



2003 Moroccan project of Autonomy for Western Sahara: Analysis and consequences for the future

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I. UN Context of the Document

The Security Council unanimous decision (Resolution 1495) on the “Baker Plan” was a hard knock for the Moroccan government. In an attempt of evading the “Baker Plan” without contravening what has been established in the 1495 Resolution, Morocco presented in December 2003 a project for the creation of the “Autonomous Region of Sahara” (hereafter referred to as ARS). It is about a document of great importance as it is the first project of autonomy that Morocco has officially presented and with the support of the King Mohamed VI. Morocco announced many times its intention of establishing an autonomy for Western Sahara, but never presented even a draft until December 2003. This was precisely be-

cause of the pressure put on Morocco after the Security Council unanimous decision backing the Baker Plan which constituted an effective means so as Morocco can come out of its stagnation. The learning is clear: the basis of the solution of the conflict lies in the UN.

Although known by the Security Council member states, the ARS project has been kept in secrecy until now, why? The reason why Morocco did not spread the news could be that some sectors of the *Majzen* believe that the project was opening new ways of internal democratization which will seriously endanger many vested interests.

The document presents legal international interest; even if it does not deal adequately the self-determination, it constitutes an ac-

ceptation of the 1495 Resolution which backs Baker Plan. But if this is really relevant, even greater is the interest created in the domestic Moroccan level in the light of the changes that introduces in the internal law of this country.

II. ARS legal international Analysis

The ARS project raises two main concerns. Its dealing with the issue of self-determination and the relation with the 1495 Resolution of the Security Council.

II.1. Regarding the saharawi people free self-determination, the 2003 Moroccan project of autonomy does not meet the demands of the international law. The point number 4 of the document is clearly incompatible with all the UN resolutions and legal opinion of the International Court of Justice of October 16th, 1975, as it states that it is a project of autonomy for the Region of Sahara, "in the respect to the Moroccan sovereignty, territorial integrity and national unity". It is evident that the ARS project, like the "framework agreement" establishes as a premise (that Western Sahara is a part of the "territorial integrity" of Morocco and it is under Moroccan "sovereignty") which could only be a conclusion of a decolonisation process in which the people of Western Sahara freely decides to be integrated into Morocco. This is the main reason that made James Baker and the UN to consider the Moroccan project "insufficient".

In fact, the premise constitutes a negation to the right of free self-

determination of the Saharawi people, which is unacceptable in the international law.

II.2. Much more interest offers the relation of the ARS project with the 1495 Security Council Resolution that backs the "Baker Plan". The point number 3 of the ARS project constitutes the key element in this question. According to this point 3, "the Moroccan delegation that met with James Baker in Houston on September 17, 2003" examined with him "the consequences derived from the resolution 1495" and "the perspectives of negotiation so as to reach a mutually acceptable solution". In this sense, "the Kingdom of Morocco had decided to bring a concrete, credible and positive contribution within the framework of the 1495 Security Council Resolution". It may be discussed if the ARS project is effectively within the framework of the 1495 Resolution. But what is important is that those words mean that Morocco has accepted the 1495 Resolution as the "framework" to reach a final solution to the conflict of Western Sahara. Otherwise said, in its ARS project 2003, Morocco had accepted "Baker Plan" as the frame for a solution to the conflict.

III. ARS project legal constitutional analysis

When analysing ARS project of December 2003, it is convenient to evaluate various important points: A) the distribution of competences between Morocco and Western Sahara; B) the system of resolution to the conflicts; C) the organisation of the autonomy; D) the autonomy

safeguard and the Moroccan constitutional system; E) the fundamental rights; F) the electorate.

A) Competences Distribution between Morocco and Western Sahara

The article 7 of the project establishes a number of ARS competences, not yet qualified as “exclusive”. Meanwhile the article 11 deals with the Kingdom of Morocco competences. According to this article the remaining competences (it means to whom corresponds the competences not expressly mentioned in the project) correspond to ARS. What is real, taking into account the competences distribution point of view is that the project constitutes a step backwards not only in relation to “Baker Plan II”, but also with respect to the “Framework Agreement” and to the King Hassan II formula of 1985. In fact, three of the most relevant competences (natural resources, police and justice) which in the previous proposals correspond to Western Sahara, now in ARS project belong to the Kingdom of Morocco.

B) System of resolution of conflicts

Unlike the “Framework Agreement”, RAS project expressly establishes a system of resolution of conflicts in its article 12 but far different from what is stated in the “Baker Plan” where the final resolution of the conflicts is attributed to a neutral international body (Secretary General of the UN). Here the “competence over the competences” (meaning sovereignty) is attributed to the “Constitutional Council” con-

trolled by the King of Morocco. As I argued before¹ the “Constitutional Council” in which half of the members, president included (casting vote in case of tie voting) is directly appointed by the King, consequently this body has no sufficient credibility to resolve conflicts with guarantees of impartiality.

C) Organisation of the autonomy

ARS project establishes a Legislative Assembly directly elected by the popular vote. However, unlike “Baker Plan II” and the “Framework Agreement” the president of the Executive Council is not elected by the people vote, but elected by the Legislative Assembly among its members (article 9).

Regarding the courts, once more unlike what reads “Baker Plan II”, the ARS project (article 10) states that the judges of the local jurisdictions are appointed “in accordance with the national (Moroccan) legislation” although introduces that they could be elected according to their “attributions and territorial competences”, it seems that it could leave an open door to the creation of ARS courts (lately confirmed in article 11).

D) Autonomy safeguard²

The ARS project (article 5) establishes that the proposal should be submitted to a free referendum of the “affected population” *after reforming the Moroccan constitution to this end*. If adopted, the project will be annexed to the Moroccan Constitution. The ARS statute of safeguard is really worrying, in my opinion, insofar it offers less guarantees than

what established for the autonomy the "Baker Plan" and even the "Framework Agreement". In fact, in these two documents, the statute of the territory of Western Sahara can not be modified unilaterally neither by the government of Morocco nor by the Sahara Authority Bodies. So, when turning the statute in an appendix of the Moroccan Constitution, this means that it could be modified by who is allowed to modify the Moroccan Constitution, that is, (theoretically) the Moroccan people. This means that to give "constitutional" nature to the ARS statute, far from supposing a greater guarantee, leaves the door opened to a unilateral modification of the same one on behalf of Morocco by means of a reform of its Constitution.

In as much as that proposed Moroccan referendum does not take place and the organs established by the statute are created, the ARS project sets transitory measures (art. 13) consistent, basically: in a general amnesty; repatriation "by the High Commissioner of the Refugees" (UNHCR) of those residing outside the territory; and in the creation of an Interim Council, composed to equal parts a) by "elect" and heads of tribe of the resident population in the territory, and b) by representatives of the populations repatriated. It must be notice that this Interim Council has consultative attributions solely.

E) Fundamental Rights

Unlike the "Framework Agreement" and the "Baker Plan" it is really surprising that the ARS project does not make any reference to the fundamental rights of the people of

Western Sahara, taking into account the massive violations of human rights in the occupied territories of Western Sahara.

F) Electorate

The ARS project sets the guidelines for the composition of the census of who is called to vote on the statute. According to article 13 of this project, the census is made up of three categories of people:

- a) People admitted as voters in the UN census of December 30, 1999; people who were 18 years old after 1993 and are descendant of voters registered in the UN census;
- b) People over 18 registered in the UNHCR repatriation lists.
- c) People with "legal links" or verified connections with the territory such as residence, birth or filiations.

The inclusion of residents in a referendum as voters gives rise to trouble. If the referendum is supposed to be an exercise of the Saharawi people right to self determination, then the clause would be illegal from the international law point of view. It is worth to remind that the International Court of Justice established that in this referendum must participate the native population of the territory and not "mere" residents³. Different would be the case if considering the referendum on the ARS statute as not an exercise of self determination.

IV) Consequences of the ARS project

The publication of the document (although maintained under re-

serve) presented by the King of Morocco establishing the ARS (Autonomy for the Region of Sahara) constitutes a priceless contribution to the Security Council debate on Western Sahara conflict. It also constitutes an essential element for the debate on Western Sahara subject.

The consequences derived from this debate would be the following:

1- The referendum of self determination is not "inapplicable"

The peace plan and the Houston agreements were paralyzed at the beginning of 2000 when proved that the census carried out by the UN was not favorable to the Moroccan interests. This country presented hundreds of thousands of appeals which the UN refused to deal with the norms mutually agreed on by the two parties as it would have meant the non acceptance of the majority of them.

The official speech delivered by high rank Moroccan officials and by headquarters of the so called CORCAS is the need to find a "political solution" which does not include the self determination, because the referendum became "invalid" and "inapplicable". The main reason is that a "census" is impossible to carry out.

However, the Moroccan King proposed a referendum in December 2003 to adopt the ARS project. Why then is possible to hold a referendum if the aim is the adoption of an autonomy and it is not possible if aimed to self determination? The Moroccan King himself admitted

the validity of the census carried out by the UN in December 30, 1999, the appeals excluded, while including these voters in the referendum of ARS project. So, why the UN census is valid to celebrate an autonomy consult and not for a self determination referendum?

2- A Moroccan project of autonomy without referendum and less competence will not be credible

The Moroccan project of ARS of December 2003 means that everything in it contained is acceptable for Morocco. Consequently, for Morocco it already constitutes something accepted that the possible project of autonomy is not "a granted" letter by the king, but a text approved in referendum by the native population and residents in Western Sahara. In the same way, this project means that Morocco already has accepted, as a minimum, to attribute to ARS all the competitions in it included. Then, the great value of the ARS project of December, 2003 really is that it fixes the threshold minimum below as any Moroccan proposal is inadmissible.

3- In Tinduf there are refugees "not kidnapped"

The Moroccan official public speech and official media means (like MAP agency) do not stop to spread the calumny that the Saharawis living in Tinduf are "kidnapped" by the Polisario Front. The ARS project, an official document presented by the king Mohamed VI, demonstrates that this is not certain. In effect, when establishing the census entrusts to the "High Commissioner of

Nations United for the *Refugees*" the repatriation of Saharawis who are outside the territory. The UNHCR assumes that function indeed because it is about refugees. And they are sheltered because they had to flee from their territory. The reason of the fled is clear, due to the military invasion of Western Sahara.

4- Morocco only present solution projects when it is under international pressure

The ARS project appeared when the UN had approved unanimously the 1495 resolution adopting the "Baker Plan" and when some of the main actors of the conflict (Spain, the USA) had decided to put pressure on Morocco that were isolated.

The international scene changed when Rodriguez Zapatero came to power in Spain. This meant the end of the policy of pressure on Mo-

rocco, replaced by the policy of complaisance. The USA position changed when Spain left its pressures on this country in favor of the self-determination and Morocco offered itself to torture in its territory the CIA prisoners in the frame of the "global war against terrorism" in what is possible to be described as "Sahara program in exchange of tortures".

5- Morocco will only offer a credible autonomy when it comes to a constitutional reform

The project of ARS presented by Morocco recognizes that to make internally possible the autonomy of Western Sahara it must be reformed the Moroccan Constitution. Consequently, while Morocco does not operate a constitutional reform, any speech or autonomy proposal will lack credibility

Notes

¹ "La 'tercera vía' ante el Derecho Constitucional marroquí: una autonomía imposible" (5-II-2002): http://sahara_opinions.site.voila.fr/CRM02.02.htm

³ ICJ Rep 1975, para. 161 y 162