never been formally recognized by the UN as being the Administrating Power of that territory. The Under-Secretary-General

therefore proceeded by way of analogy, analyzing several resolutions from the General Assembly on the subject of Non-Self-Governing Territories.

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- It was found that the General Assembly has drawn a **distinction** between economic activities that are **detrimental** to the peoples of these Territories and those **directed to benefit them**. The General Assembly has, for instance, recognised the value of foreign economic investment **when undertaken in collaboration** with the peoples of the Non-Self-Governing Territories and **in accordance to their wishes**.
- In addition to the resolutions, the legal opinion refers to the **relevant case law of the International Court of Justice** and provides an overview of the practice of States.

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- After having examined these various sources of law, the Under-Secretary-General concludes that **the analysis undertaken supports the conclusion** that mineral activities in a Non-Self-Governing Territory are **illegal if conducted in disregard of the needs and interests of the people of that Territory**.

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- After having delivered the legal opinion, Hans Corell has abstained from any further comments on the subject, stating that it is important that the legal opinion speaks for itself. However, at a conference in Pretoria in December 2008 he actually chose to deliberate on the subject. One of the issues he raised was what conclusions could be drawn from the legal opinion in relation to other resources in Western Sahara than mineral resources?

- He concludes that there is not much room for making a distinction between mineral resources and other resources. What is said in the legal opinion about mineral resources also applies to other resources.
- Hans Corell points out that a distinction can be made between renewable and non-renewable resources. A prominent renewable resource in Western Sahara is fishing. However, all natural resources must be used in the interests of the people of the Non-Self-Governing territory, in the present case the Sahrawis.
- I would like to conclude with a personal reflection. Fishing is normally considered as a renewable resource. However, if fishing is conducted ruthlessly and without care, certain species may well become extinct. It is also possible that a whole area may become devoid of fish, as indeed has happened in Nova Scotia.
- Water is another resource that normally would be considered as renewable. However, water in Western Sahara is scarce. If the area is deprived of its water resources, the balance is almost impossible to restore.
- Whether renewable or non-renewable the legal situation is clear. **Any exploitation of natural resources in Western Sahara is illegal if it is conducted in disregard of the needs and interests of the Sahrawi.**

(Extra part)

## **Fisheries Partnership Agreement**

- As you may know, the European Commission concluded a **Fisheries Partnership Agreement** with Morocco in 2006. The Agreement stands to be renegotiated during the autumn of 2010. Although the Agreement includes the coastal waters of Western Sahara, which is rich in fish, in all the pages of the Agreement there is not one word about the fact that Morocco's jurisdiction in this area is limited by the international law and the rules on self-determination.
- A first assessment of the implementation of the Agreement has in 2009 been carried out by the European Parliament's Legal Service. The Legal Service points out that among the specific objectives and actions listed in the Agreement there is not one single action explicitly foreseen to benefit the population of Western Sahara. In fact, in the whole Agreement there is no trace of any reference to the Saharawi territory or population.
- After having examined the various facts of the matter, the Legal Service draws the conclusion that it is not demonstrated that the EU financial contribution is used for the benefit of the Saharawis, despite requirements of international law. The legal Service continues:
- "It is strongly recommendable that the next annual meeting addresses these issues with a view to find an amicable settlement, fully respecting the rights of the Saharawi people under international law. If such an amicable settlement cannot be found, the Community should envisage either the suspension of the agreement or to apply the agreement in such a way that EU flagged vessels are excluded from the exploitation of the waters of Western Sahara."