Mission Permanente
du Royaume du Maroc
Genève

البـــعثة الدائمـــة
للمملكـــة المغربيـــة
جنيـــف

AS 724 **CONFIDENTIEL**

Le 21 mars 2013

Monsieur le Ministre des Affaires Etrangères et de la Coopération
-Rabat-

Destinataires: -Cabinet -MD -SG -DG8/1
Objet : Initiative marocaine d'autonomie/ proposition de services d'un professeur de l'Université de Cambridge.

J'ai l'honneur de vous informer que, suite à sa participation au séminaire international sur l'initiative marocaine d'autonomie, organisé aujourd'hui par cette Mission en marge de la 22ème session du CDH, le Professeur Marc Weller, Directeur du Centre Lauterpacht de droit international de l'Université de Cambridge m'a fait part de son souhait de mettre son expertise au service de la promotion internationale de l' initiative marocaine.

Le Professeur Weller se prévaut d'une grande expertise dans les questions d'autonomie, d'autodétermination, de gestion du dialogue interne et de médiation. Il a notamment travaillé avec M. Jamal Benomar, Conseiller spécial du Secrétaire Général des Nations Unies pour le Yemen.

M. Benomar lui aurait conseillé de se joindre à l'équipe du Représentant Personnel Christopher Ross.

Cependant, le Professeur Weller préfère apporter sa contribution à la promotion internationale de l'initiative d'autonomie pour le Sahara Marocain afin de renfoncer l'intérêt qu'elle suscite au sein de la communauté internationale, en vue de son appropriation par cette dernière.

Il a accompagné son offre de service par une série d'arguments pertinents:

* le contexte régional actuel, notamment le conflit dans le sahel, se présente sous une configuration qui augure d'une plus grande réceptivité à l'égard de cette initiative.
* les Etats Unis, la France et le Royaume Uni affichent une forte volonté pour mettre fin au statu quo et aller de l'avant dans la recherche d'une solution au conflit.
* l'inquiétude des autorités algériennes à l'égard de la pénétration de l'islamisme radical parmi les populations des camps de Tindouf.
* l'effritement de la crédibilité du polisario en raison de l'absence de la démocratie en son sein et la prise en otages de "quelques 50 000 personnes" dans les camps de Tindouf.

A la lumière de ce qui précède, je voudrais vous proposer d'envisager l'invitation du Professeur Weller au Maroc pour un entretien exploratoire sur son offre de service .

Vous voudriez bien trouver ci-joint le C.V. de l'intéressé ainsi que le texte de la présentation qu'il a faite lors du séminaire tenu ce jour à Genève, sous le thème: Représentativité et légitimité dans le négociations d'autonomie.

Haute Considération

L'Ambassadeur, Représentant Permanent

Mission Permanente Royaume du Maroc Genève

Omar HILALE

Marc WELLER

Marc Weller is Professor of International Law and International Constitutional Studies in the University of Cambridge. He is also the Director of the Lauterpacht Centre for International Law in the University. He holds Doctorates in International Law and International Relations, in Law, and in Political and Social Sciences from the Universities of Cambridge, Frankfurt and Hamburg. He is a barrister (Middle Temple) and a fully qualified and accredited mediator. He joined the Faculty of Law of the University of Cambridge in 1990 and served as Deputy Director of the Centre of International Studies from 1997-2000.

From 2000-2009 he was the Director of the European Centre for Minority Issues. In that role he directed headquarters operations and a growing field staff active in numerous projects in South Eastern Europe and the Caucasus region.

He guided and conducted conflict settlement activities involving Georgia, Moldova (Transdnistria), Bosnia and Herzegovina, Macedonia and Kosovo and served as mediator addressing the Moldova-Gagauzia autonomy dispute. He has also repeatedly served as expert and facilitator for the Council of Europe.

In 2000, he founded the Cambridge-Carnegie project on the Settlement of Self-determination Disputes, which has resulted in an international network of experts supporting ethnic peace-making around the world.

In 2011, he launched a major international research activity in cooperation with the United Nations Secretariat relating to peace-making and peace agreements. He served as legal advisor during the 1999 Rambouillet Conference on Kosovo and senior legal advisor for Kosovo in the UN-led Vienna process of Final Status Negotiations between Kosovo and Serbia of 2006/7.

Moreover, he was a senior expert for the African Union in relation to the North-South Sudan pre-referendum negotiations of 2009/10.

During 2011/12 he served as Senior Mediation Expert in the Department of Political Affairs of the United Nations Secretariat in New York. In that role, he advised on the transitions in Cote d'Ivoire, Egypt, Yemen and Libya, on the Doha Peace Process for Darfur and on the stabilization of Somalia.

He served as a legal advisor to the UN Special Envoy for Syria, Kofi Annan, and he remains a Senior Consultant to the UN Special Advisor on Yemen, Jamal Benomar.

He has served as Counsel in major international litigation, including in the International Court of Justice, and as expert in national legal proceedings.

He remains an active member of the United Nations Mediation Roster and is a member of the UK Stabilization Unit (FCO, DFID and MoD) cadre of Deployable Civilian Experts.
He has been Director of Studies at The Hague Academy for International Law and Visiting Professor in the University of Paris and at other institutions. He is the author, editor or co-editor of some 25 major books and a large number of academic journal articles and book chapters, including: Commentary on the UN Declaration on Indigenous Rights, Oxford University Press (2013) ; Handbook on the Use of Force in International Law, Oxford University Press (2013) ; Political Participation of Minorities, Oxford University Press (2010) ; Iraq and the Use of Force in International Law, Oxford University Press (2010) ; Asymmetrical State Design as a Tool of Ethnopolitical Conflict Settlement, Pennsylvania University Press (2010) ; Contested Statehood: Kosovo's Struggle for Independence, Oxford University Press (2009); Escaping the Self-determination Trap, Martinus Nijhoff Publishers (2008); Negotiating Statehood: The Vienna Negotiations on Kosovo, Chaillot Paper No. 114, European Union Institute for Security Studies (2008); The Protection of Minorities in the Wider Europe, Palgrave, Macmillan (2008); Institutions for the Management of Ethnopolitical Conflict in Eastern and Central Europe, Council of Europe Press (2008) ; Peace Lost: Missed Opportunities for Conflict Prevention in Kosovo, Martinus Nijhoff Publishers (2008) ; Settling Self-determination Conflicts, Nijhoff Publishers (2008) ; Universal Minority Rights, A Commentary on the Jurisprudence of International Court and Treaty Bodies, Oxford University Press (2007) ; Internationalized State-building after Violent Conflict: Dayton after Ten Years, Routledge (2007) ; The Rights of Minorities: Commentary on the European Framework Convention for the Protection of National Minorities, Oxford University Press, (2005); Mechanisms for the Implementation of Minority Rights, Council of Europe Press (2005) ; Autonomy, Self-Governance and Conflict Resolution, Routledge (2005).

PARTICIPATION IN AUTONOMY SETTLEMENT NEGOTIATIONS

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Contents:

The remarks that follow are focused on the scenario of internationally facilitated or mediated discussions. An entirely internal autonomy negotiation would tend to follow similar principles, although the position of the government in framing the dialogue might be more pronounced.

I. Introduction

Participation matters in international peace-making. In fact, it is widely believed that the constellation of participating sides in peace negotiations can be critical for the chances of achieving a satisfactory outcome. Accordingly, selection of participants is accorded a very high degree of importance in process design where international mediated settlements are concerned. This applies to all or most types of settlements. However, in relation to autonomy settlements, the question of participation often receives additional thought. There are a number of reasons for this special position of autonomy settlements.

First, autonomy settlements are often related to claims of self-determination and possible secession of ethnic or other groups. Hence, achieving an autonomy—or internal—settlement is a high-stakes venture, invariably touching upon what the host state might consider its vital national interest—its territorial integrity and unity. On the other hand, acceptance of continued territorial unity is difficult for groups that may have engaged over prolonged periods in a campaign for what they see as the national liberation of their constituents. The longer the conflict, and the greater the sacrifices, the more difficult it becomes to persuade their leadership and their followers to settle for anything other than independence.

Indeed, where such settlements follow-on from a period of violent conflicts, the positions of the sides will tend to be deeply entrenched. Ethnically motivated violence tends to polarize societies more than most other types of conflict. Often, the protagonists can are informed by prolonged experiences of injustice and suffering of their constituencies. Given the asymmetric nature of ethnic conflict, sacrifices on both sides in terms of lives, property and economic development tend to be particularly high.

Struggles for perceived self-determination also produce another effect that impacts on the chances of peace settlements. The armed opposition groups will often necessarily function in secret, and in the matter of highly organized cadre movements. Such movements are not always the most shining models of internal democratic organization. In addition, they may claim absolute leadership in relation to their particular cause, displacing any other potential representatives of the population concerned. They will insist on a unipolar claim to representation in internationalized discussions. If others are picked by the international facilitators to represent alongside with them, this is seen as a significant challenge to their authority.

On the other hand, the government concerned may have considered, and held out, the opposition leaders as traitors and criminals. They may find it difficult to accept that the very same individuals should now share the diplomatic stage as formally equal representatives in negotiations.

Finally, the context of autonomy settlements offers a further, particular, challenge. An autonomy settlement is in essence a new constitutional settlement for a society. Such a constitutional reconfiguration of the state must be based in a broad society consensus. The legitimacy of the constitutional order, and therefore of the state concerned, depends on it. As was already proclaimed in the UN Declaration on Human Rights, the authority to govern must be based on the will of the people. Building a new constitutional consensus requires a great deal of expertise, of public consultation and discussion, and most of all, reflection, calm and time. These conditions are precisely not available where the settlement of (at least violent) self-determination conflicts is concerned.

In such situations, there will be a significant emphasis on dealing with the armed opposition movement in order to achieve a cessation of hostilities. The actual constitutional settlement may in a way become ancillary to the aim of conflict termination. This may result in poorly thought out, or unrealistic settlements where the substance of the autonomy is concerned. Moreover, the result may lack rootedness within the populations of the newly autonomous entity, and the overall state.

II. Bilateral or Broad-based Participation

The question of whether one should aim in internationalized settlements for an essentially bilateral settlement process, or a broadly-based one, remains unresolved. As always, there are at least two schools of thought—and these stand in fundamental opposition. These are, first, the bilateralists, who argue in favour of strictly rationed participation in dialogue. They are opposed by the multilateralists, or society-based approaches. These seek to broaden participation, allowing a broad variety of stake-holders to contribute.

The first view would argue that the number of participating sides or groups in negotiations has to be restricted to an absolute minimum. Unless negotiations are conducted in an essentially bilateral fashion, it will be unlikely that an outcome can be achieved at all. Too many sides will represent too many divergent interests, and hence no agreement will ever obtain. The image of 'herding cats' is often conjured up in this context.

This view prevailed, for instance, in relation to the AU-led settlement negotiations leading to the 2005 Comprehensive Peace Agreement (CPA) in Sudan, addressing the issue of the South. The facilitators insisted on a strictly bilateral format, between the Government of Sudan (GOS) and the Sudan People's Liberation Movement (SPLA/M). It is said that the successful conclusion of the agreement would never have been possible if other groups had been included.

However, there were several factors making this a rather unique circumstance. First, the South featured in the SPLA/M—a highly organized cadre movement, under the charismatic leadership of John Garang. That movement had been fighting an armed conflict with the GOS for some two decades. It has sufficient credibility, politically and militarily, to persuade others to yield to it the privilege of exclusive representation.

However, that was not the end of the story. Even in that instance, it was found necessary to construct a mechanism addressing the concerns of other groups. The National Democratic Alliance was formed in part to maintain contact with non-represented groups, and to ensure that they would keep faith with a negotiation led only be one, admittedly highly dominant group.

The CPA precedent had rather damaging consequences for a further set of negotiations relating to Sudan, the Darfur negotiations. Based on the experience of the South, the mediators decided early on to focus exclusively on the representation of the armed movements. This excluded traditional structures of authority in Darfur, such as tribal elders, civil society organizations, women's groups and many others.

This experience proved profoundly negative, in two senses. First, the attempt to hold essentially bilateral talks involving the armed groups on the one side and the GOS on the other failed. The armed groups kept fractionating, dividing into ever more splinter groups demanding a seat at the table. In some negotiating sessions there were as many as 100 representatives. Many of these represented quite small and insignificant groups headed by the one or other disgruntled leader. Hence, instead of the strictly bilateral track that was originally intended, there emerged an unmanageable multitude of interlocutors whose representative character was in some doubt.

The second negative consequence flowed from the increasingly dubious claim of the armed factions genuinely to represent the people of Darfur. In order to make up for this deficiency, no less then three devices where employed. The joint mediators held a series of Stake-holder fora at the negotiating venue, in order to give the impression of inclusiveness that had been denied by the negotiating format. This venture was dogged by controversy. Given the hasty way of assembling these meetings, there was again doubt about the genuinely representative nature of whose selected to attend. Moreover, it became clear to the participants that their actual influence on the negotiations would be limited or non-existent. In fact, at the final of these meetings, the participants were simply asked to endorse a draft agreement which they were not allowed to see at that point. Unsurprisingly, rather than generating a sense of inclusion, this experiences demonstrated to the participants their irrelevance in the process.

Third, once the draft had been signed by the GOS and one armed opposition movement, the UN and African Union peace-keeping mission in Darfur sought to support implementation by arranging dialogue sessions about the agreement with the population. Again, as consultation occurred after the fact, an impression of a rather high-handed attitude was generated.

The African Union High Level Panel for Sudan headed by Tabo Mbeki intervened with an altogether different design for the peace process, just at the point when the draft agreement was emerging and being readied for signature by the government and at least one of the armed movements actually signed. The panel proposed to abandon negotiations focused on the armed movements altogether, and instead build up support for a negotiated outcome from the bottom up. The plan was to build up a position for Darfur through village-level consultation.

This latter approach represented an extreme version of the multi-lateral or society-based approach to peace-negotiations. The AU Panel clearly wanted to involve as many diverse stake-holders in the process of negotiation as possible, arguing that a settlement can only be achieved, and can only last, if it is based in a broad-based consensus within a given society.

III. Criteria Affecting Participation

When considering the bilateral or the society-based approaches in their purer forms, it becomes readily apparent that neither view is likely to be helpful, at least most of the time. The design of a mediated negotiating process, including issues of participation, cannot be driven by ideological adherence to the one or other school of thought. Instead of offering the one or other prescription that may or may not fit the circumstances on the ground, all that can be offered in general terms is a set of guiding principles. Such guiding principles, or criteria for participation, are derived from settlement practice and from related experiences of the past two decades or so—a period which has seen a profusion of peace settlements. The principles are:

- Positive and Negative Legality
- Relevance
- Established standing
- Full inclusivity

The first of these principles is a formal one; it is the principle of *legality*. The principle of legality operates respectively as positive and negative legality.

A. Positive Legality

Positive legality ensures that those recognized as a matter of law (rather than politics) as the representatives of the entities in dispute must participate in any negotiation and the resulting agreement. International law does not assign any binding force to agreements that have not been consented to by the legally empowered representative of the entities concerned. While the issue of the representation of domestic constituencies may be somewhat more complex, it is clear that the recognized government and those who have achieved comparable standing as recognized representatives of the population concerned must be involved.

B. Negative Legality

Negative legality, on the other hand, may preclude some groups or purported interlocutors from direct participation in talks or the resulting agreements. There are two types of claims associated with this issue. First, there is negative legality at the level of international law. Certain individuals may have offended against essential rules of international law to an extent that would render them ineligible to participate in an internationally sponsored negotiation process. Second, the government of the territorial state concerned may consider certain groups of individuals unlawful. Both of these categories will be addressed at greater lengths later in this presentation.

C. Relevance

In addition to the legal requirements, there are political criteria. The first is *relevance.* There is no point to holding negotiations if key groups necessary for the implementation of the agreement that is envisaged are not invited. While this may not sound appetizing to some, it remains true that this will generally speaking need to include the armed groups that have achieved some form of effectiveness on the ground. Peace cannot be made if those at war with one another are not in the room.

However, as the Darfur experience noted above has shown, it is not sufficient to define only those who hold the guns as relevant. The mistake there was to introduce additional representatives late in the game. By that time, the armed groups had become supremely comfortable with their role as exclusive representatives of the region of Darfur. Hence, relevance must be supplemented with the additional requirement of established standing.

D. Established Standing

Established standing refers to figures who would traditionally be seen as representatives of the population at a local, regional, ethnic or tribal level. These might be leaders of parties out of government, religious leaders or tribal elders, or elected members of local councils. This constituency group would represent the traditional sources of authority within the society in question. Often, such figures enjoy considerable local legitimacy and authority. However, they may have been displaced from their traditional role as integrating factors within the society due to the emergence of the new, armed elite that is driving the conflict. Empowering the voices of leaders of established standing may be an important step in balancing the radicalism of view that sometimes obtains among those directly involved in an armed campaign.

E. Full Inclusivity

The final requirement is that of *full inclusivity*. This describes important interest groups within a given society—interest groups that may traditionally not have had a voice in major political decisions.

The UN as a facilitator or mediator in peace negotiations is bound by Security Council Resolution 1325 and related standards. This means that the UN has to be particularly mindful of the representation of women's interests in peace negotiations, in addition to the representation of women in the actual delegations of negotiators.

There are other groups that merit special attention. Civil society, trade union and business leaders can represent an import constituency for peace. And, there may be a need to pay particular attention to the inclusion of groups representing population segments that are particularly vulnerable. This may include children, the disabled, the displaced and refugees.

It will, of course, not always be possible to include all of these groups in the actual negotiating process. However, this does not mean that they would need to remain without a voice.

F. Willingness and Capacity to Deliver

Finally, only those groups and individuals willing and able to deliver on commitments made during the negotiations should be eligible for inclusion. That does not mean that participation can or should be made subject to substantive pre-conditions. For instance, it may not be advisable to hold autonomy negotiations under the premise that participants must commit themselves to the principle of territorial unity before they attend. Even if it is believed that the talks will be substantively bounded by that doctrine, formal pre-conditions of this kind may exclude groups that are essential for the process due to their relevance. Such groups cannot be expected to accept before the talks what may be the envisaged outcome of the talks. Instead, the negotiating process itself would ordinarily be a process that may socialize participants into outcomes that they might not have been able to support before the negotiations commenced.

On the other hand, participation in negotiations can be made conditional on an assurance that the interlocutors either have the ability to bind their side to the outcome, or at least that they will be willing to argue the case for the outcome they helped to generate.

IV. Possible Steps aiming to Broaden Inclusion

Of course, it is not always possible to offer a negotiating format that ensure full participation of all groups that potentially fulfil the criteria listed above. The negotiating process must remain manageable. Despite this constraint, there are a number of avenues available to ensure broad involvement. These include:

- Direct inclusion of diverse groups
- Indirect inclusion through a caucus and a contact mechanism
- Cross representation
- Civil society fora
- Referral of key issues to a more broadly based, subsequent negotiation or national dialogue

Direct inclusion. One approach is to establish a bilateral format (government and opposition). However, the opposition delegation would be required to feature a broad spectrum of political groups, ensuring direct, broad representation in the delegation of the opposition itself.

This can be achieved by fiat on the part of the hosts of the mediation. For instance, the Kosovo delegation for the Rambouillet talks was more or less determined by one powerful state, insisting somewhat controversially on a balancing of the locally elected group (the LDK party of elected (shadow) President Ibrahim Rugova) with a large segment of military leaders (KLA) and their associated parties.

When the negotiations about Kosovo's future status continued under UN auspices in the form of the Vienna negotiations chaired by President Ahtisaari some years later, this mixed model was retained. Again, there was essentially a bilateral format, featuring the Federal Republic of Yugoslavia/Serbia, and the Kosovo side. However, Kosovo generated a so-called unity team, which in fact included all the major political parties.

Indirect inclusion. In the case of the Kosovo negotiations, this form of broad, direct representation was supplemented with an additional mechanism. The unity team designated one of its members as contact officer for groups whose interests were of particular concern in the negotiations. These were the numerically smaller ethnic groups, including the Kosovo Serbs, Roma and others. With the blessing and encouragement of the Unity Team, these groups had formed a caucus, which fed a very substantive position paper on the protection of the rights of communities into the negotiating process. That position paper exercised an important influence on the Ahtisaari settlement plan that emerged.

Cross representation. In this particular case, a rather odd situation prevailed. The communities were represented through this contact mechanism via the Kosovo delegation. However, they were also represented through the FRY/Serbia delegation. That delegation actually included representatives from non-dominant groups from Kosovo, or from the other side, as it were. Kosovo chose not to object to this rather strange situation, arguing that it was in favour of maximum protection of minority communities and therefore not opposed to their representation on both delegations.

Another instance of cross representation occurred during the negotiations about the North-East of Sri Lanka. The negotiations were conducted between the Tamil Tigers and the Sri Lanka government. However, the territory dominated and represented by the Tamil Tigers contained a sizeable Muslim religious minority. That community did not consider itself fully represented by the Tamil Tiger movement. The government side took it upon itself to offer to the Muslim minority representation in its own delegation.

Civil society fora. Reference was already made to the attempt to supplement the nominally bilateral Darfur negotiations with parallel civil society fora. In that instance, the attempt failed, as there was no clear link between negotiations and the civil society meetings that were held—despite the fact that the events took place at the negotiating venue and with the participation of the Joint Chief Mediator. Clearly, major consultations of constituencies that do not feature in the negotiations only make sense if they can exercise a visible influence on the actual

negotiations. However, where conducted in a way that has been well prepared in terms of criteria for the selection of participants, preliminary meetings of the individual constituency groups, and an undertaking that the outcome of the consultation will be listened to by the sides and the mediation, such a mechanism can be highly useful.

Deferral. Finally, there may be situations where it is impossible to ensure broad-based participation in the negotiating process. These will tend to be cases of on-going fighting, where a cease-fire and other military issues dominate the agenda. Naturally, such negotiations will focus on the government and the armed groups. However, in such circumstances, it is important to delay broader decisions affecting the political future of the country or region in question until they can be addressed by a more representative group. Hence, there might be a cease-fire, and an agreement on interim governance either through power-sharing, or through a neutral, technocratic interim administration. The space generated by such an interim arrangement would then be used to prepare for a broad-based national dialogue conference that would be full inclusive. The outcome of that dialogue would then flow into a fresh constitution-making process.

Overall, the above considerations confirm that there is an increasing recognition of the fact that autonomy negotiations must be based in a broad-based, societal consensus. This generally translates itself into an attempt to offer a relatively open and transparent negotiating format, giving access to diverse stake-holder groups. That said, in situation characterized by extreme violence and a prolonged history of conflict, such an approach may simply not be available. In those circumstances, an essentially bilateral format may commend itself, allowing the leaders of the side space to explore what may in the end be a very courageous and risky compromise for them.

V. Identifying Nominated Groups and their Representatives

There are a number of settlements that were negotiated essentially internally between a government and an opposition movement. While some of these settlements have taken hold, others were not in the end implemented or failed (e.g., Chechnya, Corsica, Tuareq and Berbers in several North African states). Failure, however, may be less attributable to the bilateral nature of the negotiations, and more to the lack of internationalized involvement in implementation in these instances.

Up to the termination of the Cold War, self-determination conflicts—and their settlements—were often conducted in an environment dominated by considerations of non-intervention in the internal affairs of states. This concern has remained strong in an international system that is still mainly operates by way of inter-state relations. However, the risk of international instability stemming from internal conflicts, the proliferation of very violent ethnic conflicts with the termination of the Cold War, and the simultaneous opening-up of a significant number of settlement opportunities since 1990 has led to significant change in this respect. International actors are now routinely involved in the creation of autonomy settlements.

The United Nations remains the leading actor in this respect, but by no means the only one. Other actors include regional organizations, such as the African Union, the OSCE or the EU, sub-regional actors, such as IGAAD, SADC or ECOWAS, individual states, including the US, UK, France, Norway, Turkey and most recently Qatar, and even specialist non-governmental organizations, including Intermediate, Humanitarian Dialogue, International Alert, the Carter Centre, the Community of St Egidio and several others.

Whatever the diversity of actors, the same principled considerations relating to participation in the dialogue mentioned above apply. However, the identity of the facilitator or mediator can have an impact on the selection of participants. Powerful governments acting as mediators will have the ability to shape the format of the negotiations, including criteria for participation—the composition of the Kosovo delegation at Rambouillet was already mentioned above as an example. On the other hand, the institutional culture of certain regional organizations may lead to great caution in proposing participants. Some of these organizations tend to be quite sovereignty conscious, preferring to defer to the views of the central government when approaching the issue of participation.

The United Nations Secretariat tends to take the view that no restrictions should be placed on its role as facilitator or mediator. This includes selection of participating groups or individuals, which is driven by the necessities of each individual case. Of course, the Secretariat will at times be guided by the Security Council or, more rarely, the General Assembly in considering this issue.

To what extent can the parties themselves exercise influence over the selection of participating groups or individuals? The answer to this question is relatively simple. Where the format of negotiations is concerned, the governmental side will enjoy a significant advantage. It will most likely be consulted in preliminary visits or contacts by the mediators on its views and preferences. The mediators will be fully aware that they are unlikely to launch a negotiation if a format is adopted that triggers fundamental opposition from the government. However, in the end, it is the mediator's responsibility to define the shape of the mediation and their approach to its format, just as it is the right of the government concerned either to participate in the process or not.

Opposition movements will find it less easy to influence the preliminaries of the negotiations, including even the question of whether they are to be regarded as a 'party' in the negotiations at all. It remains the role of the facilitator or mediator to establish which group needs to be at the table in autonomy negotiations. As was noted above, there is a whole range of options available to the mediation, trying to balance broad representation from diverse constituency groups within the entity in question on the one side, with the need to achieve a manageable negotiating process, and possibly the requirements imposed by the presence of armed groups.

Like the government, opposition groups can decide to opt in or out, depending on their assessment of whether or not the proposed format will suit their interests. However, for a whole host of reasons, they are more likely to experience significant pressure to participate according to the format put forward by the facilitators. As non-state actors, they may not even realize that they can have a role in the pre-negotiation process. They may not be fully aware of the available options. If they do object to the proposed format, they will face arguments of 'missing the boat' unless they participate at this 'critical juncture' which will be 'the only chance' to have their grievances aired. If they do fail to participate, action may be taken to try and marginalize them as an actor, and to reduce their potential as a so-called spoiler in the negotiations.

Of course, even governments may be subjected to certain pressures. If they are persistently holding up the negotiating process by opposing the format proposed by the mediation, they may face criticism and diplomatic isolation. In the cases of 'directed' mediation, there have even been threats of economic or other sanctions. But these cases are very rare indeed. Hence, the pressure points on governments tend to be reputational, rather than coercive.

Overall it remains part of the role of the mediator or facilitator to shape the format of the negotiations in a consensus approach. This means listening to the views of the parties, but insisting in the end on the format they believe best suited to the resolution of conflict. Moreover, as was noted above, UN led-mediations are conducted in accordance with Security Council Resolution 1325 (2000) and related standards. Accordingly, the parties will face pressure to ensure adequate representation of women in their delegations. The mediation will not be able to enforce this requirement, but it will argue strongly for compliance with its requests. Moreover, it would often be the case that the mediation may provide for capacity building events to enable women, or other constituencies, to contribute effectively to the negotiating effort. This applies in particular to ventures as important as the reconfiguration of the state structure through autonomy discussions.

Where the facilitator loses the support of the one or other side in designing the process, including participation, failure is likely. Hence, the mediation will generally be finely attuned to this issue. Indeed, participation issues tend to dominate pre-negotiations. It is entirely legitimate for the sides to raise their concerns, and put their views on this issue during that initial phase of discussions. However, in most instances, it is expected that the issue of participation is resolved before actual negotiations start. Participation *ad referendum* (subject to approval by the sides during the negotiations), or late additions to participation would be unusual and are best avoided. Rather than going down that avenue, the preferred solution would instead be to divide the negotiating process into distinct stages. The first stage, for instance, may be bilateral discussions concerning a cease-fire, basic principles, and the modalities of the follow-on process among a small group of interlocutors. On the basis of such agreement, the follow on process would then be conducted with a significantly expanded group. That process might be designated in a different way, for instance as a process of National Dialogue.

If the mediation remains in the driving seat where the nomination of groups for participation is concerned, the position is different in relation to the appointments of the individuals representing those groups. Once the mediator has established the constituencies to be represented in the negotiations after preliminary dialogue with the sides, it is up to those constituencies to determine the individuals who will represent them. The mediator may advise the sides on composition of their delegations, of course, in particular where the presence of the one or other individual may be seen as excessively provocative by the other side, and may risk collapse of the talks. However, in the end, it is the responsibility for each side to nominate its delegation.

There is in general no right of a side in the negotiation to review and possibly reject the list of participants nominated by another party. In autonomy negotiations following on from violent conflict, the government will often claim that certain individuals have engaged in common crimes under the law of the state concerned. Indeed, in some instances, the government has been known to seek to prevent delegates to travel from airports under their control, or to have international arrest warrants served upon them in foreign negotiating venues.

It is, of course, the essence of the autonomy negotiations to end a conflict and to restore clarity in relation to contested claims of jurisdiction in relation to the territory under dispute. A settlement associated with an autonomy arrangement will generally acknowledge that common offences, such as mere participation in the conflict at issue, will not be pursued by the central government. Indeed, often fighters from the other side will positively benefit from programmes of integration with the regular armed forces of their former opponents, or from programmes aiming to facilitate their return to civilian life. In view of this background it is not deemed helpful on the part of the governmental side to insist on the application of its own criminal jurisdiction in relation to interlocutors put forward by the other side during the settlement process. Indeed, this rather constitutes an affront to the mediators or facilitators and is likely to be interpreted as obstruction to the process.

The situation is different in relation to crimes under international law. International law precludes blanket amnesties covering genocide, crimes against humanity, sexual violence, grave war crimes or serious and persistent human rights violations. Under authoritative guidance issued to UN mediators, the United Nations would be prevented from being part to an agreement violating this principle. However, this relates to the outcome of the negotiations, rather than the negotiating process itself.

It is a more difficult question whether or not those suspected of crimes under international law can be allowed to participate in the negotiations. At least where the individuals concerned have been indicted by the International Criminal Court, or a Tribunal established under Chapter VII authority of the UN Security Council, and arrest warrants have been issued, such participation would be precluded. An exception might concern negotiations conducted on a territory that is not party to the ICC Statute, in relation to warrants issued by the ICC. While the ICC is not formally part of the UN system, UN involvement in such a negotiation would, however, in practice be unlikely.

Of course, such individuals, while not on side during the negotiations, may still 'remotely pilot' their delegation, being ensconced in an areas beyond the reach of international justice.

VI. Some Specific Considerations Concerning the Sahara Issue

The situation concerning the Sahara issue raises a number of issues that are specific to it. First, the Sahara issue has been treated within the UN system as a non-self governing territory [most recently, e.g., Report of the Special Committee, A.67/23] and, since 1988, by the Security Council as a dispute related to peace and security. Second, one particular actor, POLISARIO, has been recognized as a party in this dispute. Third, an attempt has been made to establish the territory as an independent state under the designation of the SADR. This has attracted a not insignificant number of recognitions, although the number of recognitions has been decreasing over recent years.

These background factors require a few additional observations. Starting with the latter factor, it is clear that the declaration of the SADR is not opposable to the Kingdom of Morocco. Even if there have been some recognitions, there is no legal requirement to accept this unilateral designation. Hence, Morocco could not be expected to negotiate in a format that would feature formal representation of the SADR and imply recognition of its claimed legal identity. Given the continued treatment of the territory as a non-self-governing territory by the UN organs, this result is hardly surprising.

Second, it is also clear that POLISARIO is widely regarded as the national liberation movement in relation to the Sahara issue and has been so designated by the then Organisation of African Unity (OAU). The United Nations General Assembly has considered POLISARIO as 'the representative of the people of Western Sahara' [Resolution 34/37, 21 November 1979]. The question is whether it is therefore necessarily the case that any negotiation about the future of the territory needs to be conducted in a strictly bilateral fashion.

National liberation movements have in the past tended to claim a unipolar right of representation. One might, however, need to question the extent to which this view is still persuasive after a considerable passage of time. Over what is now close to 40 years, new constituencies have emerged within the Sahrawi populations, including the expatriate or refugee communities. These deserve to the heard when the modalities of the implementation of the right to self-determination for the Western Sahara are being discussed. Moreover, the most recent report of the UN Secretary-

General indicates that there has been criticism of the nature of leadership and representation from within the organization in question.

The government of Morocco points to the fact that most of the Sahrawi population in the Saharan cities did not recognize itself in the Polisario as being their representative or as a national liberation movement. This population has been actively participating to the economic, social and cultural development of the Sahara region as well as to all the local and national elections since 1976. This population considers itself in part as being represented by the Royal Council for Saharan Affairs which has, since 2007, participated in all the rounds of the political process of negotiations, launched under the auspices of the United Nations, to achieve a political and mutually acceptable political solution to this dispute.

In this instance, there is also the issue of newcomers to the territory. The issue is of course made complicated by allegations of demographic manipulation. One would have to ask, however, whether such constituencies can be disenfranchised after they have established firm ties with the territory over an entire generation or more.

One might also note that the United Nations search for a political solution to the Sahara dispute has throughout involved "the States of the Region", namely Algeria and Mauritania. Since April 2004, Security Council resolutions on the issue are calling on "the parties and the Sates of the region to cooperate fully with the United Nations and with each other to strengthen their involvement to end the current impasse and to achieve progress towards a political solution" [(1541 (2004), 1570 (2004), 1598 (2005), 1634 (2005), 1675 (2006), 1720 (2006), 1754 (2007), 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010), 1979 (2011), 2044 (2012).]

The implications of the first item, relating to the present status of the territory are also not free from controversy. However, it appears to be the common position of all that an act of self-determination is required. According to the right to self-determination, all peoples have the right to 'freely determine their political status' [Resolution 1514 (XV), para 2.]. It is generally assumed that a self-determination entity enjoys the options of independence, free association with an independent state or integration with an independent state.

A decision on independence would come about 'in accordance with the freely expressed will and desire' of the relevant population [id. Para 5].

Association or integration require a 'free and voluntary choice of the peoples of the territory concerned expressed through informed and democratic processes' [Resolution 1541 (XV), Principle VII (a)].

Integration should be the result of 'the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage [id., Principle IX (b)].

However, there is also room for the 'emergence into any other political status freely determined by a people' as a mode of implementing the right of self-determination' Resolution 2625 (XXV), no para].

In international practice, it would be rare that all three, or possibly more, options for actualizing the right to self-determination would be put to a popular vote. Instead, the act of popular will would ordinarily focus on one particular option that is either accepted or rejected. If a particular option is rejected, another alternative would need to be put forward.

In relation to autonomy as a possible outcome, there are two alternative lines of argument. Either, autonomy would be considered as a form of integration, in which case the requirement of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage, would apply. Or, autonomy could be considered as 'any other political status freely determined by the people.' While Resolution 2625 (XXV) is less specific on the means of establishing the will of the people in that instance, it is clear that it, too, needs to be a mechanism that genuinely manifest the will of the people.

In the end, therefore, the act of self-determination is not normally achieved through an agreement between a central government and a liberation movement. Whichever outcome obtains, it must be based in a free determination of the will of the people of the territory concerned. The means of such a free determination is generally a referendum, internationally monitored or supervised, although public consultations or other forms of assessment of popular will

have on occasion been found acceptable. Clearly, though, a formal referendum after broad consultation and information of the people concerned is the better option.

Where a decision on autonomy is concerned, practice indicates that there are several possible options in the context of the implementation of the right to self-determination:

- Autonomy can be offered pending agreement of the sides on a mechanism to address the definite status of an entity (Rambouillet proposal);
- Autonomy can be offered as an interim solution, along with an agreement on the actual act of self-determination through a referendum on either continued autonomy or independence after a pre-determined period (South Sudan and Bougainville settlements); or
- Autonomy can be accepted as the definite settlement.

In the final of these instances, it is important to note that autonomy would not be offered as an alternative to self-determination. It would be the mode of actualizing self-determination of the people concerned. If the autonomy proposal is rejected, the act of self-determination would have to be considered as deferred, pending agreement on a new proposal and its adoption by popular will. Hence, it will be in the interest of those promoting the idea of autonomy to present a very advanced version of autonomy that exhibits the very features of self-government that a broad segment of the population would find attractive. The initial autonomy proposal presented by the government of Morocco in 2007 [S/2007/206] may offer the potential to explore its development into such a 'third option'.

Settlement practice in relation to autonomy as a definite status settlement would generally favour the negotiation of a comprehensive and detailed framework for self-governance, if not the full autonomy statute, before an act of will in relation to that option is administered. Best practice would emphasize the need for a very broadly-based model of consultation and involvement in generating such a framework. Ordinarily this would take the form of a national dialogue process. Such a process would generally be conducted in a politically neutral environment, assured through international facilitation. The central government would be assured representation, along with the national liberation movement, and other representative groups in a given society.

VII. Conclusion

It is undisputed that the issue of Western Sahara must be resolved through an act of self-determination. International law does not preclude autonomy as an outcome of such an act of self-determination. However, any autonomy proposal that is put forward for possible acceptance by the people of the Western Sahara would need to be the result of broad-based consultation with a sufficiently inclusive range of stake-holders. The proposal would most likely need to be quite specific in its terms. If it aims to prevail over alternative options, it would also need to offer very far-reaching self-government, approaching what is sometimes known as 'the third option'.

In internationally mediated autonomy negotiations, it tends to be the mediation which will establish the format of the talks, including the nomination of groups that may participate, although it will do so in consultation with the parties. The mediation will tend to prescribe maximum number of delegates for the sides. The groups will then themselves identify their individual representatives.

The views expressed are the author's alone and not attributable to any government or institution.