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Keynote Address on Western Sahara

by

**Ambassador (ret.) Hans Corell
Former Under-Secretary-General for Legal Affairs
and the Legal Counsel of the United Nations**

Professors Dopagne, Lagerwall and Ruys,
Fellow Panellists,
Distinguished participants,

Thank you for inviting me to address you today as part of a round-table on Western Sahara. The reason that you have asked me to participate is of course that, during my tenure as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, I delivered a legal opinion to the Security Council relating to this Non-Self-Governing Territory.

In a letter dated 13 November 2001 the President of the Security Council requested, on behalf of the members of the Council, my opinion on “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara”. Let me revert to this question later in my address.

The Declaration Regarding Non-Self-Governing Territories.

I would first like to focus on Articles 73 and 74 of the Charter of the United Nations. They are found in Chapter XI: Declaration Regarding Non-Self-Governing Territories:

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a **sacred trust** the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: [My emphasis]

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

On 14 December 1960, the UN General Assembly adopted its famous resolution 1514 (XV) Declaration on the granting of independence to colonial countries and peoples.¹

The status of Western Sahara

When the UN Charter entered into force in 1945, Western Sahara had been a Spanish protectorate since 1884. In 1963, the so-called Spanish Sahara was included in the list of Non-Self-Governing Territories under Chapter XI of the Charter.² In a series of General Assembly resolutions on the question of Spanish/Western Sahara, the applicability to the Territory of the Declaration on the Granting of Independence to Colonial Countries and Peoples was reaffirmed.

On 13 December 1974, the General Assembly requested an advisory opinion from the International Court of Justice on questions relating to Western Sahara. In its Advisory Opinion, delivered on 16 October 1975, the Court's conclusion was that the materials and information presented to it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. The final clause in the opinion reads:

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

¹ Available at [https://undocs.org/en/A/RES/1514\(XV\)](https://undocs.org/en/A/RES/1514(XV)).

² See UN Document A/5514, annex III, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N63/149/40/pdf/N6314940.pdf?OpenElement>.

and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.³

Yet, on 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania, whereby the powers and responsibilities of Spain, as the administering Power of the Territory, were transferred to a temporary tripartite administration. The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power. Spain alone could not have unilaterally transferred such a status. Nor did the transfer of administrative authority over the Territory to Morocco and Mauritania affect the international status of Western Sahara as a Non-Self-Governing Territory.

However, on 26 February 1976, Spain informed the Secretary-General of the United Nations that as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the Territory, thus leaving it in fact under the administration of both Morocco and Mauritania in their respective controlled areas.

Following the withdrawal of Mauritania from the Territory in 1979, upon the conclusion of the Mauritano-Sahraoui agreement of 19 August 1979 (S/13503, annex I),⁴ Morocco has administered the Territory of Western Sahara alone. However, Morocco is not listed as the administering Power of the Territory in the United Nations list of Non-Self-Governing Territories, and has, therefore, not transmitted information on the Territory in accordance with Article 73 e of the Charter of the United Nations.

As I mentioned in my legal opinion, the question of Western Sahara has been dealt with both by the General Assembly, as a question of decolonization, and by the Security Council, as a question of peace and security. The Council was first seized of the matter in 1975, and in its resolutions 377 (1975) of 22 October 1975 and 379 (1975) of 2 November 1975 it requested the Secretary-General to enter into consultations with the parties. Since 1988, in particular, when Morocco and the Frente Popular para la Liberación de Saguia el-Hamra y del Río de Oro (Frente POLISARIO) agreed, in principle, to the settlement proposals of the Secretary-General and the Chairman of the Organization of African Unity, the political process aiming at a peaceful settlement of the question of Western Sahara has been under the purview of the Council.

On 29 April 1991, the Security Council decided to establish the United Nations Mission for the Referendum in Western Sahara (MINURSO) in accordance with settlement proposals accepted on 30 August 1988 by Morocco and the Frente POLISARIO. As approved by the Security Council, the settlement plan provided for a transitional period for the preparation of a referendum in which the people of Western Sahara would choose between independence and integration with Morocco. The Special Representative of the Secretary-General in MINURSO was to have sole and exclusive responsibility over matters relating to the referendum and was to be assisted in his tasks by an integrated group of civilian, military and civilian police personnel.

³ Available at <https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (page 60).

⁴ Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N79/215/93/pdf/N7921593.pdf?OpenElement>.

As you are well aware, this mission has been in operation since then. But the referendum has not taken place. Every year since the establishment of MINURSO the Security Council has renewed the mandate of the mission.

One matter that caught my attention a few years ago was a Fisheries Partnership Agreement concluded between the European Union (EU) and Morocco in 2006 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. This was because I noticed that this agreement 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”. I have commented on this in an article that I published in 2015.⁵ What I also noted in that context was 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 was very serious indeed.

In a resolution of 29 April 2014, the Security Council had called 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 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.”⁶

In his speech, the King said that the Nation is “proudly celebrating the thirty-ninth anniversary of the Green March”. This march was a strategic mass demonstration in November 1975, coordinated by the Moroccan government, to force Spain to hand over the disputed Spanish Sahara to Morocco. As a matter of fact, on 6 November 1975, the Security Council adopted a resolution deploring the holding of the march and calling upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march.⁷ The problem is that the march 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 King’s speech should be noted in particular:⁸

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 the Council's resolution the same year. It also clearly contradicts the 1975 advisory opinion of the International Court of Justice that I just referred to.

⁵ See *Western Sahara: the EU Should Reconsider Its Fisheries Agreement with Morocco*, available at <https://www.neweurope.eu/article/western-sahara-eu-should-reconsider-its-fisheries-agreement-morocco/> Link to the full text

<http://www.havc.se/res/SelectedMaterial/20150313corelloneuandwesternsahara.pdf>.

⁶ Security Council resolution S/RES/2152 (2014), available at [https://undocs.org/S/RES/2152\(2014\)](https://undocs.org/S/RES/2152(2014)).

⁷ Security Council resolution 380 (1975), available at [https://undocs.org/S/RES/380\(1975\)](https://undocs.org/S/RES/380(1975)).

⁸ Available at <https://www.morocoworldnews.com/2014/11/143369/full-text-of-king-mohammed-vis-speech-on-39th-anniversary-of-green-march/>.

The spirit over the years in the King's speeches commemorating the Green March has basically remained the same. In his speech on 6 November 2019 the King said:⁹

The momentum that made the recovery of the Sahara possible in 1975 continues today, and it is still the imperishable spirit of the Green March that drives us when we commit ourselves to the successful completion of the development of all regions of the Kingdom.

On the Moroccan Sahara, Morocco has always displayed a clear position, inspired by an unwavering faith in the righteousness of its Cause and the legitimacy of its rights.

It is, therefore, with sincerity and good faith that it will continue to work, in accordance with the exclusively United Nations political process and Security Council resolutions, to achieve a political, realistic, pragmatic and consensual solution.

Serious, credible and judicious in its orientations, the Autonomy Initiative is the concrete translation of the solution sought. In fact, it is the only possible way to achieve a settlement of the conflict, with full respect for national unity and the territorial integrity of the Kingdom.

As I said, every year since MINURSO was established the Security Council has renewed the mandate of the mission. To make a long story short, let me refer to the latest resolution relating to Western Sahara adopted by the Security Council on 30 October 2019.¹⁰ It is based on a report by the Secretary-General dated 2 October 2019.¹¹

In the resolution, the Security Council recognises that the status quo is not acceptable. It emphasises the need to achieve a realistic, practicable and enduring political solution to the question of Western Sahara based on compromise and the importance of aligning the strategic focus of MINURSO and orienting resources of the United Nations to this end.

The Council also pays tribute to Horst Köhler, former Personal Envoy of the Secretary-General for Western Sahara, and commends his efforts in holding a roundtable process, which created new momentum in the political process.¹² The Council welcomes the new momentum created by the first roundtable meeting on 5–6 December 2018 and the second roundtable meeting on 21–22 March 2019, and the commitment by Morocco, the Frente POLISARIO, Algeria, and Mauritania to engage in the UN political process on Western Sahara in a serious and respectful manner in order to identify elements of convergence.

Against this background the Council decided to extend the mandate of MINURSO until 31 October 2020.

At the same time the Secretary-General's report contains information that I find troubling. He says that he remains convinced that a solution to the question of Western Sahara is possible.

⁹ <https://beninwebtv.com/en/2019/11/morocco-green-march-full-speech-of-king-mohammed-vi-to-the-nation-video/>.

¹⁰ Security Council resolution S/RES/2494 (2019), available at [https://undocs.org/S/RES/2494\(2019\)](https://undocs.org/S/RES/2494(2019)).

¹¹ UN Doc. S/2019/787, available at <https://undocs.org/en/S/2019/787>.

¹² In the report the Secretary-General had mentioned that Horst Köhler had informed him about his decision to step down from the role for health reasons.

At the same time he says that finding a just, lasting and mutually acceptable political solution that will provide for the self-determination of the people of Western Sahara in accordance with resolutions 2440 (2018) and 2468 (2019) will, however, require strong political will from the parties, and from the international community.

The Secretary-General also mentions that Horst Köhler was able to reinstate a much-needed dynamic and momentum to the political process, including through the round-table process he launched which brought together Morocco, Frente POLISARIO, Algeria and Mauritania. Against this background the Secretary-General maintains that it is essential that the continuity and momentum in this political process is not lost and calls on Security Council members, friends of Western Sahara and other relevant actors to encourage Morocco and Frente POLISARIO to engage in good faith and without preconditions in the political process as soon as a new Personal Envoy is appointed. He ends this reasoning with the following very serious plea:

78. There is continued lack of trust between the parties. Despite their respective declarations, neither Morocco nor Frente POLISARIO seem to have confidence in the other party's willingness to seriously engage and make the compromises that are necessary to achieve a just, lasting and mutually acceptable political solution that will provide for the self-determination of the people of Western Sahara. I believe, however, that the parties have a great number of interests in common that should encourage them to work together. I therefore urge the parties to make active gestures of good faith that demonstrate their willingness to make progress towards a political solution to the conflict, and to refrain from rhetoric harmful to such a resolution.

I will revert to the status of Western Sahara in my Concluding Remarks.

My Legal Opinion to the Security Council in 2002

The Security Council's request to me concerned two contracts, concluded in October 2001, for oil-reconnaissance and evaluation activities in areas offshore Western Sahara. One was between the Moroccan Office National de Recherches et d'Exploitations Pétrolières (ONAREP) and the United States oil company Kerr McGee du Maroc Ltd. The other contract was between ONAREP and the French oil company TotalFinaElf E&P Maroc. Both contracts were concluded for an initial period of 12 months. They contained standard options for the relinquishment of the rights under the respective contracts or their continuation, including an option for future oil contracts in the respective areas or parts thereof.

In my legal opinion to the Security Council, dated 29 January 2002, I analysed the question addressed to me by the Council by analogy as part of the more general question of whether mineral resource activities in a Non-Self-Governing Territory by an administering Power are illegal, as such, or only if conducted in disregard of the needs and interests of the people of that Territory.¹³ My conclusion was that an analysis of the relevant provisions of the Charter of the United Nations, General Assembly resolutions, the case law of the International Court of Justice and the practice of States supported the latter conclusion.

I also found that the General Assembly had consistently condemned the exploitation and plundering of natural resources and any economic activities detrimental to the interests of the peoples of those Territories and depriving them of their legitimate rights over their natural

¹³ UN Doc, S/2002/161, available at <https://undocs.org/en/S/2002/161>.

resources. However, the Assembly had also recognized the value of economic activities undertaken in accordance with the wishes of the peoples of those Territories, and their contribution to the development of such Territories.

This led me to the conclusion that the recent State practice, though limited, was illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities were conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they were considered compatible with the Charter obligations of the administering Power and in conformity with the General Assembly resolutions and the principle of “permanent sovereignty over natural resources” enshrined therein.

Therefore, my response to the Security Council’s request that appears in the last paragraph of my letter to the Council reads:

25. 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.

In my view this is a very clear statement. However, I know that some entities that have interacted with Morocco have misconstrued it, thinking that their actions have been in conformity with my opinion. This is very serious. In an address at a conference in Pretoria in 2008, after I had retired from the United Nations and from public service, I explained why I could not find the specific contracts which were the subject of the Security Council’s request in themselves illegal.¹⁴

I summed up this explanation by stating that there was no basis for declaring that the specific contracts were illegal in themselves and that this appears from the final sentence of the opinion, carefully drafted and discussed within the Office of Legal Affairs. The main clause of the final sentence constitutes a very clear message with respect to the legality of the activities in question when it focuses on **further exploration and exploitation activities**. If such 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. I thought that this message was clear. Is it possible to genuinely establish “the interests and wishes of the people of Western Sahara” before a referendum is held?

¹⁴ Hans Corell *The legality of exploring and exploiting natural resources in Western Sahara*. Address at a Conference in Pretoria in 2008 hosted by the South African Department of Foreign Affairs and the University of Pretoria. In: *Multilateralism and International Law with Western Sahara as a Case Study*. Ed. N. Botha, M. Olivier and D. van Tonder. University of South Africa Press (2010) (p. 231-247), available at <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.

In this context should also be mentioned that matters concerning Western Sahara has been before the European Court of Justice. Time does not allow that I get into detail here. Let me just refer to two judgements delivered by the Grand Chamber of the Court on 21 December 2016 and 27 February 2018, respectively.¹⁵ The latest development is a decision by the Council of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement.¹⁶ On 10 June 2019 the Frente POLISARIO brought an action against the Council because of that decision.¹⁷

Let me just quote the following from the Council's decision:

(11) In view of the considerations set out in the Court of Justice's judgment, the Commission, together with the European External Action Service, took all reasonable and feasible measures in the current context to properly involve the people concerned in order to ascertain their consent. Extensive consultations were carried out in Western Sahara and in the Kingdom of Morocco, and the socioeconomic and political actors who participated in the consultations were clearly in favour of concluding the Fisheries Agreement. However, the Polisario Front and some other parties did not accept to take part in the consultation process.

(14) The Fisheries Agreement, the Implementation Protocol thereto and the Exchange of Letters accompanying the Fisheries Agreement should be approved.

Concluding Remarks

Let me now add a few concluding remarks. In so doing I must repeat what I have said on other occasions when I have been invited to address the question of Western Sahara. When I do so, I am acting in my personal capacity only and with complete neutrality. I have no contacts with either side in the conflict. 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. My comments are contributed against the background of my experiences as a judge and legal advisor for many years in my country (Sweden) and later as the Legal Counsel of the United Nations for 10 years.

With respect to the factual situation today, I hesitate to express any precise opinions on how to continue. This is for the simple reason that I am not familiar with the details in the development during the last few years. For obvious reasons I must therefore point to the Secretary-General's reasoning and the manner in which the Security Council has formulated itself in its latest resolution.

¹⁵ Available at <http://curia.europa.eu/juris/document/document.jsf?docid=186489&doclang=en> and <http://curia.europa.eu/juris/document/document.jsf?docid=199682&doclang=EN>

¹⁶ COUNCIL DECISION (EU) 2019/441, available at <http://www.legislation.gov.uk/eudn/2019/441/contents>.

¹⁷ Case T-344/19, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216893&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1340830>.

It is also important that the European Union acts in accordance with international law in this matter. I was quite taken aback when I saw the formulations in the first agreements between the EU and Morocco. It is wholly unacceptable that a clear distinction is not made between the territory of Morocco and the territory of Western Sahara, including the maritime areas.

I refer again to what I have said about the fisheries agreements in the past.¹⁸ To be legal, such an agreement 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 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. This system must apply also to other natural resources in Western Sahara, such as phosphates, oil or gas, or other resources, be they renewable or non-renewable.

Of great importance is also how the business community interacts with Morocco with respect all resources in the territory of Western Sahara. In this context it is important to refer to the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011.¹⁹

My reflections also concern the manner in which the question of Western Sahara has been dealt with by the United Nations over so many years. I refer in particular to the manner in which the Security Council has dealt with the Territory. The lesson learnt here, I believe, is that the Council has to demonstrate great determination in matters concerning peace and security. This process has now gone on for nearly 45 years. In my view this is a very troubling record. As a matter of fact, I believe that the Council would be a formidable organ if it acted with determination in applying the law that the members of the Council are actually set to supervise.

For many years, there has been talk about reforming the Council. The focus is almost entirely on adding more members to the Council. I am very critical of this approach. As a matter of fact the Max Planck Institute in Germany has invited me to contribute an article on Security Council reform. I am told that the article will be published next week.²⁰

In this context I would also like to refer a Presidential Statement of 21 February 2014. In this statement the Security Council recalled a Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, held on 24 September 2012. The Council recognized the need for universal adherence to and implementation of the rule of law, the vital importance it attaches to promoting justice and the rule of law as an indispensable element for peaceful coexistence and the prevention of armed conflict. In the

¹⁸ See note 5. See also Hans Corell *The Responsibility of the UN Security Council in the Case of Western Sahara*. In: International Judicial Monitor, Winter 2015 Issue, available at <http://www.judicialmonitor.org/current/specialcommentary.html>.

¹⁹ Human Rights Council Resolution 17/4 of 16 June 2011, A/HRC/RES/17/4 (6 July 2011), endorsing the *Guiding Principles on Business and Human Rights*, available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

²⁰ Hans Corell *Security Council Reform – The Council Must Lead by Example*. In: Brill/Nijhoff The Max Planck Yearbook of UN Law (UNYB) (vol. 22) Forthcoming.

same statement the Security Council also reaffirmed its commitment to international law and the Charter of the United Nations and to an international order based on the rule of law and international law.²¹

Let me end by expressing the hope that it will now be possible to achieve a realistic, practicable and enduring political solution to the question of Western Sahara. The mantra for so many years – that the status quo is not acceptable – is unworthy. It is obvious that the parties must act with responsibility. But the Security Council and the European Union should not forget that also their behaviour is of fundamental importance here.

Thank you for your attention!

²¹ S/PRST/2014/5 available at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2014_5.pdf.