

International Workshop in the Framework of
the Italian Presidency of the European Union

**The European Union Approach
Towards Western Sahara**

*The Principle of Sovereignty of Natural Resources
and its Consequences*

Transcript of remarks by

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Europe Direct Punto Europa Forlì

University of Bologna

5 December 2014

Introduction

When I look at you now – so many students here – it struck me that I might formulate my presentation somewhat differently than I had though from the beginning. How many are law students among you? Political Science? How many? Yes. Very good. Excellent. I just wanted to know because it is important that you understand when I speak here now. As I said in my abstract, I am speaking in my personal capacity. I have retired from public service. I am a senior citizen and therefore I am free to speak my mind as I do now.

On the 8th of December 1962, I started working as law clerk in a court in my country – 52 years ago. And when I look at you I realize that I was maybe the same age as you are now. So I hope that what I am going to say now – among you, you will listen carefully and maybe carry with you some of the advices that I am going to include in my presentation.

I am also speaking as a neutral. What I mean by that is something I was taught in the courts. Ten years I served in the courts before I came to the Ministry of Justice for 13 years. And then I served in the Foreign Office as Ambassador and Head of the Legal Department for 9 years. And then I came to the United Nations where I was the Chief Legal Officer in the organization for 10 years, 3 years with Boutros Boutros-Ghali, and 7 years with Kofi Annan.

Also, when I talk about neutrality, I am referring to the analysis that the then Secretary-General Dag Hammarskjold made of the role of an international civil servant. This is a quote from him: “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 organization he serves and by recognized legal principles, then he has done his duty, and then he can face the criticism which, even so, will be 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 for 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.”

This has been a lodestar for me in my in my work as the Legal Counsel of the Organization for 10 years.

I intend to address five elements here. But I refer also to the abstract that is circulated where there are three important links to documents. The first element is my legal opinion from 2002; second the fisheries agreement from 2006-2007 when I discovered that; then the new fisheries agreement, the third element; the fourth element is King Mohammed VI speech in early November this year; the last is the Kosmos’ oil drilling ship that you saw in the picture. Those are the five elements that I intend to address.

The Legal Opinion of 2002

As far as my legal opinion is concerned, it was a question that I was asked to respond to by the Security Council. This is rather unusual – that the Security Council asks the Legal Counsel to give

an opinion in such a very important matter. But so they did. The question was whether oil prospecting contracts, given to two companies, Kerr McGee and TotalFina Elf, were legal under international law. I will not go into detail of my legal opinion because it is better that you read it by yourselves. There is a link to the document which has an acronym, S/2002/161. It is a very short document containing 25 paragraphs.

Now, I was asked to deliver an opinion on whether these contracts were legal under international law. And, of course, I had to analyze the situation in Western Sahara. This was not an opinion given by the Legal Office; it was given by the Legal Counsel, myself, that is a person who gives the opinion. But surely you must understand that I worked with a team, I had some 180 people in my department, in six different departments, one of these by the way dealing with the law of the sea, which we are actually looking at here. And I had a very good team to assist me in preparing this opinion. And when the opinion was delivered, I concluded that – and there was a quote earlier made here and often they only quote parts of my legal opinion because it is very important to read the very last sentence in the legal opinion. What was said in the opinion was:

“The foregoing legal principles established in the practice of States and the United Nations pertain to economic activities in Non-Self-Governing Territories, in general, and mineral resource exploitation, in particular. It must be recognized, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council’s request are not in themselves illegal, 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.”

It is very important when you read the analysis in the legal opinion to understand that we had to look at the situation in Western Sahara, realizing that this was a Non-Self-Governing Territory. But as a matter of fact there was no administering authority. Under the UN Charter it is a “sacred trust” to be an administering authority. That duty rested with Spain. But Spain just gave that responsibility away. They tried to invest it in Morocco and Mauritania. They had no legal authority whatsoever to do that. So the agreement concluded by Spain with Morocco and Mauritania is simply not valid under the UN Charter with respect to the rights of Western Sahara. So, by relinquishing this “sacred trust”, Spain actually caused the situation that we are now experiencing in Western Sahara. And, as you know, the United Nations has been involved for a long time here. I will come back to the Security Council’s actions. But my presentation here is much much broader in a sense than Western Sahara because it reflects some of the problems that we are facing in the world today. You are the young generation. You are the ones who are going to take over after us. What is the situation we are leaving behind for you to take care of? Could we not have done better, I am asking myself?

The whole issue actually points to one very important actor here, namely the Security Council of the United Nations. This situation has been going on and on and on and on. I gave the legal opinion almost 13 years ago. So much has happened since then, and I have been looking at other things in the meantime since I retired from public service in 2004. But when I am now getting familiar with

this situation again, I am really quite astounded that the situation is as it is. In a sense it is a charade! Something has to be done here. And all the actors here, in particular since we are discussing the European Union, the Union should know better how to deal with this situation. I will come back to this when I come to the fisheries agreements. But it is very important to understand that if you are to use the resources of a Non-Self-Governing Territory for the benefit of the people, this is the first condition: it has to be for the benefit of the people, and you have to be able to prove that. You have to consult with them or their representatives, whoever it is depending on the situation in the decolonization as it were. And then you have to also realize that it has to be done either on behalf of or in consultation with representatives of the people. What do I mean by “on behalf of” that I draw from the resolutions by the General Assembly over the years? This means that they must have come so far in the decolonization process that they have a representative body that can decide to hand over and ask an administering power to deal with this matter and to sell for their benefit resources from the territory. And this is not the case in this particular situation.

Now, so far, my legal opinion that has been quoted many times. But I was quite taken aback when I saw how the European Commission had construed it from the beginning. It was nothing of the sort that I said. The last sentence is what counts: it has to be for the benefit of and in accordance with the will of the people of Western Sahara.

The EU-Morocco Fisheries Agreement

When we come to the second element, the fisheries agreement, I was invited to Pretoria, because they wanted to discuss Western Sahara as an example of processes of decolonization. When I saw the fisheries agreement I didn't believe my eyes. What is this? I mean, they are talking about Moroccan fisheries areas, and when I look to the coordinates... – And might I add that during my tenure as the Legal Adviser of the Foreign Office in Stockholm, I was involved in negotiating three delimitation agreements in the Baltic Sea: the one with the Soviet Union; then the one with Poland; and the one with Finland. So I am very familiar with delimitation in marine areas. And in the UN, I had to oversee the Division for Ocean Affairs and the Law of the Sea. So, I have been dealing extensively with sea matters. And I can read charts. I am actually a sailor! I was for 12 months; during the time when I was a student, I signed on ships. I sailed for 12 month in four summers.

So when I looked at the charts and saw the coordinates, I realized that these coordinates are actually referring to the whole area until it comes to the borderline of Mauritania. But there is no mention in the agreement about the fact that Western Sahara is a Non-Self-Governing Territory and that Morocco does not have jurisdiction in the true sense over that area. Not a whisper. So when I was invited to address this in Pretoria, I noted some elements here that I might share with you, namely the way in which it was described in the protocol. Let me reiterate what I said in Pretoria:

“The Protocol to the Agreement refers to ‘Morocco’s resources’ (art 4). With respect to the financial contribution, the Protocol provides that, subject to its article 6, ‘the Moroccan authorities shall have full discretion regarding the use to which this financial contribution is put’. - - - The Protocol also mentions ‘the Moroccan fishing industry’ (art 8). The Annex mentions the ‘Moroccan

Atlantic zone', 'Moroccan seamen' and 'Moroccan ports'. In Appendix 4, the limits of Moroccan fishing zones are indicated. Apart from some small-scale fishing between 34° 18' N and 35° 48' N off the coast of Morocco, the rest is indicated by 'The entire Atlantic' (apart from a limited area) for tuna fishing, and 'South of 29° 00' for demersal fishing and industrial pelagic fishing. What does 'South of 29° 00' mean? A tiny area southwards to 27°-28° N where the waters of Western Sahara commence, or all the waters southwards to where the waters of Mauritania meet at about 21° N?"

It is so obvious that this agreement concerns Western Sahara's waters. And there is not a whisper in this agreement about the fact that it concerns Western Sahara.

The New Fisheries Agreement

Now I come to the third element, the new fisheries agreement. I looked very carefully at that and basically it is the same all over again. When I looked in particular at the annex, first of all the agreement refers to "the Moroccan fishing zones". No distinction is made with respect to Western Sahara. And when I come to appendix 4 where the coordinates are included, again I meet the same. There are six areas here indicated and four of them are indicated exactly in the way which I quoted a while ago. South of 30° 40', south of 29° 00', all of the Atlantic apart from an area delimited by an irrelevant area here and then 6: industrial pelagic fishing south of 29°00'.

Not a whisper whether it is only a small portion, a few kilometers south to where Western Sahara starts, or whether it is the entire coast down there. So, if I met an agreement like this in a court of law, my indication would be: is this something signed in bad faith? This is how a judge would look at something of this nature.

The Speech of King Mohammed VI

Now we have the fourth element here; the speech of the King. If you read my legal opinion, I have quoted the General Assembly extensively when they adopted resolutions on self-determination. And here you will find actually that the General Assembly is warning those who administer territories that are subject to decolonization of plundering the resources of the peoples in those regions.

Let me quote from the speech of the King. He starts by saying that, this is a speech "on the occasion of the 39th anniversary of the glorious Green March". The glorious Green March when civilians from Morocco were sort of transferred into the area of Western Sahara. Is this a way of describing a violation of the Fourth Geneva Convention? Article 49, sixth paragraph of the Fourth Geneva Convention reads: "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies."

And then there are actually now in the Rome Statute provisions that say that this kind of behavior could amount to a war crime under modern law. I say this since I had the honour of being

Secretary-General Kofi Annan's representative at the Rome Conference for the negotiation of the Statute of the International Criminal Court back in 1998. It is very important to have this distinction clear. You are not allowed to transfer your population into an area that is occupied in this way.

Now, the King goes on to talk about "our southern provinces", he called them "the southern provinces", he is talking about "the nation's territorial integrity". And towards the end the King says, and I quote:

"Let me say this, to reaffirm Morocco's position on the matter: 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"

The question I ask myself is: is this statement basis enough to renounce the fisheries agreement? This is very very serious.

The Agreement between Morocco and Kosmos

And now I come to the Kosmos issue. The Kosmos ship is steaming northwest to start drilling off the coast off Western Sahara to see if there are oil resources there. In this agreement I just note that the company says that they are acting in conformity with my legal opinion. They are not! It is obvious that this agreement is also in violation of the manner in which the resources of Western Sahara should be administered. I also note that the agreement refers to Western Sahara as the "Southern provinces of the Kingdom of Morocco". Already signing an agreement of this nature would in my view violate the principles of corporate social responsibility and the Ruggie principles of Protect, Respect and Remedy. To sign an agreement where Western Sahara is referred in this manner is simply not acceptable.

Conclusions

Now, what are the conclusions here – because I do not want to take up too much time here. There have been so many speeches in the morning. What I would do now is to refer you to the broader aspect, namely who is ultimately responsible here? Certainly we all have responsibilities, and I must say that as a European, as I said in Pretoria, I feel ashamed that the European Union has concluded an agreement of this nature with Morocco.

I have friends in many countries, but I have no connections whatsoever to the POLISARIO or to Morocco here and this is why I mentioned my neutrality here. I am speaking as a lawyer and a former judge, and I am trying my best to analyze the situation here and find a way forward. And as a matter of fact when I now got familiarized again with the situation in Western Sahara I am contemplating taking steps in my capacity as a former Legal Counsel of the United Nations.

What it boils down to is really something that is extremely important. And this is recognized by the United Nations. On the 24th of September 2012 the General Assembly adopted a global resolution on the rule of law. This, in my view, is the only way ahead. If you ask me, looking in the rear mirror from my years in the courts, the Justice Ministry, the Foreign Office, and the United Nations and now ten years after I left the UN – and I have been working for example for six years for Kofi Annan in relation to Kenya when he was asked to deal with the situation there after the terrible violence after the election in 2007 – it has been an extremely important learning experience. And I can tell you, and in particular the students, that you never cease to be a student. Sometimes when I address students I start by saying “fellow students” because you learn all the time. And I have the privilege again of learning all the time. And when I look in the rear mirror now, and I look at the conflicts in the world, anywhere where there is a conflict, you ask yourself the question: why is there a conflict? The answer is the same: no democracy, no rule of law!

In 2008, I was asked to give advice to an organization called the InterAction Council of Former Heads of State and Government. At the meeting all of a sudden Helmut Schmidt, 90 years old at the time, asked the question: do politicians understand their responsibility for the rule of law? By the way, I connect here to what I have said about the argument: “But this is a political issue, etc., etc.!” Never ever accept this argument! Look at it! Yes there are political issues, but also in a political context the politicians have to bow to the law. And parliament has to bow to the laws it has enacted itself. An international organization has to bow to the charter governing it. This is so important.

So, when I heard Helmut Schmidt, 90 years, putting this question I said: why do we not elaborate a guide for politicians on the rule of law at the national level and at the international level. So we did. A university institution in Sweden, the Raul Wallenberg Institute and the Hague Institute for the Internationalisation of Law have now provided politicians in the world with this guide. Please take these words down: *Rule of Law – A guide for politicians*, and you will find it immediately on the web. It is now translated into 17 languages, Arabic, Bahasa Indonesia, Chinese, and so forth, and it is also translated into Italian. So I would advise you to read this guide, not only politicians but also journalists and lawyers could find some guidance in this guide.

So this would be my message to you. And this is where I use Western Sahara as an example of a situation where the law has not been followed properly. And I am not only referring to the European Union, I am referring to that the Security Council should have acted with more determination than they have done here. And this is where I come back to what I said about the United Nations.

The Security Council is the organization’s most powerful organ, and yet it is sometimes its weakest link. How come that we have permanent members of the Security Council violating the Charter when it suits their interest. The attack on Iraq by the UK and the U.S. back in 2003, the attack on Georgia; and now the latest events in Ukraine – all by permanent members of the Security Council violating the very law they are set to supervise.

This is why it is so important that in the present situation, reading the Secretary-General's latest report, the Security Council really have to bring their act together and deal with Western Sahara in a proper manner.

Finally, since you are students, so many here: I challenged the students at Uppsala University a year ago when Kofi Annan visited with Jan Eliasson and they had a dialogue and I was invited to comment on the dialogue. In so doing, I challenged the students and said to them: why don't you, the new generation, challenge the Security Council – that they do their job in the proper manner. They have taken up this challenge. So now they have started STOP THE ILLEGITIMATE VETOES CAMPAIGN. If you google <http://stopillegitimatevetoes.org/>, you will find the report where they have analyzed the 33 vetoes cast in the Security Council after the fall of the Berlin Wall – 33 vetoes cast: none by France, none by the UK, 14 by the U.S., 11 by Russia and 8 by China. In this analysis, with a couple of exceptions, they come to the conclusion that they are almost all illegitimate vetoes.

One example: why did China veto a very very important resolution on Guatemala? Because Guatemala had invited Taiwan to a ceremony in their country! I mean: is this a legitimate veto? I mean: are we looking at serious actors – the most powerful states in the world acting in the Security Council, the most powerful organ of the United Nations?

We have to see to it that they actually perform. Now just speaking as a lawyer here: there is no other way than abiding by the law. That will be my message, taking Western Sahara as an example; things could have been done much better here. Let us hope that the Council brings its act together and deals with the question of Western Sahara in the manner that it should do.

Thank you very much!