

# **The Moroccan initiative for the autonomy of Western Sahara: validity under international law**

*By Mr. Benoît PELLETIER, Tenured Professor at the University of Ottawa's Faculty of Law- Canada-*

## **I. Introduction**

This document aims at analyzing the Moroccan initiative in order to see whether it is in keeping with public international law, with the right of peoples to self-determination and with human rights.

In short, we shall try to establish to what extent the initiative represents a fair, viable, sustainable and effective basis for negotiation, in order to put an end to this several decades long conflict. To this end, we will have to highlight the positive aspects, as well as the loopholes and ambiguities of the initiative.

The Western Sahara region, home to Muslim Berbers and Arabs, has been historically coveted and conquered by several peoples, yet no one knows to whom it belongs. It is currently among the 16 remaining non-autonomous territories according to the Organization of the United Nations (UN)<sup>19</sup>. A former Spanish colony, it was freed from that grip in 1975 under the Madrid Accords themselves the result of Morocco's Green March and political pressure from neighbouring countries. These Accords, signed on November 14th 1975 by Spain, Morocco and Mauritania, formalized the withdrawal of the Spanish power from Western Sahara. They also divided the region between Morocco and Mauritania, each claiming sovereignty over the territory.

Later on, following considerable pressure (and even bombings) by the Polisario Front (Frente Popular de Liberación de Saguía el hamra y Río de Oro), a movement that professes to free the Saharawi people<sup>20</sup>, Mauritania gave up the race for Western Sahara by signing the Mauritano-Saharawi agreement on August 19th 1979. From then on, the only parties that still had claims over the territory were Morocco and the Polisario Front.

Indeed, since its independence in 1956, Morocco has been claiming sovereignty over this part of the Sahara, arguing that it is the only legitimate authority on this land. This claim is based on the fact that, even before European invasions, it enjoyed full sovereignty over this territory that was part of its empire. This argument is strongly contested by the Polisario Front.

The various provisions of this initiative, and particularly articles 1, 2, 3, 7, 9, 10 and 11, clearly attest to Morocco's willingness to find a final, or at least, a long term solution to this more than 30 years old conflict. Morocco indeed openly acknowledges the stalemate on the issue of Western Sahara and is committed to doing its utmost to reach a mutually acceptable political solution and to put an end to the separation and exile of the Saharawi. It also acknowledges that it is important to find a consensus-based and fair solution to end the impasse.

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<sup>19</sup> UNITED NATIONS, *Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Special Committee of 24*, United Nations and the Peace and Security Section, [online : <http://www.un.org/Depts/dpi/decolonization/main.htm>]

<sup>20</sup> We are aware of the fact that the "Saharawi people" comprises a number of relatively distinct tribes and populations. We shall however use the singular here because we believe that despite their differences, Saharawi populations and tribes can be part of the same political entity, i.e. can be one people, with regional institutions and competencies.

The mere fact that Morocco acknowledges from the outset that the situation is in an impasse represents, in our view, an interesting advance on the Moroccan position. Morocco now seems determined to take the matter forward, in a spirit of cooperation with the UN and through dialogue with the other parties. Besides, in our view the fact that Morocco's proposal is called an initiative speaks for the very spirit of the document. The idea is indeed for Morocco to regain control over the situation and to step up efforts to find a solution that will be acceptable to all parties.

According to Morocco, the initiative is a valid, viable and interesting proposal. We indeed cannot but note that the initiative speaks of a "serious", "dynamic", "positive" and "constructive" negotiation, in a climate of trust, openness and compromise. Article 9 of the initiative mentions the will to "write a new chapter in the region's history" and attests to Morocco's willingness to give the Saharawi a better future. According to the initiative, this future will essentially involve greater autonomy for the Western Sahara region and greater respect for human rights. In short, Morocco seems bent on erasing past tensions and starting over on a better footing. Could it be that the time for reconciliation has finally come?

Obviously, the abovementioned articles 1, 2, 3, 7, 9, 10 and 11 are drafted in very general terms. Some may doubt Morocco's good will. As far as we are concerned, we have no reason to doubt it. However, whether the initiative really builds on internationally recognized norms and standards (as stated in article 11) remains to be seen. There also remains to be seen whether the initiative grants sufficient autonomy, rights and guarantees to the Saharawi so as to be acceptable.

## **II. Analysis of the initiative from an autonomy perspective**

To be destined for success, the initiative has to respect the right of the Saharawi people to self-determination as well as applicable international law standards. To be more specific, the initiative has to be in keeping with one of the basic principles of the Charter of the United Nations, the one enshrined in article 1 of the Charter that provides for the obligation to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace"<sup>21</sup>. This obligation, turned into a peremptory norm by Resolution 1514 adopted by the General Assembly of the United Nations in 1960, grants colonized peoples the right to self-determination and to free themselves from colonization if they so wish. "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"<sup>22</sup>. However, "independence is not the only way to satisfy the right to self-determination. There are many others, such as autonomy"<sup>23</sup>. Indeed, as was said by the General Assembly of the United Nations:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.<sup>24</sup>

Subsequent resolutions defined and complemented the right to self-determination. Indeed, "[...] resolutions 1541 of 1960 and 2625 of 1970 rationalized the implementation parameters contained in declaratory Resolution 1514, by acknowledging that self-determination can be realized through

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<sup>21</sup> *Charter of the United Nations*, June 25<sup>th</sup> 1945.

<sup>22</sup> *Declaration on the granting of independence to colonial countries and peoples*, December 14<sup>th</sup> 1960, G.A. 1514 (XV) 15<sup>th</sup> session.

<sup>23</sup> FINAUD, M., *Can autonomy fulfil the right to self-determination?* Geneva Papers, GCSP, October 2009, p.14.

<sup>24</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (Resolution 2625), Res. G.A.2625 (XXV), 25<sup>th</sup> Session, doc. A/8082 (October 24<sup>th</sup> 1970), title 3.

sight, this is in keeping with the Declaration on the granting of independence to colonial countries and peoples<sup>31</sup>. This provision should however be further detailed. For example, what is the actual meaning of the phrase “Inside as well as outside the territory “? Does it refer to the international scene in general or to the territory of Morocco in particular? Moreover, what does the phrase “a privileged position and a leading role” mean? As for the “bodies and institutions of the region”, we presume that we are speaking of those that will be established on the basis of the initiative.

As for article 5, it refers to legislative, executive and judiciary bodies. This article should be read in the light of article 12 which refers to the same concepts. The later lists a series of powers comparable to those of many federal States of the world. However, article 12 does not say whether these are exclusive powers or not. We presume that this is the case. It doesn't say either what is meant by “local jurisdictions”. Does the text refer to powers mentioned elsewhere in the text or to other powers yet to be defined? This is still unclear.

Besides, article 12 provides for powers in the areas of “cultural affairs, including promotion of the Saharan Hassani cultural heritage”. The same provision covers the region's powers in the field of education. It seems to be in keeping with article 13 of the International Covenant on Economic, Social and Political Rights<sup>32</sup>. These powers are obviously of the utmost importance in terms of the protection and assertion of identity - or better said, the identities – of the Saharawis.

Furthermore, it is implicit in article 12 as well as in articles 3 and 5 that the bodies and institutions of the region will have to be of a democratic rather than of an ethnic nature. That being said, the text should explicitly state that these bodies and institutions, just like the State of Morocco itself, will have the duty to make sure that universal human rights are respected as well as the rights of minorities on the territory of Western Sahara. It would indeed be advisable to prohibit all forms of discrimination by the authorities of that territory in the exercise of their powers, just like it should be prohibited within the State of Morocco vis-à-vis the Saharawis. In short, Western Sahara's self-governance should be truly democratic and egalitarian. In fact, not only should the initiative clearly guarantee the right to equal treatment (or to non-discrimination) for those living in Western Sahara, but it should also protect the rights of the minorities of the region.

Articles 12 and 5 deal with financial resources. They are a priori in keeping with the declaration of the General Assembly of the United Nations on permanent sovereignty over natural resources<sup>33</sup>. However, the negotiations should answer a certain number of questions. For instance, article 5 states that the Sahara populations “will have the financial resources needed for the region's development in all fields, and will take an active part in the nation's economic, social and cultural life”. What does “resources needed” mean? What will be the basis for determining whether resources are needed or not? Who will decide? How exactly will they take an active part in the nation's economic, social and cultural life?

To be more specific, article 12 grants the Saharawis powers over the region's budget and taxation. These powers are further detailed in article 13, but it should also be clarified in the framework of the upcoming negotiations. For instance, will the autonomous region of the Sahara be able to tax companies or levy sales taxes or other trade related taxes? What does “the financial resources required for its development” mean? Who will collect taxes, duties and regional levies as well as the proceeds from the exploitation of natural resources allocated to the region? Who will determine “the share of proceeds collected by the State from the exploitation of natural resources

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<sup>31</sup> Note 4 above.

<sup>32</sup> *International Covenant on Economic, Social and Cultural Rights*, December 16<sup>th</sup> 1966, Resolution 2200 A (XXI)

<sup>33</sup> *Permanent sovereignty over natural resources*, GA Res. 1803 (XVII), Off. Doc. GA 17<sup>th</sup> Session (December 14<sup>th</sup> 1962).

Article 14 deals with the exclusive jurisdiction of the Moroccan State. At first sight, these powers seem modest and self-evident. Indeed, no one could deny the State jurisdiction over the attributes of sovereignty, or national security, external defence and territorial integrity.

With regards to article 17, it establishes the principle of subsidiarity with regards to residual powers, subject however to a "common agreement". Is such an agreement indispensable? Shouldn't the principle of subsidiarity be automatic whenever the subject matter is not covered by any established jurisdiction? The meaning of "subsidiarity" should also be specified. This principle normally fosters decentralization rather than the opposite. Why not be more specific and simply say that residual powers shall belong to the region?

Article 18 states that "the populations of the Sahara Autonomous Region shall be represented in the Parliament and in the other national institutions. They shall take part in all national elections". It is indeed essential for the Saharawis to be represented in Parliament and in the other national institutions. However, it would be appropriate to say exactly how (i.e. in what proportions) they will be represented and what is meant by "other national institutions". Will the Saharawis be allocated seats in the House of Representatives or in the House of Councillors? If so, how many will they get? The issue of political participation is key with regard to the respect for the norms emanating from international covenants, which state that the populations concerned must feature prominently in the civil, political, economic, social and cultural life of the country they live in.

On balance, article 19 which establishes the composition of the regional parliament, should also be specified, especially with regards to the number of members elected by the Saharawi tribes against the number of members elected by direct universal suffrage by the region's population. While we are at it, if possible, it should be specified how the tribes will elect their members (under which voting system). Moreover, the election of certain members of the regional parliament by direct universal suffrage bring us back to the same issue, i.e. who would be allowed to vote in a referendum? We shall come back to that issue in the fourth part of this analysis. Otherwise, article 19 seems to be in keeping with international standards.

Article 20 deals with the exercise of executive power in the region. It provides for the election of the head of the regional Government by the regional parliament. This method of appointment seems acceptable, subject to the answers given to the questions raised in the previous paragraph on the composition of the said parliament. Once again, it will be important to clearly establish the composition of the parliament and the scope of its powers in order to see to what extent international standards in the field of self-determination are satisfied.

As for the rest, article 21 does not seem to raise any particular problem, except it would not be a bad idea to establish beforehand how administrators will be appointed and, in this respect, to make sure that the various Saharawi tribes are treated fairly.

As for articles 22 and 23, they deal with the judiciary and the administration of justice. Article 12 provides that the regional parliament can set up courts to give rulings on the enforcement of norms enacted by "the competent bodies" and further enshrines the principle of judicial independence. We assume that the competent bodies mentioned in article 22 are the same as those mentioned in articles 19, 20 and 21 of the initiative, i.e. the regional parliament and the regional Government. If not, the text should say precisely what these bodies are. Article 23 states that the high regional court shall give final decisions on the interpretation of the Region's legislation, without prejudice to the powers of the Kingdom's Supreme Court or Constitutional Council. What is the meaning of this reservation? Notwithstanding what is explicitly stated, in practice could it result in a body other than the High Regional Court giving final decisions on the disputes born out

Article 3 of the initiative deals with the building of a society based on the rule of law, individual and collective freedoms, and economic and social development. It seems to build on articles 9 and 18 to 22 of the Covenant on Civil and Political Rights, as well on articles 18 to 21 of the Universal Declaration of Human Rights. Article 3 of the initiative also calls for the end to separation and exile for the Saharawis and fostering of reconciliation. It is complemented by articles 30 and 32 that cover repatriation of refugees and their “full reintegration into the nation’s fabric [...] in a manner which preserves their dignity and guarantees their security and the protection of their property”. This is a major step towards respect for human rights. However, it would be preferable (in one or the other article, or in the three of them) to better define the conditions of repatriation and to make sure it is carried out without discrimination. Let us however underscore that the idea contained in article 32 to establish a Transitional Council composed of representatives of the parties which would assist with repatriation, disarmament, demobilization and reintegration of armed elements located outside the territory, seems to be an excellent solution to ensure some degree of equity in the repatriation and reintegration process of the Saharawis.

Regarding article 25 of the initiative, it provides that the populations of the region of the Sahara will “enjoy all the guarantees afforded by the Moroccan Constitution in the area of human rights as they are universally recognized”. These guarantees are defined in articles 1 to 18 of the Moroccan Constitution of 1996<sup>38</sup>. Without going into details, let us underline that the Constitution encompasses a number of fundamental rights such as equality of all before and under the law, and freedom of movement, freedom of opinion, of expression, of assembly and of association. These rights are moreover recognized in the Universal Declaration of Human Rights.

Still on the issue of human rights, it is worth mentioning article 31 of the initiative, which provides for a blanket amnesty, precluding any legal proceedings, arrest, detention, imprisonment or intimidation of any kind, for acts based on facts covered by this amnesty. By offering an amnesty, Morocco complies with article 9 of the Covenant on Civil and Political Rights. An amnesty would foster reintegration of fighters of opposition groups into civil society and national reconciliation. Otherwise, violence could ensue and the possible resumption of the negotiations could be undermined.

The representation of women in politics is another interesting feature of the initiative. Indeed, it is mentioned in article 19 that “there shall be adequate representation of women in the Parliament of the Sahara autonomous region”. Morocco thus takes into account the principle of gender equality as established in the preamble to the Universal Declaration of Human Rights as well as in many other international instruments. It is worth underlining here article 3 of the International Covenant on Civil and Political Rights, which recognizes full equal right of men and women to the enjoyment of all civil and political rights. Moreover, article 19 is in the spirit of the 2004 legal amendments aimed at establishing equal rights of men and women in the Moroccan society<sup>39</sup>. Article 19 should however better define “adequate representation of women” for it is unclear.

Finally, it is worth noting that democracy is mentioned on several occasions throughout the initiative. It is mentioned in article 3 (democratic society), article 5 (democratically) and article 12 (in keeping with democratic principles and procedures). However, nowhere are applicable democratic rules mentioned. In other words, the text doesn’t say who will participate in these democratic exercises (such as the holding of elections) or how they will take place. We believe this should be specified during the negotiations.

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<sup>38</sup> Moroccan Constitution of September 13<sup>th</sup> 1996, available online at <http://www.maroc.ma/PortailInst/Fr/MenuGauche/Institutions/Constitution/La+Constitution.htm>

<sup>39</sup> We refer here to the entry into force of the new Moroccan Family Code of 2004, the *Moudawana*.

court endowed with considerable powers somehow protected by the Constitution. This can potentially fulfil the right of the Saharawi population to self-determination. For this right to be truly respected, it is however imperative that the Saharawis themselves be given a chance to voice their opinion on the initiative within the framework of a public consultation. In other words, a referendum on the Moroccan initiative seems an absolute must.

Though novel, interesting and promising, the Moroccan proposal will only satisfy the right of the Saharawi population to self-determination in so far as the Saharawi makes the informed decision to accept it via a referendum. Besides, it is only in these conditions that the initiative will really contribute to solving the problems of the region.

Acceptance of the initiative by the Saharawi population through a referendum would give this text undeniable popular, democratic and sovereign legitimacy (sovereignty belongs to the people). Incorporation of the autonomy statute into the Constitution, as provided for by article 29 of the initiative, would make it legally irreversible. We say irreversible since once the statute is accepted by the Saharawi population and incorporated into the Moroccan Constitution, the Saharawi population will no longer be able to claim the right to self-determination to obtain pure and simple independence, unless of course the said statute is not implemented and respected by the Moroccan State. Indeed, once this autonomy statute is accepted and incorporated into the Constitution, the Saharawis will enjoy substantial internal autonomy and will hence no longer fulfil the requirements established by international rules related to the external exercise of the right to self-determination.

Before a referendum can be held on the autonomy statute, it is essential for the parties to agree on the people that will be allowed to take part in the referendum provided for in article 27 of the initiative. Ideally, this means that the parties should agree beforehand on a list of voters, on the referendum process and on the interpretation of the vote.

Article 28 covers the approval of the autonomy statute “by the Sahara populations”. As for article 27, it says that the statute shall be “submitted to the populations concerned in a free referendum”. Still under article 27, the referendum is supposed to represent the free exercise, by these populations, of their right to self-determination as established by many international instruments.

## **V. Conclusion**

Assuming that Morocco and the other parties act in good faith to find a solution that is equitable and viable for all, the initiative overall seems to be in keeping with international standards in the field of self-determination and human rights. True enough, some issues raised above should be specified, but this doesn't detract from the fact that the initiative is a solid basis for negotiation. In other words, the initiative is a very good starting point.

In article 33 of the initiative, Morocco states that just like the international community, it firmly believes today that “the solution to the Sahara dispute can only come from negotiations”. Further down the same article, it states that it wishes the negotiations to be in keeping with international rules, amongst which those contained in the Charter of the United Nations. Now in article 34, the Moroccan State pledges “to negotiate in good faith and in a constructive, open spirit to reach a final, mutually acceptable political solution to the dispute [...]”. Still in article 34, it says that it is prepared to actively contribute to creating an environment of trust. Finally, in article 35, Morocco states that the initiative offers a historic chance and that it hopes that the other parties will make a positive and constructive contribution to the success of this approach.