

**The pillaging of the Sahara:  
Criminal liability of European Commission officials  
resulting from proposed renewal of the  
2007 EU-Morocco Fisheries Partnership Agreement**

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## I - INTRODUCTION

On 13 July 2009 the Legal Service of the European Union Parliament admitted that the European Commission had assisted in a war crime: the illegal taking, or pillage, of natural resources from Moroccan occupied Western Sahara.<sup>1</sup> The admission cast doubt on the operation of a two-year old fisheries treaty between the European Commission (EC) and the Kingdom of Morocco, the 2007 *Fisheries Partnership Agreement*. The treaty is due to expire in early 2011 and discussions for its renewal between the EC and the government of Morocco were pursued during 2010. The EC's position on renewal has been two-fold; on the one hand acknowledging it must comply with international law and so expressing support for the United Nations (UN) in its role for self-determination of the Saharawi people (and, implicitly, their right to enjoy permanent sovereignty over natural resources). On the other hand, the EC suggests it will extend the *Fisheries Partnership Agreement* if Morocco provides evidence that the Saharan fishery is consented to and benefits the people of Western Sahara.<sup>2</sup> The two positions would be compatible if the latter requirement was confirmed by the Saharawi people. That is all but impossible, as Morocco would not concede its asserted sovereignty over the territory by responding to the EC's request in the context posed and given the Saharawi people's continuing insistence that they have not consented to European fishing in their waters.<sup>3 4</sup>

Because Morocco's continuing occupation of Western Sahara is illegal any extension of the *Fisheries Partnership Agreement* having the effect of allowing a renewed taking of fishery resources in Saharan waters would effectively contribute to the pillage of such resources, ostensibly subjecting individual responsible EC officials to criminal liability.

## II – THE SAHARAN FISHERY

In October 1975 Western Sahara, then Spanish Sahara, was invaded by Morocco and Mauritania. Spain responded ineffectually, agreeing under the illegitimate November 1975 *Madrid Accords* to share responsibility for self-determination of the people of its colony while accepting the *fait accompli* of the invasion. A bilateral Moroccan-Spanish agreement accompanying the *Accords* allowed for Spain's continuing fishery in Saharan waters. In 1986, with Spain joining the European Economic Community treaty-making competency with third states and the allocation of fishing quotas among EEC members became exclusively that of the Community, later the EU.

In 2006 Morocco and the EC concluded negotiations for the *Fisheries Partnership Agreement*. It came into operation in 2007 with a four-year term and is valued at €144.4M.<sup>5</sup> The FPA restored European fishing in Saharan waters which had not been carried out since 1999 because of overfishing, together with the parties' failure to negotiate a continuing agreement and a 2002

“fisheries cooperation accord” between Morocco and Russia. The FPA did not explicitly detail the maritime areas in which EU vessels may or may not fish, instead noting the “Moroccan fishing zone” as “the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco.”<sup>6</sup> It should be recalled that, apart from Morocco’s inability to claim jurisdiction over Saharan waters because the territory being a non-self-governing entity occupied by armed force, Morocco has not established through national legislation an exclusive economic zone in the area.<sup>7</sup>

Two threshold issues should be considered when assessing renewed European participation in the Saharan fishery. The first, noted above, is the right of the Saharawi people to permanent sovereignty over the natural resources of their territory. It is a right inherently part of that to self-determination for non-self-governing peoples, and one existing independently.<sup>8 9</sup> A second issue relevant to the EU’s involvement in the Saharan fishery is the continuing occupation of Western Sahara and the denial of its people’s right to exercise self-determination. It should be recalled that self-determination in the colonial context is universally binding on states to respect and refrain from acts inimical to its realization. In other words, self-determination for non-self-governing peoples is an *erga omnes* category of obligation incumbent on the organized international community. The International Court of Justice most recently expressed the right of self-determination in its Kosovo advisory opinion:

During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.<sup>10</sup> [Citations omitted.]

### III – THE CRIME OF PILLAGE

Pillage, or plunder as it is also known, came to be increasingly restricted and then outlawed under international criminal law in the Twentieth Century. One definition of the crime is the “unlawful appropriation of private and public property during armed conflict.”<sup>11</sup> The *Rome Statute* of the International Criminal Court with its basic description of pillage at Article 9 has with it the criteria at Article 8(2)(b)(xvi) of the “Elements of Crimes”:

#### **War crime of pillaging**

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>12</sup>

The crime of pillage is equally convention (*i.e.* treaty) based as it is a part of customary international law, having become sufficiently recognized over the past century to have become *jus cogens*. The treaty basis proscribing pillage is three-fold, namely: (i) the Regulations (the “Hague Regulations”) of the *Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of Wars*

on Land; (ii) the *Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War* (and its 1977 Protocols); and (iii) the *Rome Statute* of the International Criminal Court. Article 33(2) of the *Fourth Geneva Convention* states that “pillage is prohibited.”<sup>13</sup> Article 47 of the Hague Regulations prescribes simply that “pillage is formally forbidden.” There is, of course, a domestic basis for the crime of pillage in many states resulting from the incorporation of treaty provisions into national law by enactment of complementary criminal legislation, something required of ICC member states.<sup>14</sup>

It was prosecutions in the International Military Tribunal following the Second World War that defined pillage juridically. Numerous cases addressed the nature of the crime, including its occurrence with other war crimes, together with the liability of individuals for assistance to states and persons directly engaged in pillage. The IG Farben, Krupp and Flick prosecutions established that criminal liability for pillage could apply to businesspersons who were citizens of an occupying state.<sup>15</sup> Senior government officials were also found responsible for their direction in the taking of natural resources from occupied territories. The conviction of Schwerin von Krosigk, Germany’s Minister of Finance, who ordered the removal of “oil, coal, ores, and other raw materials” from Poland for the benefit of the German economy is typical. He was sentenced to 10 years imprisonment and released in 1951 under an amnesty.<sup>16</sup>

Liability for the involvement of senior officials for pillage in circumstances of an actual armed conflict was affirmed by the International Criminal Tribunal for the former Yugoslavia (the ICTY). The case of *Prosecutor v. Blaskic* is typical. The ICTY convicted Blaskic, commander of HVO units in central Bosnia, for failing to prevent pillage when it foreseeably would have resulted from his orders.<sup>17</sup>

#### IV – THE PILLAGE OF THE SAHARAN FISHERY

When the facts of Morocco’s taking of the Saharan fishery are assessed, the crime of pillage is made out. The necessary elements to establish the crime, similar to those prescribed for the International Criminal Court under the “Elements of Crimes” include: (i) the continuing armed conflict and occupation of the territory of Western Sahara (including control and occupation of the maritime area adjacent to the territory); (ii) the presence of a discrete or singular resource in question, one unavailable to other states as a matter of geographic circumstance and operation of international maritime law; (iii) the undisputed nature of permanent sovereignty over resource as being vested in the original inhabitants of Western Sahara, the Sahawari people; (iv) the direct and indirect (here by treaty arrangement with the EC) taking of the resource in question; and (v) the continuing protest by the legitimate representative of the Saharawi people, the Frente POLISARIO acting as the government of the Saharawi Arab Democratic Republic.

That Morocco continues to occupy part of Western Sahara including its Atlantic coast contrary to international law is evident. International humanitarian law, within which the crime of pillage is defined, no longer makes a distinction between armed conflict of a purely international character or that indirectly affecting the international community (*i.e.* “armed conflict not of an international character”) as demonstrated by the examples of Rwanda and the former Yugoslavia. The *Fourth Geneva Convention* expressly provides for protection against pillage after cessation of actual hostilities during the period a state or territory is occupied.<sup>18</sup>

There is little doubt about where the Saharan fishery exists. Without prejudice to future boundary making between a Saharawi Republic and its three maritime neighbours, that area is found between a southern limit defined by a median (equidistant) line extending from a point 12 nautical miles south of the Cape Blanc peninsula 200 nautical miles west into the Atlantic ocean (such initial point being the limit of the territorial seas of Mauritania and Western Sahara) and, in the north, a median line extending into the Atlantic from Point Stafford (south of Cape Tarfaya) at 27° 40' N between the African coast and the Canary Islands.

The taking of the Saharan fishery under colour of right by Morocco as an occupying state is evident and the EC arranged participation in that fishery by vessels from EU member states, admitted: "Following a series of [EU] parliamentary questions to the Commission, it appears that EU-flagged vessels have fished in the waters off Western Sahara. Not only this can be deducted [sic] from the data provided by the Member States to the Commission ... it has also been explicitly acknowledged in several Commission declarations."<sup>19</sup> In response to this the protest and assertion of rights over the resource by representatives of the Saharawi people has been continuous.<sup>20</sup>

#### V – THE EC’S PROSPECTIVE CRIMINAL ASSISTANCE TO MOROCCO

A renewed participation by EU vessels in the Saharan fishery - the action of approving and entering into treaty arrangements that support Morocco - would be a clear assistance. That assistance has been evident in the operation of the FPA, with the EC providing technical support and monetary payment to Morocco in exchange for EU vessels taking fish from Saharan waters. Article 25(3)(c) of the ICC’s *Rome Statute* defines contributory liability:

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.<sup>21</sup>

The giving of assistance in a case of renewing the FPA would therefore have two elements: the creation and public declaration of the treaty as conferring rights upon vessels approved to participate in the Saharan fishery, and monetary payment together with other forms of remuneration to Morocco as the party primarily responsible.<sup>22</sup>

Payments to Morocco under a renewed *Fisheries Partnership Agreement* would manifestly be assistance. But would the resumed participation by EU vessels also be a crime of common purpose, that is, a joint criminal enterprise between Morocco and the EC? A renewed agreement appears to be encompassed by such a definition, for the EC would intend to benefit from participating in the fishery beyond mere assistance to Morocco in its taking of the resource. The reciprocal obligations of the FPA provide a basis for this mode of liability. As such, EC officials who approve or administer the implementation of an agreement allowing resumption of EU fishing in Saharan waters could *prima facie* incur liability for their participation in a joint criminal enterprise.<sup>23</sup>

## VI – CONCLUSION

The liability of EC officials as matter of international criminal law in a renewal of the EU-Morocco *Fisheries Partnership Agreement* allowing resumption of European fishing in Saharan waters is clear. Such a crime, whether a contribution to Morocco's direct offence of pillage or as a joint criminal enterprise, would be established if EU vessels resume fishing in the waters off Western Sahara. The crime would fall within the jurisdiction of the International Criminal Court and national courts under legislation defining pillage as a war crime, as well as those states with courts exercising universal jurisdiction over breaches of international humanitarian law. The European pillage of Saharan waters is a crime for which individual EC officials would face liability.

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<sup>1</sup> EU Parliament Legal Service Memorandum, "Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara - Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara" (13 July 2009) (accessed 8 November 2010), available at: <[www.fishelsewhere.eu/index.php?parse\\_news=single&cat=140&art=1077](http://www.fishelsewhere.eu/index.php?parse_news=single&cat=140&art=1077)>

<sup>2</sup> Statement of EC Commissioner Maria Damanaki. "It is likely that the Commissioner will bring up the request the European Commission had made to Morocco, to provide information on how the agreement is benefitting the population of Western Sahara. Damanaki considers this data 'indispensable' in order to renew the agreement." *EC and Morocco to discuss fisheries accord tomorrow*, ABC Spain, 19 October (accessed 10 November 2010), available at: <<http://www.abc.es/agencias/noticia.asp?noticia=558344>>

<sup>3</sup> See the 1 March 2010 letter of Frente POLISARIO representative and minister delegate Mohamed Sidati to the EC, reiterated 16 November 2010 (accessed 28 November 2010) available at: <[www.fishelsewhere.eu/files/dated/2010-11-17/fp-damanki\\_letter\\_16.11.2010.pdf](http://www.fishelsewhere.eu/files/dated/2010-11-17/fp-damanki_letter_16.11.2010.pdf)>

<sup>4</sup> Saharan waters, namely the territorial sea and exclusive economic zone (EEZ) presumptively belonging to an independent Saharawi Arab Democratic Republic (the "SADR") are described below. The SADR claims an EEZ through Law No. 3 of 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic.

<sup>5</sup> *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco* (entered into force 7 March 2007) (the "FPA" and the "2007 FPA") (accessed 10 November 2010) available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:EN:PDF>> The EU Parliament subjected the FPA to legal review before entering into it. See "Legal Opinion – Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Compatibility with principles of international law" (20 February 2006), *idem*.

<sup>6</sup> See Article 2 of the FPA, *ibid.* Appendix 4 of the FPA stipulates specific fishing areas, with two, for industrial pelagic and demersal fishing, being "south of 29° 00' 00" N." It is not known why EC negotiators apparently failed to consider the absence of a formally claimed or defined Moroccan EEZ on the Saharan coast.

<sup>7</sup> Cf. Article 5(4) of the FPA, *ibid.*: "The Community undertakes to take all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Morocco has jurisdiction, in accordance with the United Nations Convention on the Law

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of the Sea.” Morocco acceded to the *Convention* on 31 May 2007. The EU acceded in 1998 under Article 305(f) and Annex IX of the *Convention*. UN *Convention on the Law of the Sea*, done at Montego Bay, Jamaica, 10 December 1982 (in force 16 November 1994) (“UNCLOS”), 21 *International Legal Materials* 1261.

<sup>8</sup> James Crawford, “The Rights of Peoples: Some Conclusions” in James Crawford, ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1992) at 171. See also UN General Assembly Resolution 2158 (XXI) of 25 November 1966, “Permanent right of sovereignty over natural resources”.

<sup>9</sup> See also Resolution III of the Final Act of the Third United Nations Conference on the Law of the Sea.

<sup>10</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, referred for an advisory opinion by the General Assembly under Resolution A/Res/63/3 of 8 October 2008. For the Court’s opinion of 22 July 2010 (accessed 8 November 2010) available at: <[www.icj-cij.org](http://www.icj-cij.org)>

<sup>11</sup> See James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York, New York: Open Society Institute, 2010) at 15-17.

<sup>12</sup> *Rome Statute of the International Criminal Court, 1998* (in force 1 July 2002) (the “*Rome Statute*”) (accessed 15 November 2010), available at: <[www.iccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm](http://www.iccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm)> All EU states are members of the Assembly of States Party to the ICC.

<sup>13</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949 (in force 21 October 1950) (the “*Fourth Geneva Convention*”), online (accessed 7 November 2010) at: <[www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5](http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5)>

<sup>14</sup> See *e.g.* *Gesetzes zue Einführung des Völkerstrafgesetzbuches* of 30 June 2003, BGBl 2002, I, 2254, §9(1); the German Code of Crimes against International Law.

<sup>15</sup> See respectively 8 *Trials of War Criminals before the Nuernburg Military Tribunals under Control Council Law No. 10* (“*Trials of War Criminals*”) 1081; 9 *Trials of War Criminals* 1461; 6 *Trials of War Criminals* 1191. See online at: <[www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html)> For a description of the decisions see *Corporate War Crimes*, *supra* note 12 at 95-99.

<sup>16</sup> 14 *Trials of War Criminals* 784.

<sup>17</sup> IT-95-14-T, judgment of 3 March 2000 (the “*Lasva Valley case*”).

<sup>18</sup> *Fourth Geneva Convention*, *supra* note 13, Article 6.

<sup>19</sup> *Supra* note 1. A covering letter to the memorandum noted that “it is strongly recommendable [sic] that the next annual meeting or a special meeting of the [EC] Joint Committee addresses these issues with a view to find an amicable settlement, fully respecting the rights of the Saharawi people under international law.”

<sup>20</sup> Letter of 1 March 2010, *supra* note 3. See also “Statement by Mr. Ahmed Boukhari, ‘Memorandum by the Frente Polisario on Western Sahara Peace Process’ at the Caribbean regional seminar on the implementation of the Second International Decade for the Eradication of Colonialism”, (May 2009), UN Doc. CRS/2009/CRP.15 at page 7. “The people of Western Sahara have a permanent right of sovereignty over the natural resources of the territory.”

<sup>21</sup> *Rome Statute*, *supra* note 12.

<sup>22</sup> The *mens rea* of an assisting party to be established when securing a conviction was expressed by the ICTY in *Prosecutor v. Kunarec*; showing that the person made “the conscious decision to act in the knowledge that he thereby supports the commission of the crime.” IT-96-23-T (22 February 2001) at para. 392 [translation by the author].

<sup>23</sup> *Rome Statute*, *supra* note 12 at Article 25(3)(d).