

THE EU'S APPROACH TOWARDS WESTERN SAHARA *

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1. *Introduction*

Our purpose in this intervention is to give a general overview of the attitude adopted by the EU towards the question of Western Sahara.

For the sake of simplicity, we may distinguish between the general political approach adopted by the EU and the concrete attitude adopted by the same organization vis-à-vis all the interested actors in the region and, above all, vis-à-vis the main power concerned, i.e. Morocco.

2. *General political attitude*

The general political approach adopted by the EU on the question of Western Sahara comes from two main sources: the resolutions of the European Council (EC) adopted in the field of the Common Foreign and Security Policy (the so-called second pillar) and the resolutions or declarations of the European Parliament (EP) adopted in the framework of its autonomous political capacity ¹.

The EP is quite favourable to the rights of the Saharawi people. At least since 1989, the EP has openly defined the issue as a problem of decolonization which must be resolved in accordance with the right of the Saharawi people to self-determination and has urged Member States and the European Council to use their influence in order to promote a solution of the conflict in accordance with that principle ².

On the opposite, the attitude of the European Council adopted in the framework of the Common Foreign and Security Policy is more cautious. From the early 1990s, the EC has constantly restricted itself to sustain the approach and the actions implemented by the UN and to invite all the parties in conflict to cooperate with the UN in order to find a solution.

This can be considered a very minimal approach compared to the positions adopted towards very similar situations such as Palestine and Cyprus.

As it is well known, this attitude is due to the deeply different positions of Member States concerning the question of Western Sahara. While many northern countries have an approach favourable to the rights of the Saharawi people, many southern countries have a more careful, if not hostile, approach, due to the will of maintaining good relations with Morocco. It is not just the case of France, a country that has built important ties with Morocco and is not keen on jeopardise them, but also of Spain, at least in these last times ³.

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¹ For comprehensible reasons, the European Commission keeps itself out of the political scene as such. This does not mean that its role is without political implications, for instance in the process of negotiation of agreements. See below.

² *Texts adopted by the European Parliament*, March 1989, Doc. A2-374/88 of 15 March, 1989, pp. 20 ff. Since then, the EP has adopted a number of resolutions or declarations with more or less the same content, but not always with an express reference to the right of self-determination of the Saharawi people (see for instance resolution P6_TA(2005)0414). However, this positive attitude does not prevent the EP to 'blow hot and cold', as it happens almost every time the EP is asked of approving agreements with Morocco. See below.

³ For a general overview, see J. Vaquer I Fanés, *The European Union and the Western Sahara Conflict: Managing the Colonial Heritage*, in *European Foreign Policy in an Evolving International System, The Road towards Convergence*, N. Casarini, C. Musu (ed.), 2007, pp. 144 ss.

However this minimal approach does not lack of positive aspects.

First of all, in this way, the EC can speak as one single voice. This happens even within the IV^o Commission of the General Assembly that is charged of the questions concerning decolonisation. This does not always happen for other international organisations, starting with the League of Arab States (Arab League) or the African Union.

Secondly, this minimal approach has not prevented the EU from finding the agreement necessary in order to adopt concrete actions on the field that have proved to be very important, as the humanitarian aid the EU has granted to the region and the continuous and profitable cooperation within the actions and programmes implemented by the UN.

Third, this attitude is not detrimental to any solution of the conflict in compliance with the applicable principles of international law, starting with the principle of self-determination as acknowledged within the UN framework.

Another issue is whether this general political attitude is consistent with the legal ties the EU has built on the field with the countries involved and, above all, with Morocco.

3. Concrete attitude on the field

3.1. THE RELATIONSHIPS BETWEEN THE EU AND MOROCCO: A LEGAL FRAMEWORK

The European Union has concluded several agreements with Morocco and Morocco is now the first partner of the Union in the region. All these agreements are bilateral and have been concluded within the framework of the Barcelona process⁴. They aim at implementing economic cooperation between the countries party to the agreement and at exploiting the natural resources of the same parties, in exchange of a financial compensation.

The first agreement adopted between the parties is the EU-Morocco Association Agreement that is in force since 2000. It forms the legal basis of relations between the EU and its North African neighbour. It sets out in detail the specific areas in which the Barcelona Process objectives can be developed bilaterally and, among the other aims, the development of a Euro-Mediterranean free trade area is envisaged.

In July 2005, Morocco has signed with the European Union an action plan in the framework of the European Neighbourhood Policy, which includes priorities and objectives for cooperation in the political, economic and commercial spheres. This Action Plan facilitates the implementation of the instruments provided for in the Association Agreement between the EU and Morocco and fosters the economic integration with Morocco. Following this Action Plan, a number of agreements have been concluded: one of the most important is the one entered into force in 2007 establishing a partnership for fishery products, that recalls previous agreements⁵.

Recently, Morocco has applied to the European Union for the granting of the Advanced status. Morocco is the first country in the southern Mediterranean region which could benefit from the Advanced status in its relations with the EU. The status paves the way to gradually integrate Morocco into EU policies, to deepen free trade agreements by the establishment of a common economic area based on the rules of the European Economic Area and to enlarge free trade

⁴ As it is well known, the Barcelona Declaration of 1995 is the founding document of the Euro-Mediterranean Partnership (EMP).

⁵ European Commission, 3 April 2008, COM (2008) 164, *Implementation of the European neighbourhood policy in 2007*; European Neighbourhood and Partnership Instrument – Morocco Strategy Paper 2007 - 2013.

agreement to new areas such as intellectual property rights, capital movements and sustainable development⁶.

None of the aforementioned agreements specifies whether the territory of Western Sahara falls within their scopes of application. This differs from the attitude adopted by other international actors. For instance, the Free Trade Agreement between United States and Morocco explicitly excludes Western Sahara.

In order to understand and to find out if these agreements are intended to be applicable to the territory of Western Sahara the only way is to refer to the principles of international law concerning the interpretation of treaties as set out in the Vienna Conventions on the Law of Treaties and by international customary law⁷. Between these principles, practice plays a central role given the fact that other criteria are of very difficult application.

If one takes into account practice, the most convincing solution is that the territory of Western Sahara is always included in the scope of application of these treaties.

One could take for example the EU-Morocco fisheries partnership agreement⁸.

The text of the agreement establishes that the agreement is applicable to the territories under the sovereignty or jurisdiction of Morocco. While the term *sovereignty* is clear, the term *jurisdiction* is not. It may make reference to the exclusive economic zone or any other territory on which Morocco has not full sovereignty, but on which it exercises some form of control, including Western Sahara.

Requested by the Development Committee of the European Parliament of a legal advice on the compatibility of the agreement with international law, the legal service of the European Parliament specified that the agreement does neither include nor exclude the waters of Western Sahara and therefore it was up to the Moroccan authorities to apply the agreement in compliance with the obligations pending on the country according to international law⁹.

This position cannot be accepted, because the EU itself plays a central role in the execution of the agreement. For instance, the applications for licenses are submitted to the competent Moroccan authorities by the relevant Community authorities on behalf of the individual ship-owners and the same licenses are delivered to the EC delegation in Morocco. Therefore, not only the practice of Morocco is relevant, but also the practice of the European Union.

Now, if one look at the current practice about the implementation of the agreement, it seems that the agreement itself is intended to include the territory of Western Sahara. In fact, the present practice is not different from the previous one adopted in the implementation of the earlier fisheries agreements¹⁰.

Whatever the answer to this question may be, one may wonder whether or within which limits it is important to establish if the territory of Western Sahara is included or not.

To this end, it should be made a distinction between the obligations the European Union has assumed in the framework of the bilateral relationships with Morocco and the obligations which fall down to the EU from general international law.

⁶ Commission Européenne, Déclaration de l'Union européenne Septieme Session du Conseil d'Association UE-Maroc, Luxembourg, le 13 octobre 2008, DG E V, n. 13653/08.

⁷ The Vienna Convention relevant in this case would be the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, not yet in force and not ratified neither by Morocco nor by the EC. However, on the point at issue, the 1986 Vienna Convention largely corresponds to the Vienna Convention on the Law of Treaties of 1969 and to international customary law.

⁸ Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Council Regulation (EC) n. 764/2006, 22 May 2006, in *Official Journal of the European Union*, L 141, 2006, p. 1 ff.

⁹ Legal Opinion of the Legal Service of the Parliament, Doc. SJ-0085/06, 20 February 2006. Despite its confidential character, the Opinion was originally available on the net, but not anymore. For large passages of the Opinion, see E. Milano, *The new Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing Too Far South?*, in *Anuario Español de Derecho Internacional*, 2006 and in <http://eng.gees.org>.

¹⁰ See Western Sahara Resource Watch (WSRW), *EU Commission admits fishing in occupied Western Sahara*, in *Archive 2008*, www.wsrw.org, last consulted December 2008.

3.2. Obligations assumed by the European Union in the framework of bilateral relationships

The bilateral agreements in force between the EU and Morocco are generally based on the so-called democratic or essential clause. This clause states that the respect, among other things, of human rights constitutes an essential element of the agreement. This implies that if a serious and persistent breach of human rights occurs, this is to be considered as a substantial violation of the agreement.

For the implementation of the clause, one should take into consideration the following two points.

First of all, this clause is applicable on an objective basis, i.e. whenever a contracting party is responsible for a violation of the essential elements, even if the agreement has nothing to do with the violation occurred. In other words, it is not necessary to demonstrate that the agreement is applicable to the Western Sahara. It is enough to show that Morocco is internationally responsible for the violation of the clause.

Secondly, a State has to abide by the obligations deriving from its participation to human rights instruments even out of its territory, at least when it occupies or controls on its own motion this territory effectively¹¹. As specified by the High Commissioner for Human Rights (OHCHR), the assessment of violations on the basis of international law on human rights binding an occupying State should not be “interpreted as constituting a position vis-à-vis the status of the territory according to international law or attributing any legitimacy to claims of sovereignty, but rather constitutes an evaluation of the *de facto* enjoyment of human rights by the people” of the territory concerned¹².

Now, many important violations of human rights have been found by international organs for the protection of human rights in Western Sahara¹³. As the OHCHR affirmed in its report adopted in 2006, almost all these violations stem from the non-realization of the right of self-determination which is in turn a human right protected both by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹⁴.

In light of the above, there are very few reasons which may justify the fact that the EU does not take into consideration the application of the clause in its relationships with Morocco. As said, the fact that these violations happen outside the territory of Moroccan sovereignty is not a justification according to the international law of human rights¹⁵. At the same time, it is not necessary to show that the territory of Western Sahara is included in the agreement.

The problem is that the EU applies the democratic or essential clause in a quite arbitrary way. Moreover, if you look at the practice, you could realise that the EU has always applied the democratic clause in cases where internal self-determination was at stake (violation of right of free elections above all), but never in cases where external self-determination was at stake, i.e. in a case

¹¹ International Court of Justice (ICJ), 9 July 2004, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, par. 102 ff.; European Court of Human Rights (ECHR), 18 December 1996, *Loizidou v. Turkey*. As it is well known, the responsibility of a State for its extraterritorial presence may have a different answer in different contexts, for instance, in the context of a mission sent or authorized by an international organisation (between others, ECHR, 15 November 2006 and 2 May 2007, *Behrami v. France and Saramati v. France, Germany and Norway*). On the opposite, it seems quite undisputed that a State is fully responsible when, as in the case of Morocco for Western Sahara, it controls effectively a territory as a result of a decision taken on its own.

¹² OHCHR, *Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf - 15/23 May and 19 June 2006*, Geneva, 8 September 2006, par. 11.

¹³ See for instance OHCHR, *Report of the OHCHR Mission to Western Sahara*, cit.

¹⁴ OHCHR, *Report of the OHCHR Mission to Western Sahara*, cit., par. 9 and 52.

¹⁵ Beyond the fact that this justification would be inconsistent with the practice adopted by the same EU in other areas, as in the field of exploitation of national resources. See below.

of occupation of a country by another, with the subsequent violation of basic human rights of the people occupied ¹⁶.

3.3. Obligations stemming from general International Law

On the opposite, as far as obligations coming from general international law are concerned, it is important to establish whether the agreements between Morocco and the EU are applicable to Western Sahara or not. This is because, as we will see, general international obligations arise only if the situation of violation is provided for in the agreements, i.e. Western Sahara is included.

General international obligations concern both the EU - as any other subject of international law - and its member States.

In fact, there is no reason for affirming that international organisations should not be bound by the same legal obligations binding States under general international law. As far as Member States are concerned, their responsibility for the actions of international organisations is still controversial and under codification. However, it seems that there is room enough for affirming that member States continue to bear either a so called subsidiary responsibility, at least in some fields, either a separate responsibility for acts carried out by their own within the intergovernmental bodies of the organisation, as it occurs with the expression of their vote in the intergovernmental Council ¹⁷.

From the point of view of general international law, three legal grounds deserve attention ¹⁸.

First of all, we have to wonder whether Morocco has the legal capacity to conclude international agreements on behalf of Western Sahara.

As you probably know, the status of Morocco is under discussion. Some believe that Morocco is not an occupying country, but a *de facto* administering or administrative power or, even, an administering power *tout-court* ¹⁹.

Obviously, these are evident attempts of legitimizing the conclusion of international agreements with Morocco which include Western Sahara. This is an issue we cannot discuss here. Our belief is that the most correct reconstruction according to international law is that Morocco is an occupying power and not an administering one ²⁰.

Anyway, according to international law, it seems that even an administering power has not the right to conclude agreements on behalf of the territory under administration once the process of decolonisation has begun or, at least, acquired an international relevance. This has been stated by the International Arbitration Tribunal in the case *Guinea-Bissau v. Senegal* and seems to correspond largely to international customary law ²¹.

¹⁶ For a general overview on the matter, see L. Ficchi, *Il contributo dell'Unione europea all'affermazione dello stato di diritto nella Comunità internazionale*, Phd Thesis, University of Bologna, 2008. See also A. Karmous, *Les enjeux des ressources halieutiques du Sahara Occidental*, Fondation France Libertés, 23 octobre 2002, in <http://membres.lycos.fr/tomdsm/analyses.html>, p. 8 ff., wondering whether the essential clause is just a style clause.

¹⁷ See G. Gaja, *Second Report on Responsibility of International Organisation*, UN Doc. A/CN.4/541.

¹⁸ On the matter, see further E. Milano, *The new Fisheries Partnership*, cit.

¹⁹ The qualification as *de facto* administering or administrative power mainly comes from the Opinion of the Legal Service of the European Parliament, cit., and from the EU Commissioners, while the qualification as administering power *tout-court* comes from national politicians, especially Spanish. On the matter, C. Ruiz Miguel, *El acuerdo de pesca UE-Marruecos o el intento español de considerar a Marruecos como "potencia administradora" del Sahara Occidental*, in <http://www.umdraiga.com>; P. San Martín, *EU-Morocco Fisheries Agreement: The Unforeseen Consequences of a Very Dangerous Turn*, in *Grupo de Estudios Estratégicos GEES*, 2006, in <http://eng.gees.org>.

²⁰ While saying that Morocco is a *de facto* administering or administrative power is just another way to say that it is an occupying power. For a general and deep overview on the matter, J. Soroeta Licerias, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho internacional*, Bilbao, 2001.

²¹ Arbitration Tribunal for the Determination of the Maritime Boundary, Decision of 31 July 1989, *Guinea-Bissau v. Senegal*, RIAA (vol. XX), par. 40 ff., even if according to the Tribunal the abovementioned principle cannot be inferred from the right of peoples to self-determination, but constitutes a legal norm connected more with the principle of effectiveness and the rules governing the formation of States in the international sphere, the same

Looking at the history of Western Sahara, it is out of question that the agreements between Morocco and the EU have been concluded once the process of decolonisation has acquired an international relevance in the sense specified by the Arbitration Tribunal.

The second legal ground comes from the obligation not to recognise international illegal situations, at least when these situations stem from the violation of a preemptory rule of international law²².

The obligation not to recognise international illegal situations encompasses also the so called implicit recognition. In fact, the International Court of Justice has stated that the conclusion of bilateral agreements may imply recognition of an international illegal situation, the only exception being the cases where the absence of recognition could deprive the people of the advantages or benefits of the international cooperation²³.

The practice of the EU to conclude bilateral agreements with Morocco seems not only in violation of this general obligation, but also inconsistent with the practice that the same EU has put in place with similar situations. One may recall the Association agreement concluded with Israel which is not applicable to the importations of goods from the Occupied Palestinian Territories (OPT) and the Association agreement with Cyprus, not applicable to Northern Cyprus although after a judgment of the European Court of Justice²⁴.

The third legal ground we have to mention is the obligation to respect the principle of sovereignty over natural resources. This comes into play, for instance, when we refer to the EU-Morocco fisheries partnership agreement.

As said, in this field, the EU may not discharge its responsibility by saying that Morocco is the only responsible for the application of the agreement in accordance with international law, as the Opinion of the EP legal service seems to suggest²⁵. As we have already seen, the EU too plays a role in the implementation of the agreement. Therefore, she has the same responsibilities of Morocco as far as its cooperation in the implementation of the agreement is concerned²⁶.

The principle of sovereignty over natural resources in itself does not prevent the conclusion of an international agreement on behalf of a people under occupation²⁷. However two conditions must be met: the agreement must be concluded in accordance with the interests and the will of the people. Both elements (interests and will) must be present at the same time and not just one of them²⁸.

principle has not character of a rule of *jus cogens* and is applicable only when the activity of the national liberation movement has “acquired an international impact”.

²² See art. 41 par. 2 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, according to which “no State shall recognize as lawful a situation created by a serious breach within the meaning of article 40”, i.e. a serious breach of “an obligation arising under a peremptory norm of general international law”. As the Special Rapporteur J. Crawford clarifies recalling previous international practice, the “attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples” is such a breach: Report of the International Law Commission, 53rd session, 2001, pp. 287 ff.. According to E. Milano, *The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes*, 2007, in http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf, the obligation of not recognition should arise also in the absence of the peremptory character of the breached norm.

²³ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports, p. 56. See also, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, par. 154 ff.

²⁴ ECJ, case C-432/92, *Anastasiou I* (1994) ECR I-3087. Doubts on the exact meaning of this practice are expressed by E. Milano, *The new Fisheries Partnership*, cit., par. 6.

²⁵ See Opinion cit. above.

²⁶ Not to mention the fact that the vessels involved are Community vessels.

²⁷ This incapacity comes from another rule: see above.

²⁸ On the opposite, many actors at Community level seem to believe that just one of them (interests or benefit) must be present, included the legal service of the EP (see the Opinion cit. above).

The need for both elements corresponds to general international customary law as confirmed by many United Nations General Assembly resolutions on the matter ²⁹, the practice ³⁰ and finally recognized by the UN legal service in a well-known opinion requested by the President of the United Nations Security Council in 2001 ³¹.

Now, if concluded in the interest of the people ³², the fisheries partnership agreement is certainly not concluded in accordance with their will, as the representatives of Saharawi people have often explained to the EU relevant authorities.

²⁹ Since 1995, the General Assembly has affirmed “the value of foreign economic investment undertaken in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories”: Res. 50/33 of 6 December 1995, par. 2, on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, annually reiterated.

³⁰ Although scarce.

³¹ UN Security Council, Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, 12 February 2002. In fact, the request concerned the conclusion of contracts between the Moroccan authorities and foreign companies and not the conclusion of agreements with foreign subjects of international law. However, as far as the principle of sovereignty over natural resources is concerned, the conclusions reached by the Opinion seem the same, given that the Opinion reaches its conclusions on the basis of the practice between States. Anyway, the Opinion contains a contradiction. Although it generally says that the principle of sovereignty over natural resources is violated if exploitation is in disregard of the interest *and* wishes of the people, according to par. 24, resource exploitation activities in Non-Self-Governing Territories should be conducted “for the benefit of the peoples of those Territories, on their behalf *or* in consultation with their representatives”. The *or-and* alternative is not a detail. It is almost impossible to determine on an objective way what is the benefit or interest of a people. Only the will of the people concerned could determine that interest or benefit. So the two requirements are strictly interconnected and must be present at the same time.

³² Which remains to be shown.