International Judicial Monitor

An international law resource for judiciaries, justice sector professionals, and the rule of law community around the world

Current Issue

Archive

Published by the International Judicial Academy, Washington, D.C., with assistance from the American Society of International Law

Winter 2015 Issue

In this issue

INTERNATIONAL LAW ANALYSIS AND COMMENTARY

Send this article

The Responsibility of the UN Security Council in the Case of Western Sahara

By: Hans Corell, Former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations

At the request of the UN Security Council, I delivered a legal opinion to the Council relating to Western Sahara on 29 January 2002. This I did in my capacity as the Legal Counsel of the UN at the time. The opinion concerned the legality in the context of international law of actions by the Moroccan authorities

The latest development with respect to natural resources is a contract between Morocco and two companies, Kosmos and Glencore, relating to oil exploration and exploitation in the Cap Boujdour area off the coast of Western Sahara. I can see from the web that the two companies maintain that this contract is in conformity with my 2002 legal opinion. Regrettably, it is not. Already signing an agreement in which Morocco refers to Western Sahara as "the southern provinces of the Kingdom of Morocco" is at variance with Corporate Social Responsibility and the principles Protect, Respect and Remedy.

In his latest report on the situation concerning Western Sahara, dated 10 April 2014, the Secretary-General

consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara. My conclusion was 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 principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.

This development happened 13 years ago. In the meantime, I have followed the development in Western Sahara at a distance, in particular because of the Fisheries Partnership Agreement concluded between the European Union (EU) and Morocco in 2007 and the protocols to that agreement. In my view this agreement is not in conformity with international law as far as it concerns Western Sahara.

In early December 2014, I was invited to address an international workshop on the topic *The European Union Approach Towards Western Sahara*, organised by the University of Bologna in the framework of the Italian Presidency of the European Union. This made me take a closer look at the situation in the region again. In particular, I focused on the question if the United Nations Mission for the Referendum in Western Sahara (MINURSO), the Secretary-General and his Personal Envoy, Ambassador Christopher Ross, had made any progress towards a solution of the situation in Western Sahara. In that context I noted the obvious conflict between the Security Council's latest resolution on Western Sahara and the attitude reflected in a speech to the Nation that King Mohammed VI of Morocco delivered on 6 November 2014. This made me realise that the situation is very serious indeed.

observes that, in the light of the presence of Western Sahara on the list of Non-Self-Governing Territories since 1963, "the efforts of the United Nations, through the work of my Personal Envoy, my Special Representative and MINURSO, will remain highly relevant until its final status is established." If no progress occurs before April 2015, the Secretary-General believes that the time will have come to engage the members of the Council in a comprehensive review of the framework that it provided for the negotiating process in April 2007.

The question is, therefore, how the Council should now address the main issue, namely the question of providing for the self-determination of the people of Western Sahara. This process has now gone on for decades, and it is obvious that the current negotiation has become a charade that has come to an end. How this should be done is a political issue that the Council simply has to deal with. At the same time, any solution must be in conformity with international law. In this process the Council must now examine more radical options than applied in the past, among them the following three.

One option is to transform MINURSO into an operation similar to the United Nations Transitional Administration in East Timor (UNTAET), which was endowed with overall responsibility for the administration of East Timor and empowered to exercise all legislative and executive authority, including the administration of justice.

Another option is to order Spain to resume her responsibility as administering Power in Western Sahara, a responsibility that Spain relinquished in February 1976. In

In this resolution (S/RES/2152/2014 of 29 April 2014) the Security Council "calls upon the parties to continue negotiations under the auspices of the Secretary-General without preconditions and in good faith - - - with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the *self-determination of the people of Western Sahara* (my emphasis) in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations, and noting the role and responsibilities of the parties in this respect."

In his speech, the King says that the Nation is "proudly celebrating the thirty-ninth anniversary of the Green March" [Editor's note: The Green March was a "strategic mass demonstration in November 1975, coordinated by the Moroccan government, to force Spain to hand over the disputed, autonomous semi-metropolitan Spanish Provinceof Sahara to Morocco."] The problem is that this occurrence was probably a violation of Article 49 of the Fourth Geneva Convention, which prohibits an occupying power from deporting or transferring parts of its own civilian population into the territory it occupies. The following quote from the speech should be noted in particular:

We say 'No' to the attempt to change the nature of this regional conflict and to present it as a decolonization issue. Morocco is in its Sahara and never was an occupying power or an administrative power. In fact, it exercises its sovereignty over its territory;"

It is obvious that this speech is wholly incompatible with Article 73 of the UN Charter this responsibility, which encompasses the development of self-government, is referred to as a "sacred trust". Precisely because of the fact that Spain abandoned this "sacred trust" this option, although legal, may not be advisable. An additional dilemma in this context is that Spain is now a member of the Council.

The problem with both these options is that they require the organisation of a referendum in which the people of Western Sahara can exercise its right to self-determination. This means that the identification process which has been a constant problem over the years will still be a major complication.

In view of the fact that the issue of Western Sahara has been on the agenda of the United Nations for four decades, the solution may be a third and more radical option, namely that the Security Council recognises Western Sahara as a sovereign state. Also this option should be acceptable from a legal point of view. It would not deprive the people of Western Sahara from seeking a different solution to their self-determination in the future, if they so wish.

However, from a security point of view, this option entails several problems that must be addressed. First of all, it requires a major effort to support capacity-building for self-government. Otherwise, the option may result in the creation of a failed state, which will cause serious risks, not least in view of the security situation in certain neighbouring states in the region. A solution here might be that the Council gives effect to its decision on a date maybe five years ahead, while in the meantime entrusting

the Council's resolution. It also clearly contradicts the 1975 advisory opinion of the International Court of Justice in the case of Western Sahara (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. *12)* in which the Court found no 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.

This brings to the forefront the question how the Security Council now must deal with the situation in Western Sahara.

With respect to the natural resources of Western Sahara the Council simply cannot allow the present situation to continue. A very serious question in this context is the fisheries agreement between the EU and Morocco which does not contain one word – apart from the cryptic "sovereignty or jurisdiction" in Article 2 (a) – about the fact that Morocco's 'jurisdiction' in the waters of Western Sahara is limited by the international rules on self-determination. Instead the agreement and its protocols are replete with references to the "Moroccan fishing zones".

To be legal, an agreement of this nature would have to contain an explicit reference to the fishing zone off the coast of Western Sahara, defined by coordinates. The regime for issuing fishing licences within this zone would have to be completely separate from the regime that applies in the Moroccan fishing zone. Furthermore, the revenues generated by the licences in the zone of Western Sahara would have to be delivered not to Morocco's public

MINURSO with a mandate similar to the one given to UNTAET.

In making these suggestions, I must stress that I am acting in my personal capacity only and with complete neutrality (see quote below). I have no contacts with either side in the conflict. As I said at a conference in Pretoria in 2008 on the legality of exploring and exploiting natural resources in Western Sahara, hosted by the South African Department of Foreign Affairs and the University of Pretoria, I have no other interest in this matter than that of the rule of law, and that the member states of the United Nations respect the norms that the Organisation itself has established. The suggestions are based on my experiences as a judge and legal adviser for many years in my country (Sweden) and later as UN Legal Counsel for ten years. They simply constitute an expression of my siding with the law to the best of my understanding.

Those who now serve the United Nations should bear in mind the standard set by the late UN Secretary-General Dag Hammarskjöld. In his famous Oxford address from 1961, where he analyses the duties of an international civil servant, he actually makes reference to the standards that judges must apply and then continues:

> If the international civil servant knows himself to be free from such personal influences in his actions and guided solely by the common aims and rules laid down for, and by the Organisation he serves and by recognised legal principles, then he has done his duty, and then he can face the criticism which, even so, will be

treasury or equivalent but to a separate account that can be audited independently by representatives of the people of Western Sahara so that they can ascertain that the revenues are used solely in accordance with the needs and interests of their people.

Against this background, the Council should examine the legality of the EU-Morocco fisheries agreement. The appropriate way to receive an authoritative answer to this question is for the Council to request the International Court of Justice to give an advisory opinion on the question in accordance with article 96 of the UN Charter. In case the Council is unable to unite behind such action, the General Assembly could take the initiative.

What is said about fisheries applies also to other natural resources in Western Sahara, such as phosphates, oil or gas, or other resources, be they renewable or non-renewable. Against this background, the Security Council should adopt a resolution laying down clear conditions for the exploration and exploitation of natural resources in Western Sahara that comply with the General Assembly resolutions adopted under the agenda item entitled "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples" and other relevant resolutions addressing activities of foreign economic and other interests which impede the implementation of this Declaration.

« Top of Article

« Back to the Home Page

unavoidable. As I said, at the final last, this is a question of integrity, and if integrity in the sense of respect for law and respect truth were to drive him into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality – then it is in line, not in conflict with, his duties as an international civil servant.

The reason that I am raising the question of Western Sahara now is that it is a situation where the Security Council risks falling short in fulfilling its mandate. Under the UN Charter the Council has a legal obligation to take action in situations like the present. This obligation follows from Article 24 – the provision in which the Council is entrusted with the primary responsibility for the maintenance of international peace and security.

In the past, there have been serious deficiencies in this respect, including cases where permanent members of the Council have even violated the UN Charter. The latest example is Ukraine. This failure to respect and defend the rule of law at the international level simply has to come to an end. The authority of the United Nations must be upheld, and the Council must be in the lead. It is therefore imperative that the Council in dealing with the question of Western Sahara now acts with authority, determination and consequence in accordance with the law.

International Judicial Monitor
© 2015 – The International Judicial Academy
with assistance from the American Society of International Law.

Editor: James G. Apple.
IJM welcomes comments, suggestions, and submissions.
Please contact the IJM editor at ijaworld@verizon.net.