

# **COURT OF ETHICS**

## ***GIBRALTAR FINDINGS 2004***



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## Court of Ethics



### Session of 2004-2005

Let us take this opportunity to remind everyone that the analysis upon which we are about to embark differs fundamentally from the legal analysis conducted by a Court of Law.

The Court of Ethics cannot issue anything but opinions and other unbinding expression of belief, yet there may be those who are more than prepared to act upon its word, taking legitimacy from its finding to justify what is but acts of anarchy, vigilantism, and the like. Those may have seen its verdict as but the final component in a complex formula or equation, that which is “sine qua non” but not something demanding an extraordinary amount of attention or effort in the preceeding years. The Court of Ethics should beware this risk, especially in a case as politically charged and explosive as this. This might be the ultimate danger that follows from being so correct all the time, that a moral legitimacy evolves gradually until it turns into a movement, like a cult phenomenon or like an Evangelic prognostication machine out of control, as it spews out the “truth” about pretty much anything. However, should the Court of Ethics decline to rule on matters of the highest importance for these reasons, it would doom itself to becoming pretty marginal.

Standing before the Court of Ethics, Advocate-General must always make such distinctions as to relevance. Whenever the Court of Ethics decides to hear the case, it will – at the end of having reviewed all written materials available – call the Advocate-General in for a discussion or supplemental presentation, if it so desires and feels that this would be useful or necessary under the present circumstances. It is clear that a rather strong professional relationship can develop between the Court of Ethics and the Advocate-General, and needless to say there must be absolute trust, as the Court of Ethics relies primarily and at times almost exclusively upon the Advocate-General as far as the selection of facts and presentation of evidence relevant to the case. Whereas when it comes to the ethics component, similar to the application of law in a court of law, the judges search freely from multiple sources; the AG constituting in this respect just one voice amongst many and thus speaking with no particular rank but only with

that which might stem from the correctness of his argument, the straightforwardness of his line of thinking, and – although this is hardly an official fact – his ability to tune in on the judges’ line of thinking.

Due to the manner in which it works, the Court of Ethics cannot issue specific findings on specific situations, but merely extend its relevant experiences and make these available to the parties interested in the issue at hand. It is, however, obvious that the vast body of opinions generated have originated in, or in no small measure been inspired by, the facts and issues of a specific case or situation. The Court of Ethics should not and cannot exist in a vacuum. Accordingly, the issue presented by a case should be laid out in a generalized manner so as to better fit into the categories of question which the Court of Ethics has already taken under consideration and/or is willing to consider or reconsider under the present set of circumstances but always in the generalized manner as has just been described. It is then possible that the Advocate-General or others may be helpful in applying these conclusions to the concrete matter at hand, for instance through unbinding summaries, executive summaries or the like.

The legalities involved may seem complex, trivial, or somewhere in between, but that is not what we are here to find out. We will consider the legal issues involved, but only as part of the overall background or backdrop against which we will carry out or further analysis. It is thus essential to appreciate the linguistic significance of the term “should” as well as the carefully chosen and limited in scope manner in which we make use of it. “Should” does not refer to legal doctrine, but to moral indication or imperative. We aim to seek justice not by relying exclusively upon rules of law but by weighing in a much wider range of circumstances, all of which we will then weigh or select among or arbitrarily emphasize as we deem fit. Our rationale is bound by strict principles of logical thinking and ethical conduct, not of a subjective or random kind – these are the laws to which we submit and have sworn to uphold at all times, as they constitute the constitutional framework of this Court. And it is the commitment to consistently adhere to such principles which makes us worthy of the title “Court,” as we are unable to reconstitute ourselves beyond the framework of our constitution. The Court of Ethics exists for the fulfillment of said articles, if it can no longer do so or does no longer in the opinion of two or more judges fit within said framework, then it must be dissolved immediately and permanently, never to resurface or reappear.

## GUIDING PRINCIPLES

How to arrive at determination of that which is just and that which is right, while filtering out that which is not.

Such determinations ultimately depend upon which prism one elects to see things through, the values which one applies. Various schools of thought will lead to different results, and truisms are rarely if ever unconditional. Strict adherence to certain values –

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as in a fundamentalist religious persuasion or theological strictness, an absolute governmental order – will of course lead to results differing from those that would follow from one based on compassion or humanistic values and principles.

Accordingly, the Court of Ethics will have to make a determination about what basic philosophy it intends to follow, either across the board or applicable to each characteristic issue or group or class of such issues, and would be expected to eventually develop a unique doctrine of its own while maintaining respect for the references that inspired it.

Conservatism leads to demands for preservation of status quo: Gibraltar must remain British at all costs. While satisfying Gibraltarians' sense of patriotism, such an inflexible and dogmatic approach does not reflect the underlying political, economical and cultural changes within a European and geopolitical context and may thus be viewed as reactionary.

Utilitarianism leads to a cost-effect analysis: If changing Gibraltar's sovereignty status would be in the Spanish and British national interest, if it is doable, and if the adverse effect can be overlooked, then it is passable. While pragmatic, such an approach may be viewed as overly simplistic, as it fails to take into account the virtues of restraint and shows little respect for longstanding agreements.

At issue concerning Gibraltar:

- the perpetuity clause may have created certain rights and the expectations associated therewith may be legally relevant and morally legitimate;
- the British government has repeatedly declared that it will never yield sovereignty against the wishes of the people of Gibraltar, something which has created expectations as well – and contributed to cementing the idea that current arrangements are indeed perpetual;
- what is in the national interest of the states directly involved, and what is in the best interest of the affected people and the international community. Any solution that does not address all of these issues would set a bad example and might evolve into a dangerous trend;
- A handover or agreement concerning shared sovereignty is likely to affect property values, the investment climate, taxation, international trade and so forth.

The Court of Ethics finds that these are very straightforward issues that should be fully addressed prior to any change to Gibraltar's sovereignty status. The abovementioned considerations would seem to point toward a status quo solution or one that would at least preserve a reasonable measure of stability and continuity.

## ☒ REFLECTIONS

It would be of utmost relevance and interest to establish what constitutes the real fundament for the perceived need at the behest of the governments of Spain and Britain to revise Gibraltar's sovereignty status at the present time.

One might speculate that this perceived need is the direct consequence of the various "outstanding issues" that subject Gibraltarians to various inconveniences, that impose administrative and financial burdens, and that may potentially impair Gibraltar's future economical development. If this is the case, then shared sovereignty – possibly leading to Spanish full sovereignty down the line – may be viewed as a normalization of relations between these two countries within the general framework of the European Union.

While such an objective may at a glance seem plausible, and while the Utrecht Treaty in spite of its talk about "perpetuity" does envisage a potential sovereignty transfer at some undecided point into the future, we cannot help but ask ourselves the question why relations haven't been normalized years, decades or even centuries ago. It is thus our basic assumption that by signing the Utrecht Treaty, Spain and Britain jointly assumed responsibility for allowing Gibraltarians reasonable living conditions within the framework of said Treaty.

Therefore, we would consider it to be presumptively unethical were the perceived need for an adjustment of Gibraltar's sovereignty status at this time to achieve "normalization" actually to be viewed as a short-cut for removing what essentially amounts to obstacles which Spain deliberately and systematically have been raising throughout the years. The underlying reason for our finding such a result presumptively unethical is that were the international community to aid the governments in altering Gibraltar's status against the wishes of Gibraltarians at this point, i.e. to press a deal through, then this would essentially amount to condoning the type of harassment which Spain in our view has been engaging in over the years.

However, one must remember at all times that an adjustment of Gibraltar's sovereignty status may be reasonable or necessary for other reasons. Were that to apply in this situation, the next question to be examined would be whether such a change would be compatible with Gibraltarians' alleged right to self-determination.

What concerns us, furthermore, is that there is now an obvious discrepancy and incompatibility between the position of the Gibraltar government to the effect that sovereignty should be excluded from any future negotiations and that of the British government, which still has as its official policy the concept of shared sovereignty as part of the negotiations envisaged by the European Union.

This seems to leave Gibraltarians more exposed to uncertainty and potential pressure from the Spanish government than what has hitherto been the case. On the other hand,

the notion of being isolated might well lead Gibraltarians to pursue independence – something which is scalable going from self-rule under different forms toward full independence (statehood). As it is quite obvious that a fully independent Gibraltar would be even less acceptable to Spain than the present arrangement, one could be concerned that this would lead to heightened tension in the area and unpleasantness such as extremism and random acts of violence. It would be most unfortunate were a radical separatist movement to take foothold in Gibraltar, which has hitherto been marked by a peaceful and civilized approach to resolving the outstanding issues.

## ✠ FINDINGS

The Court of Ethics finds that insofar as Spain did, in 1713, transfer full sovereignty over Gibraltar to Britain into perpetuity, the two countries have certain responsibilities towards Gibraltar and its residents. Normalization of relations as envisaged in the joint communiqué is overdue, as most outstanding issues are the result of deliberate obstacles raised by Spain (“petty harassment”); issues that both governments have failed to resolve much earlier as was their obligation under the 1713 Utrecht Treaty as confirmed in subsequent treaties.

In all fairness, it should be noted that the 1713 Utrecht Treaty clearly spells out that sovereignty would revert to Spain were Britain ever to relinquish its sovereignty over Gibraltar. Diplomatic pursuit of such objectives would thus seem legitimate within the framework of international law accented upon the Treaty. In sharp contrast hereto, Spain’s petty harassment of the people of Gibraltar must be deemed morally indefensible.

The joint declaration makes shared sovereignty the basis for future negotiations concerning the various outstanding issues. Such a linkage closely resembles Spain’s longstanding *de facto* position of making normalization of Spain’s relations with Gibraltar contingent upon a solution to the sovereignty dispute. Acceptance of the joint declaration would thus, in our view, be tantamount to rewarding Spain for its morally indefensible conduct at the expense of the people of Gibraltar.

For these reasons, we find this particular British and Spanish approach to changing Gibraltar’s sovereignty status against the express wishes of the Gibraltarians to be presumptively unethical. It would then be up to the governments to provide substantial evidence indicating that such practices are nonetheless ethical for one or more specific reasons. We have found no evidence to the contrary, and thus the approach jointly undertaken by Britain and Spain to the Gibraltar sovereignty issue appears to be unethical.

A transfer of sovereignty as envisaged by the Utrecht Treaty might be ethically defensible provided that adequate safeguards are in place to ensure due process, which

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should include respect for the legitimate rights and expectations of Gibraltarians. Should they remain opposed to a sovereignty transfer, then a ruling by appropriate legal institutions should be obtained to establish whether or not such a transfer would be incompatible with the Gibraltarian people's fundamental legal rights, including its purported right to self-determination.

No finding by the Court of Ethics is final, as the Court of Ethics may at any time revisit an issue and amend or update its prior findings. ■