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WESTERN SAHARA

ADVISORY OPINION OF 16 OCTOBER 1975

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WESTERN SAHARA

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ADVISORY OPINION

Present: *President* LACHS; *Vice-President* AMMOUN; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc BONI; *Registrar* AQUARONE.

Concerning certain questions relating to Western Sahara (Río de Oro and Sakiet El Hamra),

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions upon which the advisory opinion of the Court has been asked were laid before the Court by a letter dated 17 December 1974, filed in the Registry on 21 December 1974, addressed by the Secretary-General of the United Nations to the President of the Court. In his letter the Secretary-General informed the Court that, by resolution 3292 (XXIX) adopted on 13 December 1974, the General Assembly of the United Nations had decided to request the Court to give an advisory opinion at an early date on the questions set out in the resolution. The text of that resolution is as follows:

"*The General Assembly*,

Recalling its resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Recalling also its resolutions 2072 (XX) of 16 December 1965, 2229 (XXI) of 20 December 1966, 2354 (XXII) of 19 December 1967, 2428 (XXIII) of 18 December 1968, 2591 (XXIV) of 16 December 1969, 2711 (XXV) of 14 December 1970, 2983 (XXVII) of 14 December 1972 and 3162 (XXVIII) of 14 December 1973,

Reaffirming the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV),

Considering that the persistence of a colonial situation in Western Sahara jeopardizes stability and harmony in the north-west African region,

Taking into account the statements made in the General Assembly on 30 September and 2 October 1974 by the Ministers for Foreign Affairs of the Kingdom of Morocco [1] and of the Islamic Republic of Mauritania [2],

Taking note of the statements made in the Fourth Committee by the representatives of Morocco [3] and Mauritania [4], in which the two countries acknowledged that they were both interested in the future of the Territory,

Having heard the statements by the representative of Algeria [5],

Having heard the statements by the representative of Spain [6],

(The references given below appear in the text adopted by the General Assembly.)

[1] A/PV.2249.

[2] A/PV.2251.

[3] A/C.4/SR.2117, 2125 and 2130.

[4] A/C.4/SR.2117 and 2130.

[5] A/PV.2265; A/C.4/SR.2125.

[6] A/PV 2253; A/C.4/SR.2117, 2125, 2126 and 2130.

Noting that during the discussion a legal controversy arose over the status of the said territory at the time of its colonization by Spain,

Considering, therefore, that it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem,

Bearing in mind Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court of Justice,

1. *Decides* to request the International Court of Justice, without prejudice to the application of the principles embodied in General Assembly resolution 1514 (XV), to give an advisory opinion at an early date on the following questions:

'I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one *(terra nullius)*?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?';

2. *Calls upon* Spain, in its capacity as administering Power in particular, as well as Morocco and Mauritania, in their capacity as interested parties, to submit to the International Court of Justice all such information and documents as may be needed to clarify those questions;

3. *Urges* the administering Power to postpone the referendum it contemplated holding in Western Sahara until the General Assembly decides on the policy to be followed in order to accelerate the decolonization process in the territory, in accordance with resolution 1514 (XV), in the best possible conditions, in the light of the advisory opinion to be given by the International Court of Justice;

4. *Reiterates* its invitation to all States to observe the resolutions of the General Assembly regarding the activities of foreign economic and financial interests in the Territory and to abstain from contributing by their investments or immigration policy to the maintenance of a colonial situation in the Territory;

5. *Requests* the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to keep the situation in the Territory under review, including the sending of a visiting mission to the Territory, and to report thereon to the General Assembly at its thirtieth session."

2. In a communication received in the Registry on 19 August 1975, the Secretary-General indicated that, owing to a technical error, the word "controversy" in the ninth paragraph of the preamble of the above resolution had been replaced by the word "difficulty" in the text originally transmitted to the President of the Court.

3. By letters dated 6 January 1975 the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for advisory opinion to all States entitled to appear before the Court.

4. The Court having decided, pursuant to Article 66, paragraph 2, of the Statute, that the States Members of the United Nations were likely to be able

to furnish information on the questions submitted, the President, by an Order dated 3 January 1975, fixed 27 March 1975 as the time-limit within which the Court would be prepared to receive written statements from them. Accordingly, the special and direct communication provided for in Article 66, paragraph 2, of the Statute was included in the letters addressed to those States on 6 January 1975.

5. The following States submitted written statements or letters to the Court in response to the Registry's communications: Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, France, Guatemala, Mauritania, Morocco, Nicaragua, Panama and Spain. The texts of these statements and letters were transmitted to the States Members of the United Nations, and to the Secretary-General of the United Nations, and made accessible to the public as from 22 April 1975.

6. In addition to its written statement, Spain submitted six volumes entitled "Information and Documents presented by the Spanish Government to the Court in accordance with paragraph 2 of resolution 3292 (XXIX) of the United Nations General Assembly", and two volumes of "Further Documents" submitted on the same basis. Morocco similarly submitted a large number of documents "in support of its written statement and in accordance with paragraph 2 of resolution 3292 (XXIX)". Mauritania likewise appended documentary annexes to its written statement. All three States provided cartographical material.

7. The Secretary-General of the United Nations, pursuant to Article 65, paragraph 2, of the Statute and Article 88 of the Rules of Court, transmitted to the Court a dossier of documents likely to throw light upon the question, together with an Introductory Note; this dossier was received in the Registry in several instalments, in the two official languages of the Court, between 18 February and 15 April 1975. On 23 April 1975 the Registrar transmitted to the States Members of the United Nations the Introductory Note and the list of the documents comprised in the dossier.

8. By letters dated 25 and 26 March 1975, respectively, Morocco and Mauritania each submitted a request for the appointment of a judge *ad hoc* to sit in the case. At public sittings held from 12 to 16 May 1975 the Court heard observations on this question from representatives of those States, as also of Spain and Algeria, which had likewise asked to be heard.

9. In an Order of 22 May 1975 (*I.C.J. Reports 1975*, pp. 6-10) the Court concluded that, for the purpose of the preliminary issue of its composition, the material submitted to it indicated that at the time of the adoption of resolution 3292 (XXIX):

> ". . . there appeared to be a legal dispute between Morocco and Spain regarding the Territory of Western Sahara; that the questions contained in the request for an opinion [might] be considered to be connected with that dispute; and that, in consequence, for purposes of application of Article 89 of the Rules of Court, the advisory opinion requested in that resolution appear[ed] to be one 'upon a legal question actually pending between two or more States';"

with regard to Mauritania, the Court concluded that the material submitted to it, while showing that at the time of the adoption of the resolution "Mauritania had previously adduced a series of considerations in support of its

particular interest in the territory of Western Sahara", indicated, for the purpose of the aforesaid preliminary issue, that at that time "there appeared to be no legal dispute between Mauritania and Spain regarding the Territory of Western Sahara; and that, in consequence, for purposes of application of Article 89 of the Rules of Court, the advisory opinion requested" appeared "not to be one 'upon a legal question actually pending' between those States"; those conclusions, the Court stated, "in no way prejudge[d] the *locus standi* of any interested State in regard to matters raised in the present case, nor [did] they prejudge the views of the Court with regard to the questions referred to it", or any other question which might fall to be decided in the further proceedings, including those of the Court's competence and the propriety of its exercise. The Court found accordingly that Morocco was entitled under Articles 31 and 68 of the Statute and Article 89 of the Rules of Court to choose a person to sit as judge *ad hoc*, but that, in the case of Mauritania, the conditions for the application of those Articles had not been satisfied.

10. Morocco had, in its communication of 25 March 1975 mentioned above chosen Mr. Alphonse Boni, President of the Supreme Court of the Ivory Coast, to sit as judge *ad hoc* in the case. Spain, consulted in accordance with Article 3, paragraph 1, of the Rules of Court, did not make any objection to this choice.

11. By a letter of 29 May 1975, the Registrar invited the Governments of the States Members of the United Nations to inform him whether they intended to take part in the oral proceedings. In addition to the four Governments which had already submitted observations during the hearings devoted to the question of the appointment of judges *ad hoc*, the Government of Zaire indicated that it proposed to submit its point of view to the Court. These Governments and the Secretary-General of the United Nations were informed that the date fixed for the opening of the oral proceedings was 25 June 1975. In the course of 27 public sittings, held between 25 June and 30 July 1975, oral statements were made to the Court by the following representatives:

for Morocco:
H.E. Mr. Driss Slaoui, Ambassador, Permanent Representative to the United Nations;
Mr. Magid Benjelloun, *Procureur général* at the Supreme Court of Morocco;
Mr. Georges Vedel, *Doyen honoraire* of the Faculty of Law, Paris;
Mr. René-Jean Dupuy, Professor at the Faculty of Law, Nice; member of the Institute of International Law;
Mr. Mohamed Bennouna, Professor at the Faculty of Law, Rabat;
Mr. Paul Isoart, Professor at the Faculty of Law, Nice;

for Mauritania:
H.E. Mr. Moulaye el Hassen, Permanent Representative to the United Nations;
Mr. Yedali Ould Cheikh, Assistant Secretary-General of the Office of the President;
H.E. Mr. Mohamed Ould Maouloud, Ambassador;
Mr. Jean Salmon, Professor in the Faculty of Law at the Université libre de Bruxelles;

for Zaire: Mr. Bayona-ba-Meya, Senior President of the Supreme Court of Zaire, Professor at the Faculty of Law, National University of Zaire;

for Algeria: H.E. Mr. Mohammed Bedjaoui, Ambassador of Algeria to France;

for Spain: H.E. Mr. Ramón Sedó, Ambassador of Spain to the Netherlands;
Mr. Santiago Martínez Caro, Director of the technical staff of the Minister for Foreign Affairs;
Mr. José M. Lacleta, Legal Adviser to the Ministry of Foreign Affairs;
Mr. Fernando Arias-Salgado, Legal Adviser to the Ministry of Foreign Affairs;
Mr. Julio González Campos, Ordinary Professor of International Law at the University of Oviedo.

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12. The Court will first consider certain matters regarding the procedure adopted in the present case. One is a suggestion that the Court ought to have suspended the proceedings on the substance of the questions referred to it and to have first confined itself to determining in interlocutory proceedings certain issues said to be preliminary: whether the Court is confronted with a legal question; whether there are compelling reasons for the Court's declining to reply to the request; what the eventual effect of the Court's findings may be in respect of the further process of decolonization of the territory. That these issues are of a purely preliminary character is, however, impossible to accept, particularly as they concern the object and nature of the request, the role of consent in the present proceedings, and the meaning and scope of the questions referred to the Court. Far from having a preliminary character, they constitute part of the substance of the case. Moreover, the procedure suggested, instead of facilitating the work of the Court, would have caused unwarranted delay in the discharge of the Court's functions and in its responding to the request of the General Assembly. In the event, the procedure adopted by the Court afforded a full opportunity for all the above issues to be examined, and in fact they were debated in extensive proceedings.

13. Another suggestion is that, before pronouncing on the requests made by Morocco and Mauritania for appointment of judges *ad hoc*, the Court ought to have decided with finality whether there was in this case a legal dispute between those States and Spain. However, as the Court said in the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*:

> "... the question whether a judge *ad hoc* should be appointed is of course a matter concerning the composition of the Bench and possesses ...

absolute logical priority. It has to be settled prior to the opening of the oral proceedings, and indeed before any further issues, even of procedure, can be decided. Until it is disposed of the Court cannot proceed with the case. It is thus a logical necessity that any request for the appointment of a judge *ad hoc* must be treated as a preliminary matter on the basis of a prima facie appreciation of the facts and the law. This cannot be construed as meaning that the Court's decision thereon may involve the irrevocable disposal of a point of substance or of one related to the Court's competence . . . [T]o assert that the question of the judge *ad hoc* could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case." (*I.C.J. Reports 1971*, p. 25.)

It is also to be observed that, if the Court had subordinated its decision on the requests for judges *ad hoc* to a final conclusion on these allegedly preliminary issues, the practical result would have been that these issues – some of the most important and controverted in the case – would have been decided with the participation of a judge of Spanish nationality and without the question of judges *ad hoc* having been resolved.

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14. Under Article 65, paragraph 1, of the Statute:

"The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The present request has been made pursuant to Article 96, paragraph 1, of the Charter of the United Nations, under which the General Assembly may seek the Court's advisory opinion on any legal question.

15. The questions submitted by the General Assembly have been framed in terms of law and raise problems of international law: whether a territory was *terra nullius* at the time of its colonization; what legal ties there were between that territory and the Kingdom of Morocco and the Mauritanian entity. These questions are by their very nature susceptible of a reply based on law; indeed, they are scarcely susceptible of a reply otherwise than on the basis of law. In principle, therefore, they appear to the Court to be questions of a legal character. It may be added that none of the States which have appeared before it have contended that the questions are not legal questions within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute. It is necessary, however, to consider the matter further, because doubts have been raised concerning the legal character of the questions in the particular circumstances of this case.

16. It has been suggested that the questions posed by the General Assembly are not legal, but are either factual or are questions of a purely historical or academic character.

17. It is true that, in order to reply to the questions, the Court will have to determine certain facts, before being able to assess their legal significance.

However, a mixed question of law and fact is none the less a legal question within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute. As the Court observed in its Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*:

> "In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a 'legal question' as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues." (*I.C.J. Reports 1971*, p. 27.)

18. The questions put to the Court confine the period to be taken into consideration to the time of colonization by Spain. The view has been expressed that in order to be a "legal question" within the meaning of Article 65, paragraph 1, of the Statute, a question must not be of a historical character, but must concern or affect existing rights or obligations. Yet there is nothing in the Charter or Statute to limit either the competence of the General Assembly to request an advisory opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations. There have been instances of Advisory Opinions which did not concern existing rights nor an actually pending issue (e.g., *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1922, P.C.I.J., Series B, No. 1*). When confronted, in the advisory case concerning *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, with the proposition that the Court should not deal with a question couched in abstract terms, this Court rejected it in the following words:

> "That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise." (*I.C.J. Reports 1947-1948*, p. 61.)

And in its Advisory Opinion of 12 July 1973 the Court said:

> "The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute." (*Application for Review of*

Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973, p. 172.)

Although these pronouncements were made in somewhat different contexts, they indicate that the references to "any legal question" in the above-mentioned provisions of the Charter and Statute are not to be interpreted restrictively.

19. Thus, to assert that an advisory opinion deals with a legal question within the meaning of the Statute only when it pronounces directly upon the rights and obligations of the States or parties concerned, or upon the conditions which, if fulfilled, would result in the coming into existence, modification or termination of such a right or obligation, would be to take too restrictive a view of the scope of the Court's advisory jurisdiction. It has undoubtedly been the usual situation for an advisory opinion of the Court to pronounce on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs. However, the Court may also be requested to give its opinion on questions of law which do not call for any pronouncement of that kind, though they may have their place within a wider problem the solution of which could involve such matters. This does not signify that the Court is any the less competent to entertain the request if it is satisfied that the questions are in fact legal ones, and to give an opinion once it is satisfied that there is no compelling reason for declining to do so.

20. The Court accordingly finds that it is competent under Article 65, paragraph 1, of its Statute to entertain the present request, by which the General Assembly has referred to it questions embodying such concepts of law as *terra nullius* and legal ties, regardless of the fact that the Assembly has not requested the determination of existing rights and obligations. At the same time it appears from resolution 3292 (XXIX) that the opinion is sought for a practical and contemporary purpose, namely, in order that the General Assembly should be in a better position to decide at its thirtieth session on the policy to be followed for the decolonization of Western Sahara. However, the issue of the relevance and practical interest of the questions posed concerns, not the competence of the Court, but the propriety of its exercise. It is therefore in considering the subject of judicial propriety that the Court will examine the objection which has been raised in this connection, alleging that the questions are devoid of any useful object.

21. Similarly, the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court but the propriety of its exercise, as clearly appears from the Advisory Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* to which reference will be made later. Hence, notwithstanding the fact that Spain has based on the absence of its consent an objection against the competence of the Court as well as the propriety of its exercise, it is in dealing with the latter that the Court will examine the issues raised by that lack of consent.

22. In sum, while the Court is satisfied of its competence to entertain the present request, it remains to be considered whether, in the circumstances of this case, it should exercise this competence or, on the contrary, decline to do so, whether on the grounds already referred to or for any other reason.

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23. Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character. In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request. It has also said that the reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the Organization and, in principle, should not be refused. By lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations. The Court has further said that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950,* p. 72; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971,* p. 27).

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24. Spain has put forward a series of objections which in its view would render the giving of an opinion in the present case incompatible with the Court's judicial character. Certain of these are based on the consequences said to follow from the absence of Spain's consent to the adjudication of the questions referred to the Court. Another relates to the alleged academic nature, irrelevance or lack of object of those questions. Spain has asked the Court to give priority to the examination of the latter. The Court will, however, deal with the objections founded on the lack of Spain's consent to adjudication of the questions, before turning to the objection which concerns the subject-matter of the questions themselves.

25. Spain has made a number of observations relating to the lack of its consent to the proceedings, which, it considers, should lead the Court to decline to give an opinion. These observations may be summarized as follows:

(a) In the present case the advisory jurisdiction is being used to circumvent the principle that jurisdiction to settle a dispute requires the consent of the parties.

(b) The questions, as formulated, raise issues concerning the attribution of territorial sovereignty over Western Sahara.

(c) The Court does not possess the necessary information concerning the relevant facts to enable it to pronounce judicially on the questions submitted to it.

26. The first of the above observations is based on the fact that on 23 September 1974 the Minister for Foreign Affairs of Morocco addressed a communication to the Minister for Foreign Affairs of Spain recalling the terms of a statement by which His Majesty King Hassan II had on 17 September 1974 proposed the joint submission to the International Court of Justice of an issue expressed in the following terms:

> "You, the Spanish Government, claim that the Sahara was *res nullius*. You claim that it was a territory or property left uninherited, you claim that no power and no administration had been established over the Sahara: Morocco claims the contrary. Let us request the arbitration of the International Court of Justice at The Hague . . . It will state the law on the basis of the titles submitted . . ."

Spain has stated before the Court that it did not consent and does not consent now to the submission of this issue to the jurisdiction of the Court.

27. Spain considers that the subject of the dispute which Morocco invited it to submit jointly to the Court for decision in contentious proceedings, and the subject of the questions on which the advisory opinion is requested, are substantially identical; thus the advisory procedure is said to have been used as an alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question. Consequently, to give a reply would, according to Spain, be to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's jurisdiction. If the Court were to countenance such a use of its advisory jurisdiction, the outcome would be to obliterate the distinction between the two spheres of the Court's jurisdiction, and the fundamental principle of the independence of States would be affected, for States would find their disputes with other States being submitted to the Court, by this indirect means, without their consent; this might result in compulsory jurisdiction being achieved by majority vote in a political organ. Such circumvention of the well-established principle of consent for the exercise of

international jurisdiction would constitute, according to this view, a compelling reason for declining to answer the request.

28. In support of these propositions Spain has invoked the fundamental rule, repeatedly reaffirmed in the Court's jurisprudence, that a State cannot, without its consent, be compelled to submit its disputes with other States to the Court's adjudication. It has relied, in particular, on the application of this rule to the advisory jurisdiction by the Permanent Court of International Justice in the *Status of Eastern Carelia* case *(P.C.I.J., Series B, No. 5),* maintaining that the essential principle enunciated in that case is not modified by the decisions of the present Court in the cases concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase (I.C.J. Reports 1950,* p. 65) and the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (I.C.J. Reports 1971,* p. 16). Morocco and Mauritania, on the other hand, have maintained that the present case falls within the principles applied in those two decisions and that the *ratio decidendi* of the *Status of Eastern Carelia* case is not applicable to it.

29. It is clear that Spain has not consented to the adjudication of the questions formulated in resolution 3292 (XXIX). It did not agree to Morocco's proposal for the joint submission to the Court of the issue raised in the communication of 23 September 1974. Spain made no reply to the letter setting out the proposal, and this was properly understood by Morocco as signifying its rejection by Spain. As to the request for an advisory opinion, the records of the discussions in the Fourth Committee and in the plenary of the General Assembly confirm that Spain raised objections to the Court's being asked for an opinion on the basis of the two questions formulated in the present request. The Spanish delegation stated that it was prepared to join in the request only if the questions put were supplemented by another question establishing a satisfactory balance between the historical and legal exposition of the matter and the current situation viewed in the light of the Charter of the United Nations and the relevant General Assembly resolutions on the decolonization of the territory. In view of Spain's persistent objections to the questions formulated in resolution 3292 (XXIX), the fact that it abstained and did not vote against the resolution cannot be interpreted as implying its consent to the adjudication of those questions by the Court. Moreover, its participation in the Court's proceedings cannot be understood as implying that it has consented to the adjudication of the questions posed in resolution 3292 (XXIX), for it has persistently maintained its objections throughout.

30. In other respects, however, Spain's position in relation to the present proceedings finds no parallel in the circumstances of the advisory proceedings concerning the *Status of Eastern Carelia* in 1923. In that case, one of the States concerned was neither a party to the Statute of the

Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers. In the proceedings in the General Assembly, Spain did not oppose the reference of the Western Sahara question as such to the Court's advisory jurisdiction: it objected rather to the restriction of that reference to the historical aspects of that question.

31. In the proceedings concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* this Court had to consider how far the views expressed by the Permanent Court in the *Status of Eastern Carelia* case were still pertinent in relation to the applicable provisions of the Charter of the United Nations and the Statute of the Court. It stated, *inter alia*:

> "This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.
>
> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the organization, and, in principle, should not be refused." (*I.C.J. Reports 1950,* p. 71.)

32. The Court, it is true, affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them. However, the Court proceeded not merely to stress its judicial character and the permissive nature of Article 65, paragraph 1, of the Statute but to examine, specifically in relation to the opposition of some of the interested States, the question of the judicial propriety of giving the opinion. Moreover, the Court emphasized the circumstances differentiating the case

then under consideration from the *Status of Eastern Carelia* case and explained the particular grounds which led it to conclude that there was no reason requiring the Court to refuse to reply to the request. Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.

33. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.

34. The situation existing in the present case is not, however, the one envisaged above. There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations. In a communication addressed on 10 November 1958 to the Secretary-General of the United Nations, the Spanish Government stated: "Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain". This gave rise to the "most explicit reservations" of the Government of Morocco, which, in a communication to the Secretary-General of 20 November 1958, stated that it "claim[ed] certain African territories at present under Spanish control as an integral part of Moroccan national territory".

35. On 12 October 1961, after Spain had agreed to transmit information on the territories in question, Morocco formulated in the Fourth Committee of the General Assembly "the strongest reservations" regarding any information Spain might submit concerning them. "Those cities and regions", it said, "formed an integral part of Morocco and the statutes at present governing them were contrary to international law and incompatible with the territorial sovereignty and integrity of Morocco". In answering these reservations, Spain drew attention, with reference to Western Sahara, to the statement it had made on 10 October 1961 in the General Assembly:

> ". . . the historic presence of Spanish citizens on the west coast of Africa, not subject to the sovereignty of any other country and devoting

themselves largely to fishing, goes back a very long way and has been confirmed by international law ... [T]he rulers of Morocco have recognized on repeated occasions that their sovereignty does not extend to the coasts of the present Spanish province of the Sahara".

36. The legal controversy which thus arose in the General Assembly in regard to Western Sahara remained in a latent state from 1966 to 1974, a period in which Morocco, without abandoning its legal position, accepted the application of the principle of self-determination. The controversy reappeared when Morocco directly presented to Spain its legal claim in the above communication of 23 September 1974, and continued to subsist; this communication, however, did not have the effect of detaching the dispute from the decolonization proceedings of the United Nations. The submission of the issue to the Court was explicitly proposed by Morocco "in order to guide the United Nations towards a final solution of the problem of Western Sahara . . .".

37. After it became a Member in 1960, Mauritania put forward in the United Nations the claim that Western Sahara was a part of its national territory. It was however prepared to acquiesce in the will of the population and did not confront Spain with a direct legal claim parallel to that of Morocco.

38. As previously noted, Spain considers that the terms of the Moroccan Note of 23 September 1974 and those of the request are substantially identical. This is not however the case. The questions in the request differ materially from those raised in the Moroccan proposal, in that the former introduces the issue of the ties of the territory with the Mauritanian entity and places the case referred to the Court in a different context. In the General Assembly debates the claims of Mauritania and Morocco to legal ties appeared, in many respects, as conflicting; in the oral proceedings before the Court they were described as overlapping in certain areas rather than as conflicting. The interaction between these two claims in respect of the same territory introduces, in either situation, a substantial difference, going beyond a mere broadening in the scope of the questions posed. In any event, the terms of the request contain a proviso concerning the application of General Assembly resolution 1514 (XV). Thus the legal questions of which the Court has been seised are located in a broader frame of reference than the settlement of a particular dispute and embrace other elements. These elements, moreover, are not confined to the past but are also directed to the present and the future.

39. The above considerations are pertinent for a determination of the object of the present request. The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement

of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.

40. The General Assembly, as appears from paragraph 3 of resolution 3292 (XXIX), has asked the Court for an opinion so as to be in a position to decide "on the policy to be followed in order to accelerate the decolonization process in the territory ... in the best possible conditions, in the light of the advisory opinion ...". The true object of the request is also stressed in the preamble of resolution 3292 (XXIX), where it is stated "that it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem".

41. What the Court said in a similar context, in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, applies also to the present case: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) The legitimate interest of the General Assembly in obtaining an opinion from the Court in respect of its own future action cannot be affected or prejudiced by the fact that Morocco made a proposal, not accepted by Spain, to submit for adjudication by the Court a dispute raising issues related to those contained in the request. It is difficult to see on what basis the sending of the Note would make Spain's consent necessary for the reference of the questions to the Court, if that consent would not otherwise be needed.

42. Furthermore, the origin and scope of the dispute, as above described, are important in appreciating, from the point of view of the exercise of the Court's discretion, the real significance in this case of the lack of Spain's consent. The issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not "in any way compromised by the answers that the Court may give to the questions put to it" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 72).

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43. A second way in which Spain has put the objection of lack of its consent is to maintain that the dispute is a territorial one and that the consent

of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary. The questions in the request do not however relate to a territorial dispute, in the proper sense of the term, between the interested States. They do not put Spain's present position as the administering Power of the territory in issue before the Court: resolution 3292 (XXIX) itself recognizes the current legal status of Spain as administering Power. Nor is in issue before the Court the validity of the titles which led to Spain's becoming the administering Power of the territory, and this was recognized in the oral proceedings. The Court finds that the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory. Nor does the Court's Order of 22 May 1975 convey any implication that the present case relates to a claim of a territorial nature.

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44. A third way in which Spain, in its written statement, has presented its opposition to the Court's pronouncing upon the questions posed in the request is to maintain that in this case the Court cannot fulfil the requirements of good administration of justice as regards the determination of the facts. The attribution of territorial sovereignty, it argues, usually centres on material acts involving the exercise of that sovereignty, and the consideration of such acts and of the respective titles inevitably involves an exhaustive determination of facts. In advisory proceedings there are properly speaking no parties obliged to furnish the necessary evidence, and the ordinary rules concerning the burden of proof can hardly be applied. That being so, according to Spain, the Court should refrain from replying in the absence of facts which are undisputed, since it would not be in possession of sufficient information such as would be available in adversary proceedings.

45. Considerations of this kind played a role in the case concerning the *Status of Eastern Carelia.* In that instance, the non-participation of a State concerned in the case was a secondary reason for the refusal to answer. The Permanent Court of International Justice noted the difficulty of making an enquiry into facts concerning the main point of a controversy when one of the parties thereto refused to take part in the proceedings.

46. Although in that case the refusal of one State to take part in the proceedings was the cause of the inadequacy of the evidence, it was the actual lack of "materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact" (*P.C.I.J., Series B, No. 5,* p. 28) which was considered by the Permanent Court, for reasons of judicial propriety, to prevent it from giving an opinion. Consequently, the issue is whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination

of which is necessary for it to give an opinion in conditions compatible with its judicial character.

47. The situation in the present case is entirely different from that with which the Permanent Court was confronted in the *Status of Eastern Carelia* case. Mauritania, Morocco and Spain have furnished very extensive documentary evidence of the facts which they considered relevant to the Court's examination of the questions posed in the request, and each of these countries, as well as Algeria and Zaire, have presented their views on these facts and on the observations of the others. The Secretary-General has also furnished a dossier of documents concerning the discussion of the question of Western Sahara in the competent United Nations organs. The Court therefore considers that the information and evidence before it are sufficient to enable it to arrive at a judicial conclusion concerning the facts which are relevant to its opinion and necessary for replying to the two questions posed in the request.

* *

48. The Court has been asked to state that it ought not to examine the substance of the present request, since the reply to the questions put to it would be devoid of purpose. Spain considers that the United Nations has already affirmed the nature of the decolonization process applicable to Western Sahara in accordance with General Assembly resolution 1514 (XV); that the method of decolonization—a consultation of the indigenous population by means of a referendum to be conducted by the administering Power under United Nations auspices—has been settled by the General Assembly. According to Spain, the questions put to the Court are therefore irrelevant, and the answers cannot have any practical effect.

49. Morocco has expressed the view that the General Assembly has not finally settled the principles and techniques to be followed, being free to choose from a wide range of solutions in the light of two basic principles: that of self-determination indicated in paragraph 2 of resolution 1514 (XV), and the principle of the national unity and territorial integrity of countries, enunciated in paragraph 6 of the same resolution. Morocco points out that decolonization may come about through the reintegration of a province with the mother country from which it was detached in the process of colonization. Thus, in the view of Morocco, the questions are relevant because the Court's answer will place the General Assembly in a better position to choose the process best suited for the decolonization of the territory.

50. Mauritania maintains that the principle of self-determination cannot be dissociated from that of respect for national unity and territorial integrity; that the General Assembly examines each question in the context of the situations to be regulated; in several instances, it has been induced to give

priority to territorial integrity, particularly in situations where the territory had been created by a colonizing Power to the detriment of a State or country to which the territory belonged. Mauritania, pointing out that resolutions 1541 (XV) and 2625 (XXV) have laid down various methods and possibilities for decolonization, considers, in view of the foregoing, that the questions put to the Court are relevant and should be answered.

51. Algeria states that the self-determination of peoples is the fundamental principle governing decolonization, enshrined in Articles 1 and 55 of the Charter and in General Assembly resolution 1514 (XV); that, through successive resolutions which recommend that the population should be consulted as to its own future, the General Assembly has recognized the right of the people of Western Sahara to exercise free and genuine self-determination; and that the application of self-determination in the framework of such consultation has been accepted by the administering Power and supported by regional institutions and international conferences, as well as endorsed by the countries of the area. In the light of these considerations, Algeria is of the view that the Court should answer the request and, in doing so, should not disregard the fact that the General Assembly, in resolution 3292 (XXIX), has itself confirmed its will to apply resolution 1514 (XV), that is to say, a system of decolonization based on the self-determination of the people of Western Sahara.

52. Extensive argument and divergent views have been presented to the Court as to how, and in what form, the principles of decolonization apply in this instance, in the light of the various General Assembly resolutions on decolonization in general and on decolonization of the territory of Western Sahara in particular. This matter is not directly the subject of the questions put to the Court, but it is raised as a basis for an objection to the Court's replying to the request. In any event, the applicable principles of decolonization call for examination by the Court, in that they are an essential part of the framework of the questions contained in the request. The reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial functions. That would not be consistent with the Court's judicial character; for in the exercise of its functions it is necessarily called upon to take into account existing rules of international law which are directly connected with the terms of the request and indispensable for the proper interpretation and understanding of its Opinion (cf. *I.C.J. Reports 1962*, p. 157).

53. The proposition that those questions are academic and legally irrelevant is intimately connected with their object, the determination of which requires the Court to consider, not only the whole text of resolution 3292 (XXIX), but also the general background and the circumstances which led to its adoption. This is so because resolution 3292 (XXIX) is the latest of a long series of General Assembly resolutions dealing with Western Sahara. All these resolutions, including resolution 3292 (XXIX), were drawn up in the general context of the policies of the General Assembly regarding the

decolonization of non-self-governing territories. Consequently, in order to appraise the correctness or otherwise of Spain's view as to the object of the questions posed, it is necessary to recall briefly the basic principles governing the decolonization policy of the General Assembly, the general lines of previous General Assembly resolutions on the question of Western Sahara, and the preparatory work and context of resolution 3292 (XXIX).

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54. The Charter of the United Nations, in Article 1, paragraph 2, indicates, as one of the purposes of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." This purpose is further developed in Articles 55 and 56 of the Charter. Those provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter. As the Court stated in its Advisory Opinion of 21 June 1971 on *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*:

> "... the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them" (*I.C.J. Reports 1971*, p. 31).

55. The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). In this resolution the General Assembly proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations". To this end the resolution provides *inter alia*:

> "2. 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.
>
> . . . . . .
>
> 5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations."

The above provisions, in particular paragraph 2, thus confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.

56. The Court had occasion to refer to this resolution in the above-mentioned Advisory Opinion of 21 June 1971. Speaking of the development of international law in regard to non-self-governing territories, the Court there stated:

> "A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'." (*I.C.J. Reports 1971*, p. 31.)

It went on to state:

> "... the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law" *(ibid.)*.

The Court then concluded:

> "In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (*Ibid.*, pp. 31 f.)

57. General Assembly resolution 1514 (XV) provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations. It is complemented in certain of its aspects by General Assembly resolution 1541 (XV), which has been invoked in the present proceedings. The latter resolution contemplates for non-self-governing territories more than one possibility, namely:

(a) emergence as a sovereign independent State;
(b) free association with an independent State; or
(c) integration with an independent State.

At the same time, certain of its provisions give effect to the essential feature of the right of self-determination as established in resolution 1514 (XV). Thus

principle VII of resolution 1541 (XV) declares that: "Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." Again, principle IX of resolution 1541 (XV) declares that:

> "Integration should have come about in the following circumstances:
>
> . . . . . .
>
> *(b)* The 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. The United Nations could, when it deems it necessary, supervise these processes."

58. General Assembly resolution 2625 (XXV), "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", – to which reference was also made in the proceedings – mentions other possibilities besides independence, association or integration. But in doing so it reiterates the basic need to take account of the wishes of the people concerned:

> "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." (Emphasis added.)

Resolution 2625 (XXV) further provides that:

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> . . . . . .
>
> *(b)* To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."

59. The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.

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60. Having set out the basic principles governing the decolonization policy of the General Assembly, the Court now turns to those resolutions which bear specifically on the decolonization of Western Sahara. Their analysis is necessary in order to determine the validity of the view that the questions posed in resolution 3292 (XXIX) lack object. In particular it is pertinent to compare the different ways in which the General Assembly resolutions adopted from 1966 to 1969 dealt with the questions of Ifni and Western Sahara.

61. In 1966, in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Spain expressed itself in favour of the decolonization of Western Sahara through the exercise by the population of the territory of their right to self-determination. At that time this suggestion received the support of Mauritania and the assent of Morocco. As to Ifni, Spain suggested establishing contact with Morocco as a preliminary step. Morocco stated that the decolonization of Ifni should be brought into line with paragraph 6 of resolution 1514 (XV).

62. On the basis of the proposals of the Special Committee, the General Assembly adopted resolution 2229 (XXI), which dealt differently with Ifni and Western Sahara. In the case of Ifni, the resolution:

> "3. *Requests* the administering Power to take immediately the necessary steps to accelerate the decolonization of Ifni and to determine with the Government of Morocco, bearing in mind the aspirations of the indigenous population, procedures for the transfer of powers in accordance with the provisions of General Assembly resolution 1514 (XV)."

In the case of Western Sahara, the resolution:

> "4. *Invites* the administering Power to determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination . . ."

In respect of this territory the resolution also set out conditions designed to ensure the free expression of the will of the people, including the provision by the administering Power of "facilities to a United Nations mission so that it may be able to participate actively in the organization and holding of the referendum".

63. Resolution 2229 (XXI) was the model for a series of resolutions the provisions of which regarding Western Sahara were in their substance almost identical. Only a few minor variations were introduced. In 1967 the operative part of resolution 2354 (XXII) was divided into two sections, one dealing with Ifni and the other with Western Sahara; and in 1968 resolution 2428

(XXIII), similarly divided, included a preamble noting "the difference in nature of the legal status of these two Territories, as well as the processes of decolonization envisaged by General Assembly resolution 2354 (XXII) for these Territories". Since 1969 Ifni, having been decolonized by transfer to Morocco, has no longer appeared in the resolutions of the Assembly.

64. In subsequent years, the General Assembly maintained its approach to the question of Western Sahara, and reiterated in more pressing terms the need to consult the wishes of the people of the territory as to their political future. Indeed resolution 2983 (XXVII) of 1972 expressly reaffirms "the responsibility of the United Nations in all consultations intended to lead to the free expression of the wishes of the people". Resolution 3162 (XXVIII) of 1973, while deploring the fact that the United Nations mission whose active participation in the organization and holding of the referendum had been recommended since 1966 had not yet been able to visit the territory, reaffirms the General Assembly's:

> "... attachment to the principle of self-determination and its concern to see that principle applied with a framework that will guarantee the inhabitants of the Sahara under Spanish domination free and authentic expression of their wishes, in accordance with the relevant United Nations resolutions on the subject".

65. All these resolutions from 1966 to 1973 were adopted in the face of reminders by Morocco and Mauritania of their respective claims that Western Sahara constituted an integral part of their territory. At the same time Morocco and Mauritania assented to the holding of a referendum. These States, among others, alleging that the recommendations of the General Assembly were being disregarded by Spain, emphasized the need for the referendum to be held in satisfactory conditions and under the supervision of the United Nations.

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66. A significant change was introduced in resolution 3292 (XXIX) by which the Court is seised of the present request for an advisory opinion. The administering Power is urged in paragraph 3 of the resolution "to postpone the referendum it contemplated holding in Western Sahara". The General Assembly took special care, however, to insert provisions making it clear that such a postponement did not prejudice or affect the right of the people of Western Sahara to self-determination in accordance with resolution 1514 (XV).

67. The provisions in question contain three express references to resolution 1514 (XV). In the General Assembly debates the representative of the Ivory Coast, one of the sponsors of resolution 3292 (XXIX), after describing the text before the General Assembly as the result of a compromise, called attention to these references to resolution 1514 (XV),

explaining that they had been introduced into the original text in order to enable the General Assembly to be consistent. In the light of the terms of resolution 3292 (XXIX) this must be understood as indicating the intention to ensure the consistency of that resolution with previous resolutions of the General Assembly.

68. The third paragraph in the preamble of resolution 3292 (XXIX) reaffirms "the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV)". In paragraph 1 of the operative part, where the questions asked of the Court are formulated, the Court is requested, "without prejudice to the application of the principles embodied in General Assembly resolution 1514 (XV)", to give its advisory opinion. This mention of resolution 1514 (XV) is thus made to relate to the actual request for the opinion. The reference to the application of the principles embodied in resolution 1514 (XV) has necessarily to be read in the light of the General Assembly's reaffirmation in the third paragraph of the preamble of "the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV)".

69. In paragraph 3 of the operative part it is urged that the referendum be postponed "until the General Assembly decides on the policy to be followed in order to accelerate the decolonization process in the territory, in accordance with resolution 1514 (XV)". This third mention of resolution 1514 (XV), which has also to be read in the light of the preamble, thus refers to it as governing "the decolonization process in the territory" and "the policy to be followed in order to accelerate" that process.

70. In short, the decolonization process to be accelerated which is envisaged by the General Assembly in this provision is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right is not affected by the present request for an advisory opinion, nor by resolution 3292 (XXIX); on the contrary, it is expressly reaffirmed in that resolution. The right of that population to self-determination constitutes therefore a basic assumption of the questions put to the Court.

71. It remains to be ascertained whether the application of the right of self-determination to the decolonization of Western Sahara renders without object the two specific questions put to the Court. The Court has already concluded that the two questions must be considered in the whole context of the decolonization process. The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.

72. An advisory opinion of the Court on the legal status of the territory at the time of Spanish colonization and on the nature of any ties then existing with Morocco and with the Mauritanian entity may assist the General Assembly in the future decisions which it is called upon to take. The General Assembly has referred to its intention to "continue its discussion of this question" in the light of the Court's advisory opinion. The Court, when

considering the object of the questions in accordance with the text of resolution 3292 (XXIX), cannot fail to note this statement. As to the future action of the General Assembly, various possibilities exist, for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people. In general, an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara.

73. In any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide. The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.

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74. In the light of the considerations set out in paragraphs 23-73 above, the Court finds no compelling reason, in the circumstances of the present case, to refuse to comply with the request by the General Assembly for an advisory opinion.

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75. Having established that it is seised of a request for advisory opinion which it is competent to entertain and that it should comply with that request, the Court will now examine the two questions which have been referred to it by General Assembly resolution 3292 (XXIX). These questions are so formulated that an answer to the second is called for only if the answer to the first is in the negative:

"I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one *(terra nullius)*?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"

The suggestion has been made that the two questions are so far connected in substance that an affirmative answer could scarcely be given to the first question without also investigating the answer to be given to the second. It is possible, however, that, in the actual circumstances of the case, a negative answer to the first question may be called for irrespective of the Court's

conclusions regarding the answer to be given to the second. Accordingly, the two questions will be taken up separately and in turn.

76. The request, by its express terms, relates Question I specifically to the time of colonization of Western Sahara (Río de Oro and Sakiet El Hamra) by Spain. Similarly, by making the second question conditional upon the answer to the first and by formulating it in the past tense, the request also unmistakably relates the second question to that same period. Consequently, before embarking on its examination of the questions, the Court has to determine what, for the purposes of the present Opinion, should be considered "the time of colonization by Spain". In this connection, it emphasizes that it is not here concerned to establish a "critical date" in the sense given to this term in territorial disputes; for the questions do not ask the Court to adjudicate between conflicting legal titles to Western Sahara. It is here concerned only to identify the period of the historical context in which the request places the questions referred to the Court and the answers to be given to those questions.

77. In the view of the Court, for the purposes of the present Opinion, "the time of colonization by Spain" may be considered as the period beginning in 1884, when Spain proclaimed a protectorate over the Río de Oro. It is true that Spain has mentioned certain earlier acts of alleged display of Spanish sovereignty in the fifteenth and sixteenth centuries. But it has explained that it did so only to enlighten the Court as to the remote antecedents of the Spanish presence on the west-African coast, and not to prove any continuity between those acts and "the time of colonization by Spain", which it conceded should be regarded as beginning in 1884. In any event, the information before the Court convinces it that the period beginning in 1884 represents "the time of colonization by Spain" of Western Sahara within the meaning of the request and constitutes the temporal context within which the two questions are placed by the terms of the request.

78. Although the Court has thus been asked to render an opinion solely upon the legal status and legal ties of Western Sahara as these existed at the period beginning in 1884, this does not mean that any information regarding its legal status or legal ties at other times is wholly without relevance for the purposes of this Opinion. It does, however, mean that such information has present relevance only in so far as it may throw light on the questions as to what were the legal status and the legal ties of Western Sahara at that period.

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79. Turning to Question I, the Court observes that the request specifically locates the question in the context of "the time of colonization by Spain", and it therefore seems clear that the words "Was Western Sahara . . . a territory belonging to no one *(terra nullius)*?" have to be interpreted by reference to the

law in force at that period. The expression *"terra nullius"* was a legal term of art employed in connection with "occupation" as one of the accepted legal methods of acquiring sovereignty over territory. "Occupation" being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the "occupation" (cf. *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53,* pp. 44 f. and 63 f.). In the view of the Court, therefore, a determination that Western Sahara was a *"terra nullius"* at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation".

80. Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a *"terra nullius"* in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

81. In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them. It also shows that, in colonizing Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terrae nullius*. In its Royal Order of 26 December 1884, far from treating the case as one of occupation of *terra nullius*, Spain proclaimed that the King was taking the Río de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes: the Order referred expressly to "the documents which the independent tribes of this part of the coast" had "signed with the representative of the Sociedad Española de Africanistas", and announced that the King had confirmed "the deeds of adherence" to Spain. Likewise, in negotiating with France concerning the limits of Spanish territory to the north of the Río de Oro, that is, in the Sakiet El Hamra area, Spain did not rely upon any claim to the acquisition of sovereignty over a *terra nullius*.

82. Before the Court, differing views were expressed concerning the nature and legal value of agreements between a State and local chiefs. But the Court

is not asked by Question I to pronounce upon the legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara. It is asked only to state whether Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain was "a territory belonging to no one *(terra nullius)*". As to this question, the Court is satisfied that, for the reasons which it has given, its answer must be in the negative. Accordingly, the Court does not find it necessary first to pronounce upon the correctness or otherwise of Morocco's view that the territory was not *terra nullius* at that time because the local tribes, so it maintains, were then subject to the sovereignty of the Sultan of Morocco; nor upon Mauritania's corresponding proposition that the territory was not *terra nullius* because the local tribes, in its view, then formed part of the "Bilad Shinguitti" or Mauritanian entity. Any conclusions that the Court may reach with respect to either of these points of view cannot change the negative character of the answer which, for other reasons already set out, it has found that it must give to Question I.

83. The Court's answer to Question I is, therefore, in the negative and, in accordance with the terms of the request, it will now turn to Question II.

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84. Question II asks the Court to state "what were the legal ties between this territory" – that is, Western Sahara – "and the Kingdom of Morocco and the Mauritanian entity". The scope of this question depends upon the meaning to be attached to the expression "legal ties" in the context of the time of the colonization of the territory by Spain. That expression, however, unlike *"terra nullius"* in Question I, was not a term having in itself a very precise meaning. Accordingly, in the view of the Court, the meaning of the expression "legal ties" in Question II has to be found rather in the object and purpose of General Assembly resolution 3292 (XXIX), by which it was decided to request the present advisory opinion of the Court.

85. Analysis of this resolution, as the Court has already pointed out, shows that the two questions contained in the request have been put to the Court in the context of proceedings in the General Assembly directed to the decolonization of Western Sahara in conformity with resolution 1514 (XV) of 14 December 1960. During the discussion of this item, according to resolution 3292 (XXIX), a legal controversy arose over the status of Western Sahara at the time of its colonization by Spain; and the records of the proceedings make it plain that the "legal controversy" in question concerned pretensions put forward, on the one hand, by Morocco that the territory was then a part of the Sherifian State and, on the other, by Mauritania that the territory then formed part of the Bilad Shinguitti or Mauritanian entity. Accordingly, it appears to the Court that in Question II the words "legal ties between this territory and the Kingdom of Morocco and the Mauritanian

entity" must be understood as referring to such "legal ties" as may affect the policy to be followed in the decolonization of Western Sahara. In this connection, the Court cannot accept the view that the legal ties the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it. Such an interpretation would unduly restrict the scope of the question, since legal ties are normally established in relation to people.

86. The Court further observes that, inasmuch as Question II had its origin in the contentions of Morocco and Mauritania, it was for them to satisfy the Court in the present proceedings that legal ties existed between Western Sahara and the Kingdom of Morocco or the Mauritanian entity at the time of the colonization of the territory by Spain.

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87. Western Sahara (Río de Oro and Sakiet El Hamra) is a territory having very special characteristics which, at the time of colonization by Spain, largely determined the way of life and social and political organization of the peoples inhabiting it. In consequence, the legal régime of Western Sahara, including its legal relations with neighbouring territories, cannot properly be appreciated without reference to these special characteristics. The territory forms part of the great Sahara desert which extends from the Atlantic coast of Africa to Egypt and the Sudan. At the time of its colonization by Spain, the area of this desert with which the Court is concerned was being exploited, because of its low and spasmodic rainfall, almost exclusively by nomads, pasturing their animals or growing crops as and where conditions were favourable. It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them. In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.

88. These various points of attraction of a tribe to particular localities were reflected in its nomadic routes. But what is important for present purposes is the fact that the sparsity of the resources and the spasmodic character of the

rainfall compelled all those nomadic tribes to traverse very wide areas of the desert. In consequence, the nomadic routes of none of them were confined to Western Sahara; some passed also through areas of southern Morocco, or of present-day Mauritania or Algeria, and some even through further countries. All the tribes were of the Islamic faith and the whole territory lay within the Dar al-Islam. In general, authority in the tribe was vested in a sheikh, subject to the assent of the "Juma'a", that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law. Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorial, ties of allegiance or vassalage.

89. It is in the context of such a territory and such a social and political organization of the population that the Court has to examine the question of the "legal ties" between Western Sahara and the Kingdom of Morocco and the Mauritanian entity at the time of colonization by Spain. At the conclusion of the oral proceedings, as will be seen, Morocco and Mauritania took up what was almost a common position on the answer to be given by the Court on Question II. The contentions on which they respectively base the legal ties which they claim to have had with Western Sahara at the time of its colonization by Spain are, however, different and in some degree opposed. The Court will, therefore, examine them separately.

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90. Morocco's claim to "legal ties" with Western Sahara at the time of colonization by Spain has been put to the Court as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory. This immemorial possession, it maintains, was based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested, for centuries.

91. In support of this claim Morocco refers to a series of events stretching back to the Arab conquest of North Africa in the seventh century A.D., the evidence of which is, understandably, for the most part taken from historical works. The far-flung, spasmodic and often transitory character of many of these events renders the historical material somewhat equivocal as evidence of possession of the territory now in question. Morocco, however, invokes *inter alia* the decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case *(P.C.I.J., Series A/B, No. 53).* Stressing that during a long period Morocco was the only independent State which existed in the north-west of Africa, it points to the geographical contiguity of Western Sahara to Morocco and the desert character of the territory. In the light of these considerations, it maintains that the historical material suffices to establish Morocco's claim to a title based "upon continued display of authority" (*loc. cit.*, p. 45) on the same principles as those applied

by the Permanent Court in upholding Denmark's claim to possession of the whole of Greenland.

92. This method of formulating Morocco's claims to ties of sovereignty with Western Sahara encounters certain difficulties. As the Permanent Court stated in the case concerning the *Legal Status of Eastern Greenland,* a claim to sovereignty based upon continued display of authority involves "two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" (*ibid.*, pp. 45 f). True, the Permanent Court recognized that in the case of claims to sovereignty over areas in thinly populated or unsettled countries, "very little in the way of actual exercise of sovereign rights" (*ibid.*, p. 46) might be sufficient in the absence of a competing claim. But, in the present instance, Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent. In the particular circumstances outlined in paragraphs 87 and 88 above, the paucity of evidence of actual display of authority unambiguously relating to Western Sahara renders it difficult to consider the Moroccan claim as on all fours with that of Denmark in the *Eastern Greenland* case. Nor is the difficulty cured by introducing the argument of geographical unity or contiguity. In fact, the information before the Court shows that the geographical unity of Western Sahara with Morocco is somewhat debatable, which also militates against giving effect to the concept of contiguity. Even if the geographical contiguity of Western Sahara with Morocco could be taken into account in the present connection, it would only make the paucity of evidence of unambiguous display of authority with respect to Western Sahara more difficult to reconcile with Morocco's claim to immemorial possession.

93. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time (cf. *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953,* p. 57). As Morocco has also adduced specific evidence relating to the time of colonization and the period preceding it, the Court will now consider that evidence.

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94. Morocco requests that, in appreciating the evidence, the Court should take account of the special structure of the Sherifian State. No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of

State found in the world today. Morocco's request is therefore justified. At the same time, where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty.

95. That the Sherifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory. Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler. Even the Dar al-Islam, as Morocco itself pointed out in its oral statement, knows and then knew separate States within the common religious bond of Islam. Political ties of allegiance to a ruler, on the other hand, have frequently formed a major element in the composition of a State. Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of State authority. It follows that the special character of the Moroccan State and the special forms in which its exercise of sovereignty may, in consequence, have expressed itself, do not dispense the Court from appreciating whether at the relevant time Moroccan sovereignty was effectively exercised or displayed in Western Sahara.

96. It has been stated before the Court, and not disputed in the course of the proceedings, that at the relevant period the Moroccan State consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan, and partly of what was called the Bled Siba, areas in which *de facto* the tribes were not submissive to the Sultan. Morocco states that the two expressions, Bled Makhzen and Bled Siba, merely described two types of relationship between the Moroccan local authorities and the central power, not a territorial separation; and that the existence of these different types did not affect the unity of Morocco. Because of a common cultural heritage, the spiritual authority of the Sultan was always accepted. Thus the difference between the Bled Makhzen and the Bled Siba, Morocco maintains, did not reflect a wish to challenge the existence of the central power so much as the conditions for the exercise of that power; and the Bled Siba was, in practice, a way of affecting an administrative decentralization of authority. Against this view it is stated that what characterized the Bled Siba was that it was not administered by the Makhzen; it did not contribute contingents to the Sherifian army; no taxes were collected there by the Makhzen; the government of the people was in the hands of caids appointed by the tribes, and their powers were derived more from the acquiescence of the tribes than from any delegation of authority by the Sultan; even if these local powers did not totally reject any connection with the Sherifian State, in reality they

became *de facto* independent powers. It is also said that the historical evidence shows the territory between the Souss and the Dra'a to have been in a state of permanent insubordination and part of the Bled Siba; and that this implies that there was no effective and continuous display of State functions even in those areas to the north of Western Sahara. In the present proceedings, it has been common ground between Mauritania, Morocco and Spain that the Bled Siba was considered as forming part of the Moroccan State at that time, as also appears from the information before the Court.

97. That the areas immediately to the north of Western Sahara lay within the Bled Siba at the relevant period is a point which does not appear to be in dispute. This is accordingly an element to be taken into consideration in appreciating the material which has been submitted regarding the alleged display of Moroccan authority in Western Sahara itself.

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98. As evidence of its display of sovereignty in Western Sahara, Morocco has invoked alleged acts of internal display of Moroccan authority and also certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of the territory.

99. The principal indications of "internal" display of authority invoked by Morocco consist of evidence alleged to show the allegiance of Saharan caids to the Sultan, including dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and what were referred to as "military decisions" said to constitute acts of resistance to foreign penetration of the territory. In particular, the allegiance is claimed of the confederation of Tekna tribes, together with its allies, one part of which was stated to be established in the Noun and another part to lead a nomadic life the route of which traversed areas of Western Sahara: through Tekna caids, Morocco claims, the Sultan's authority and influence were exercised on the nomad tribes pasturing in Western Sahara. Moreover, Morocco alleges that, after the marabout Ma ul-'Aineen established himself at Smara in the Sakiet El Hamra in the late 1890s, much of the territory came under the direct authority of this sheikh, and that he himself was the personal representative of the Sultan. Emphasis is also placed by Morocco on two visits of Sultan Hassan I in person to the southern area of the Souss in 1882 and 1886 to maintain and strengthen his authority in the southern part of his realm, and on the despatch of arms by the Sultan to Ma ul-'Aineen and others in the south to reinforce their resistance to foreign penetration. In general, it is urged that Western Sahara has always been linked to the interior of Morocco by common ethnological, cultural and religious ties, and that the Sakiet El Hamra was artificially separated from the Moroccan territory of the Noun by colonization.

100. Spain, on the other hand, maintains that there is a striking absence of any documentary evidence or other traces of a display of political authority by Morocco with respect to Western Sahara. The acts of appointment of caids produced by Morocco, whether dahirs or official correspondence, do not in Spain's view relate to Western Sahara but to areas within southern Morocco such as the Noun and the Dra'a; nor has any document of acceptance by the recipients been adduced. Furthermore, according to Spain, these alleged appointments as caid were conferred on sheikhs already elected by their own tribes and were, in truth, only titles of honour bestowed on existing and *de facto* independent local rulers. As to the Tekna confederation, its two parts are said to have been in quite different relations to the Sultan: only the settled Tekna, established in southern Morocco, acknowledged their political allegiance to the Sultan, while the nomadic septs of the tribe who traversed the Western Sahara were "free" Tekna, autonomous and independent of the Sultan. Nor was Ma ul-'Aineen, according to Spain, at any time the personal representative of the Sultan's authority in Western Sahara; on the contrary, he exercised his authority to the south of the Dra'a in complete independence of the Sultan; his relations with the Sultan were based on mutual respect and a common interest in resisting French expansion from the south; they were relations of equality, not political ties of allegiance or of sovereignty.

101. Further, Spain invokes the absence of any evidence of the payment of taxes by tribes of Western Sahara and denies all possibility of such evidence being adduced; according to Spain, it was a characteristic even of the Bled Siba that the tribes refused to be taxed, and in Western Sahara there was no question of taxes having been paid to the Makhzen. As to the Sultan's expeditions of 1882 and 1886, these, according to Spain, are shown by the historical evidence never to have reached Western Sahara or even the Dra'a, but only the Souss and the Noun; nor did they succeed in completely subjecting even those areas; and they cannot therefore constitute evidence of display of authority with respect to Western Sahara. Their purpose, Spain maintains, was to prevent commerce between Europeans and the tribes of the Souss and Noun, and this purpose was unrelated to Western Sahara. Again, the alleged acts of resistance in Western Sahara to foreign penetration are said by Spain to have been nothing more than occasional raids to obtain booty or hostages for ransom and to have nothing to do with display of Moroccan authority. In general, both on geographical and on other grounds, Spain questions the unity of the Saharan region with the regions of southern Morocco.

102. Mauritania's views, in so far as they relate to Morocco's pretensions to have exercised sovereignty over Western Sahara at the time of its colonization, may be summarized as follows: Mauritania does not oppose Morocco's claim to have displayed its authority in some, more northerly,

areas of the territory. Thus it does not dispute the allegiance at that time of the Tekna confederation to the Sultan, nor Morocco's claim that, through the intermediary of Tekna caids in southern Morocco, it exercised a measure of authority over Tekna nomads who traversed those areas of Western Sahara. Mauritania does not, however, admit the allegiance of other tribes in Western Sahara to the Sultan, as it considers them to belong to the Bilad Shinguitti, or Mauritanian entity. In particular, like Spain, it maintains that the Regheibat were a tribe of marabout warriors wholly independent of both the Tekna caids and the Sultan, and that their links were rather with the tribes of the Bilad Shinguitti. Again, Mauritania does not admit that the marabout sheikh, Ma ul-'Aineen, represented the authority of the Sultan in Western Sahara. Instead, it insists that he was a Shinguitti personality, who acquired influence and renown as head of a religious brotherhood in the Bilad Shinguitti and also became a political figure in the Sakiet El Hamra in the later stages of his life. Like Spain also, Mauritania maintains that, as a political figure organizing and leading resistance to French penetration, Ma ul-'Aineen dealt with the Sultan on a basis of co-operation between equals; and that the relation between them was not one of allegiance but of an alliance, lasting only until the time came when the sheikh proclaimed himself Sultan.

103. The Court does not overlook the position of the Sultan of Morocco as a religious leader. In the view of the Court, however, the information and arguments invoked by Morocco cannot, for the most part, be considered as disposing of the difficulties in the way of its claim to have exercised effectively internal sovereignty over Western Sahara. The material before the Court appears to support the view that almost all the dahirs and other acts concerning caids relate to areas situated within present-day Morocco itself and do not in themselves provide evidence of effective display of Moroccan authority in Western Sahara. Nor can the information furnished by Morocco be said to provide convincing evidence of the imposition or levying of Moroccan taxes with respect to the territory. As to Sheikh Ma ul-'Aineen, the complexities of his career may leave doubts as to the precise nature of his relations with the Sultan, and different interpretations have been put upon them. The material before the Court, taken as a whole, does not suffice to convince it that the activities of this sheikh should be considered as having constituted a display of the Sultan's authority in Western Sahara at the time of its colonization.

104. Furthermore, the information before the Court appears to confirm that the expeditions of Sultan Hassan I to the south in 1882 and 1886 both had objects specifically directed to the Souss and the Noun and, in fact, did not go beyond the Noun; so that they did not reach even as far as the Dra'a, still less Western Sahara. Nor does the material furnished lead the Court to conclude that the alleged acts of resistance in Western Sahara to foreign penetration could be considered as acts of the Moroccan State. Similarly, the despatch of arms by the Sultan to Ma ul-'Aineen and others to encourage their resistance

to French penetration to the east of Western Sahara is, in any case, open to other interpretations than the display of the Sultan's authority. Again, although Morocco asserts that the Regheibat tribe always recognized the suzerainty of the Tekna confederation, and through them that of the Sultan himself, this assertion has not been supported by any convincing evidence. Moreover, both Spain and Mauritania insist that this tribe of marabout warriors was wholly independent.

105. Consequently, the information before the Court does not support Morocco's claim to have exercised territorial sovereignty over Western Sahara. On the other hand, it does not appear to exclude the possibility that the Sultan displayed authority over some of the tribes in Western Sahara. That this was so with regard to the Regheibat or other independent tribes living in the territory could clearly not be sustained. The position is different, however, with regard to the septs of the Tekna whose routes of migration are established as having included the territory of the Tekna caids within Morocco as well as parts of Western Sahara. True, the territory of the Tekna caids in the Noun and the Dra'a were Bled Siba at the relevant period and the subordination of the Tekna caids to the Sultan was sometimes uncertain. But the fact remains that the Noun and the Dra'a were recognized to be part of the Sherifian State and the Tekna caids to represent the authority of the Sultan. No doubt, as appears from previous paragraphs, the allegiance of the nomadic septs of the Tekna to the Tekna confederation has been in dispute in the present proceedings. The mere fact that those Tekna septs in their nomadic journeys spent periods of time within the territory of the caids of the Tekna confederation appears, however, to the Court to lend support to the view that they were subject, at least in some measure, to the authority of Tekna caids. The Court at the same time notes that Mauritania considers these Tekna septs to have been in "Moroccan fealty".

106. Furthermore, the material before the Court contains various indications of some projection of the Sultan's authority to certain Tekna tribes or septs nomadizing in Western Sahara. Such indications are, for example, to be found in certain documents relating to the recovery of shipwrecked seamen and other foreigners held captive by Teknas in Western Sahara; in documents showing that on some occasions, notably the Sultan's visits to the south in 1882 and 1886, he received the allegiance of certain nomadic tribes which came from Western Sahara for the purpose; and in letters from the Sultan to Tekna caids requesting the performance of certain acts to the south of the Noun and the Dra'a. Accordingly, and after taking due account of any contradictory indications, the Court considers that, taken as a whole, the information before it shows the display of some authority by the Sultan, through Tekna caids, over the Tekna septs nomadizing in Western Sahara.

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107. Thus, even taking account of the specific structure of the Sherifian State, the material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory.

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108. The Court must now examine whether its appreciation of the legal situation which appears from a study of the internal acts invoked by Morocco is affected to any extent by a consideration of the international acts said by it to show that the Sultan's sovereignty was directly or indirectly recognized as extending to the south of the Noun and the Dra'a. The material upon which it relies may conveniently be considered under four heads:

(a) A series of Moroccan treaties, and more especially a treaty with Spain of 1767, and treaties of 1836, 1856 and 1861 with the United States, Great Britain and Spain respectively, provisions of which deal with the rescue and safety of mariners shipwrecked on the coast of Wad Noun or its vicinity.

(b) A Moroccan treaty with Great Britain of 1895 in which Great Britain, it is claimed, recognized "the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it" as part of Morocco.

(c) Diplomatic correspondence concerning the implementation of Article 8 of the Treaty of Tetuan of 1860 and an alleged agreement with Spain of 1900 relating to the cession of Ifni, which are claimed to show Spanish recognition of Moroccan sovereignty as far southwards as Cape Bojador.

(d) A Franco-German exchange of letters of 1911 which expressed the understanding of the parties that "Morocco comprises all that part of northern Africa which is situated between Algeria, French West Africa, and the Spanish colony of Río de Oro".

109. The treaty provisions cited by Morocco begin with Article 18 of the Treaty of Marrakesh of 1767, the interpretation of which is in dispute between Morocco and Spain. This Article concerned a project of the Canary Islanders to set up a trading and fishing post on "the coasts of Wad Noun", according to Morocco, or "to the south of the River Noun", according to Spain, and the dispute is as to the scope of the Sultan's disavowal in Article 18 of any responsibility with respect to such a project. Morocco states that in the Arabic text the Article has the following meaning:

> "His Imperial Majesty warns the inhabitants of the Canaries against any fishing expedition to the coasts of Wad Noun and beyond. He disclaims any responsibility for the way they may be treated by the Arabs of the country, to whom it is difficult to apply decisions, since they have no fixed residence, travel as they wish and pitch their tents where they choose. The inhabitants of the Canaries are certain to be maltreated by those Arabs."

It contends, moreover, that this Arabic text is the only "official text" and should have preference also as being the more limited interpretation. On the basis of the Arabic text, it maintains that the Article signifies that the Sultan was recognized to have the power to take decisions with respect to the inhabitants of "Wad Noun and beyond", though it was difficult to apply his decisions to them.

110. Spain, however, stresses that the Spanish text of the treaty is also an original text, which is equally authentic and has the following meaning:

> "His Imperial Majesty refrains from expressing an opinion with regard to the trading post which His Catholic Majesty wishes to establish to the south of the River Noun, since he cannot take responsibility for accidents and misfortunes, because his domination *[sus dominios]* does not extend so far. ... Northwards from Santa Cruz, His Imperial Majesty grants to the Canary Islanders and the Spaniards the right of fishing without authorizing any other nation to do so."

It also disputes the meaning attributed by Morocco to the crucial words in the Arabic text and maintains that the meaning found in the Spanish text is confirmed by the wording of contemporary letters sent by the Sultan to King Carlos III, as well as other diplomatic material, and by a later Hispano-Moroccan treaty of 1799. Morocco, it should be interposed, in its turn questions the meaning given by Spain to certain words in the Arabic texts of the Sultan's letters and the 1767 treaty. Spain, however, on the basis of its interpretations of the various texts, contends that Article 18 of that treaty, far from evidencing Spanish recognition of the Sultan's sovereignty to the south of the Wad Noun, constitutes a disavowal by the Sultan himself of any pretensions to authority in that region.

111. The Court does not find it necessary to resolve the controversy regarding the text of Article 18 of this early treaty, because a number of later treaties, closer to the time of the colonization of Western Sahara and thus more pertinent in the present connection, contained clauses of a similar character, concerning mariners shipwrecked on coasts of the Wad Noun. It confines itself, therefore, to the following observations: In so far as this, or any other treaty provision, is relied upon by Morocco as showing international recognition by another State of Moroccan sovereignty, it would be difficult to consider such international recognition as established on the sole basis of a Moroccan text diverging materially from an authentic text of

the same treaty written in the language of the other State. In any event, the question of international recognition which Morocco claims to be raised by Article 18 of the Treaty of 1767 hinges upon the meaning to be given to such phrases as "Wad Noun and beyond" and "to the south of the River Noun", which is also a matter in dispute and calls for consideration in connection with the later treaties.

112. Article 18 of the 1767 treaty is indeed superseded for present purposes by provisions in Article 38 of the Hispano-Moroccan Treaty of Commerce and Navigation of 20 November 1861, which itself followed the model of similar provisions in treaties signed by Morocco with the United States in 1836 and with Great Britain in 1856. The relevant provisions of the 1861 treaty ran:

> "If a Spanish vessel of war or merchant ship get aground or be wrecked on any part of the coasts of Morocco, she shall be respected and assisted in every way, in conformity with the laws of friendship, and the said vessel and everything in her shall be taken care of and returned to her owners, or to the Spanish Consul-General . . . If a Spanish vessel be wrecked at Wad Noun or on any other part of its coast, the Sultan of Morocco shall make use of his authority to save and protect the master and crew until they return to their country, and the Spanish Consul-General, Consul, Vice-Consul, Consular Agent, or person appointed by them shall be allowed to collect every information they may require . . . The Governors in the service of the Sultan of Morocco shall likewise assist the Spanish Consul-General, Consul, Vice-Consul, Consular Agent or person appointed by them, in their investigations, according to the laws of friendship."

Morocco considers that these provisions, and similar provisions in other treaties, recognize the existence of Moroccan authorities in the Noun and Western Sahara, in the form of Governors in the service of the Sultan of Morocco, and also the effective possibilities of action by those Governors. It also argues that they recognize Moroccan sovereignty over Western Sahara because under Article 38 the Spanish authorities receive permission to enquire into the fate of shipwrecked mariners and derive that permission from the Sultan.

113. Morocco further considers that this view of the treaty provisions is confirmed by Spanish diplomatic documents relating to the recovery in 1863 of nine sailors from the Spanish vessel *Esmeralda* who had been captured, while fishing, by "Moors of the frontier coast". According to the documents, this incident occurred "more than 180 miles south of Cape Noun" and the Moors had demanded a ransom. The Spanish Minister of State had then instructed the Spanish Minister in Morocco to make the necessary request to the Sultan, pursuant to Article 38 of the 1861 treaty, "to use his powers to rescue the captive sailors". In due course the sailors were reported to have been freed and to be in the hands of Sheikh Beyrouk of the Noun; and the

Spanish Minister in Morocco was authorized to make a gift to the sheikh as a mark of gratitude.

114. Spain, on the other hand, claims that the origin of the shipwreck clauses was directly connected with the state of insubordination in the Souss and the Noun, and stresses that the treaties contained two systems of rescue and protection. One system, which it calls the general system, provided for areas where the Sultan did exercise his authority and undertook to use his normal powers to protect the shipwrecked. The other was a special régime for the Wad Noun. If a vessel were shipwrecked at the Wad Noun or beyond, the treaty provisions gave a different answer as to the duty of the Sultan. In that case, he did not "order" or "protect" but undertook to try to liberate the shipwrecked persons so far as he was able; and in order to do that he would use his influence with the peoples neighbouring on his realm and negotiate the ransoming of the sailors, usually with the local authorities. It was not, Spain considers, a matter of his exercising his own authority.

115. Spain also refers to various diplomatic documents relating to the recovery of sailors from a number of shipwrecked vessels as confirming the above interpretation of the clauses. Those documents, it states, show that in all those cases, including that of the *Esmeralda*, it was the intervention of the Beyrouk family, the sheikhs of the Wad Noun, which was decisive for the liberation of the captives, and that they negotiated directly with the Spanish Consul at Mogador. In one case, according to these documents, Sheikh Beyrouk informed the Spanish authorities that he had resisted the Sultan's efforts to wrest the prisoners from him and that their liberation had been achieved only when he himself had "negotiated the affair with the Spanish nation". According to Spain, this evidence indicates that to the north of Agadir the power of the Sultan was exercised and the Sultan could give orders; from Agadir to the south, in the Souss, the Noun and the Dra'a, the Sultan negotiated with local powers, he could not give orders; and this, Spain says, explains the cardinal role played by Sheikh Beyrouk in these matters.

116. Implicit in Morocco's claim that these treaties signify international recognition of the exercise of its sovereignty in Western Sahara is the proposition that phrases such as "the coasts of Wad Noun", "to the south of Wad Noun" or "Wad Noun and beyond" are apt to comprise Western Sahara. This proposition it advances on the basis that "Wad Noun" was a term used with two meanings: one narrow and restricted to the Wad Noun itself, the other wider and covering not only the Wad Noun but the Dra'a and the Sakiet El Hamra. This wider meaning, it indicates, was the one with which the term was used in Moroccan documents and treaties. Spain, on the other hand, maintains that no evidence has been adduced to demonstrate the use of the term Wad Noun with that special meaning, that there is no trace of it in the cartography of the period and that the testimony of travellers and explorers is conclusive as to the geographical separation of the Wad Noun country from

the Sakiet El Hamra. It is for Morocco to demonstrate convincingly the use of the term with that special meaning (cf. *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, p. 49) and this demonstration, in the view of the Court, is lacking.

117. In the particular case of the *Esmeralda*; as the Court has already noted, Morocco points to documents showing a request by Spain to the Sultan in 1863 for the application of Article 38 of the Treaty of 1861 in respect of an incident which had occurred more than 180 miles to the south of Cape Noun. That incident may, therefore, be invoked as indicating Spain's recognition of the applicability of the treaty provision in relation to that part of the coast of Western Sahara. But those documents, especially when read together with further documents before the Court relating to the same incident, do not appear to warrant the conclusion that Spain thereby also recognized the Sultan's territorial sovereignty over that part of Western Sahara. The documents, and the whole incident, appear rather to confirm the view that Article 38, and other similar provisions, concerned, instead, the exercise of the personal authority or influence of the Sultan, through the Tekna caids of the Wad Noun, to negotiate the ransom of the shipwrecked sailors from the tribe holding them captive to the south of the Wad Noun. Clearly, Morocco is correct in saying that these provisions would have been pointless if the other State concerned had not considered the Sultan to be in a position to exercise some authority or influence over the people holding the sailors captive. But it is a quite different thing to maintain that those provisions implied international recognition by the other State concerned of the Sultan as territorial sovereign in Western Sahara.

118. Examination of the provisions discussed above shows therefore, in the view of the Court, that they cannot be considered as implying international recognition of the Sultan's territorial sovereignty in Western Sahara. It confirms that they are to be understood as concerned with the display of the Sultan's authority or influence in Western Sahara only in terms of ties of allegiance or of personal influence in respect of some of the nomadic tribes of the territory.

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119. The Anglo-Moroccan Agreement of 13 March 1895 is invoked by Morocco as evidencing specific international recognition by Great Britain that Moroccan territory reached as far south as Cape Bojador. This treaty concerned the purchase by the Sultan from the North-West African Company of the trading-station which had been set up at Cape Juby some years previously by agreements made between Mr. Donald Mackenzie and Sheikh Beyrouk. The treaty of 1895 provided *inter alia* that, if the Moroccan Government bought the trading-station from the company, "no one will have any claim to the lands that are between Wad Draa and Cape Bojador, and which are called Terfaya above named, and all the lands behind it, because all this belongs to the territory of Morocco". A further clause provided that the

Moroccan Government in turn undertook that "they will not give any part of the above-named lands to any-one whatsoever without the concurrence of the English Government". Morocco asks the Court to see these provisions as constituting express recognition by Great Britain of Moroccan sovereignty at the relevant period in all the land between the Wad Dra'a and Cape Bojador and the hinterland.

120. The difficulty with this interpretation of the 1895 treaty is that it is at variance with the facts as shown in the diplomatic correspondence surrounding the transaction concerning the Mackenzie trading-station. Numerous documents relating to this transaction and presented to the Court show that the position repeatedly taken by Great Britain was that Cape Juby was outside Moroccan territory, which in its view did not extend beyond the Dra'a. In the light of this material the provisions of the 1895 treaty invoked by Morocco appear to the Court to represent an agreement by Great Britain not to question in future any pretensions of the Sultan to the lands between the Dra'a and Cape Bojador, and not a recognition by Great Britain of previously existing Moroccan sovereignty over those lands. In short, what those provisions yielded to the Sultan was acceptance by Great Britain not of his existing sovereignty but of his interest in that area.

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121. Morocco also asks the Court to find indications of Spanish recognition of Moroccan sovereignty southwards as far as Cape Bojador in diplomatic material concerning the implementation of Article 8 of the Treaty of Tetuan of 1860 and an agreement of 1900 alleged to have been concluded with Spain in that connection. By Article 8 of the Treaty of Tetuan, the Sultan had agreed to concede to Spain "in perpetuity, on the coast of the Ocean, near Santa Cruz la Pequeña, the territory sufficient for the construction of a fisheries establishment, as Spain possessed in prior times". Morocco invokes a diplomatic Note of 19 October 1900 from the Spanish Ambassador in Brussels to the Belgian Foreign Minister, which referred to instructions having been given to the Spanish representative in Tangier "to negotiate an exchange between the port of Ifni and another port situated between Ifni and Cape Bojador as well as the cession of the city of Terfaya between the Dra'a and Cape Bojador . . .". In the same year a publication in Spain appeared to give some substance to the suggestion that as a result of those negotiations a protocol had been concluded in this connection.

122. Spain, however, denies altogether the existence of any such protocol, which, it argues, Morocco could not have failed to produce if it had been concluded; for Morocco itself would have been one of the parties to this alleged agreement. An examination of its archives, Spain states, shows that no agreement was concluded at the time of the mission, although the press published erroneous news on the subject at the time. Mauritania also voices strong doubts as to the existence of the alleged protocol. It further says:

"In the absence of direct evidence, and faced with second-hand references, which are geographically vague and general, it is difficult to express a view on the question, and in particular to draw any conclusions as to territorial recognitions by the Spanish Government."

123. The doubts raised by both Spain and Mauritania as to the alleged protocol of 1900 have not been dispelled by the material before the Court. The Court is not, therefore, able to take the possible existence of such a document into account.

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124. There remains the exchange of letters annexed to the Agreement between France and Germany of 4 November 1911, which Morocco presents as recognition by those Powers of Moroccan sovereignty over the Sakiet El Hamra. In Article 1 of the Agreement Germany undertook not to interfere with the action of France in Morocco. The exchange of letters then further provided that:

"Germany will not intervene in any special agreements which France and Spain may think fit to conclude with each other on the subject of Morocco, it being understood that Morocco comprises all that part of northern Africa which is situated between Algeria, French West Africa and the Spanish colony of Río de Oro."

It is on these last words that Morocco relies; and it maintains that, whatever construction is put upon the exchange of letters, those words mean that the agreement recognized that the Sakiet El Hamra belonged to Morocco. In support of this contention, it refers to certain diplomatic letters which are claimed to show that, when France and Germany drew up the exchange, they meant "to posit the principle that the Sakiet El Hamra was part of Moroccan territory".

125. Spain, on the other hand, points to Article 6 of the earlier Franco-Spanish Convention of 3 October 1904, which stated:

"... the Government of the French Republic acknowledges that Spain has henceforward full liberty of action in regard to the territory comprised between the 26° and 27° 40′ north latitude and the 11th meridian west of Paris, which are outside the limits of Morocco".

It further points to Article 2 of the Franco-Spanish Convention of 27 November 1912 as providing expressly that Article 6 of the 1904 Convention was to "remain effective". In those two Conventions, it observes, France clearly recognized that the Sakiet El Hamra was "outside the limits of Morocco". At the same time, it contests the view expressed by Morocco in the proceedings that these Conventions are not opposable to Morocco. It also draws attention to other diplomatic material relating to the 1911 exchange

of letters and claimed by it to show that this was concerned with Franco-German relations and not with the existing frontier of Morocco.

126. In the present connection, the Court emphasizes, the question at issue is not the Spanish position in the Sakiet El Hamra but the alleged recognition by other States of Moroccan sovereignty over the Sakiet El Hamra at the time of colonization by Spain. Accordingly the question of how far any of these agreements may or may not be opposable to any of the States concerned does not arise. The various international agreements referred to by Morocco and Spain are of concern to the Court only in so far as they may contain indications of such recognition. These agreements, in the opinion of the Court, are of limited value in this regard; for it was not their purpose either to recognize an existing sovereignty over a territory or to deny its existence. Their purpose, in their different contexts, was rather to recognize or reserve for one or both parties a "sphere of influence" as understood in the practice of that time. In other words, one party granted to the other freedom of action in certain defined areas, or promised non-interference in an area claimed by the other party. Such agreements were essentially contractual in character. This is why one party might be found acknowledging in 1904, vis-à-vis Spain, that the Sakiet El Hamra was "outside the limits of Morocco" in order to allow Spain full liberty of action in regard to that area, and yet employing a different geographical description of Morocco in 1911 in order to ensure the complete exclusion of Germany from that area.

127. In consequence, the Court finds difficulty in accepting the Franco-German exchange of letters of 1911 as constituting recognition of the limits of Morocco rather than of the sphere of France's political interests vis-à-vis Germany.

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128. Examination of the various elements adduced by Morocco in the present proceedings does not, therefore, appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonization. Some elements, however, more especially the material relating to the recovery of shipwrecked sailors, do provide indications of international recognition at the time of colonization of authority or influence of the Sultan, displayed through Tekna caids of the Noun, over some nomads in Western Sahara.

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129. The inferences to be drawn from the information before the Court concerning internal acts of Moroccan sovereignty and from that concerning international acts are, therefore, in accord in not providing indications of the existence, at the relevant period, of any legal tie of territorial sovereignty

between Western Sahara and the Moroccan State. At the same time, they are in accord in providing indications of a legal tie of allegiance between the Sultan and some, though only some, of the tribes of the territory, and in providing indications of some display of the Sultan's authority or influence with respect to those tribes. Before attempting, however, to formulate more precisely its conclusions as to the answer to be given to Question II in the case of Morocco, the Court must examine the situation in the territory at the time of colonization in relation to the Mauritanian entity. This is so because the "legal ties" invoked by Mauritania overlap with those invoked by Morocco.

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130. The Court will therefore now take up the question of what were the legal ties which existed between Western Sahara, at the time of its colonization by Spain, and the Mauritanian entity. As the very formulation of Question II implies, the position of the Islamic Republic of Mauritania in relation to Western Sahara at that date differs from that of Morocco for the reason that there was not then any Mauritanian State in existence. In the present proceedings Mauritania has expressly accepted that the "Mauritanian entity" did not then constitute a State; and also that the present statehood of Mauritania "is not retroactive". Consequently, it is clear that it is not legal ties of State sovereignty with which the Court is concerned in the case of the "Mauritanian entity" but other legal ties. It also follows that the first point for the Court's consideration is the legal nature of the "Mauritanian entity" with which Western Sahara is claimed by Mauritania to have had those legal ties at the time of colonization by Spain.

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131. The term "Mauritanian entity", as appears from the information before the Court, is a term first employed during the session of the General Assembly in 1974 at which resolution 3292 (XXIX) was adopted. This term, Mauritania maintains, was used by the General Assembly to denote the cultural, geographical and social entity which existed at the time in the region of Western Sahara and within which the Islamic Republic of Mauritania was later to be created. That such is the sense in which the term is used in Question II has not been disputed.

132. Explaining its concept of the Mauritanian entity at the time of the colonization of Western Sahara, Mauritania has stated:

(a) Geographically, the entity covered a vast region lying between, on the east, the meridian of Timbuktu and, on the west, the Atlantic, and bounded on the south by the Senegal river and on the north by the Wad

Sakiet El Hamra. In the eyes both of its own inhabitants and of the Arabo-Islamic communities, that region constituted a distinct entity.

(b) That entity was the Bilad Shinguitti, or Shinguitti country, which constituted a distinct human unit, characterized by a common language, way of life and religion. It had a uniform social structure, composed of three "orders": warrior tribes exercising political power; marabout tribes engaged in religious, teaching, cultural, judicial and economic activities; client-vassal tribes under the protection of a warrior or marabout tribe. A further characteristic of the Bilad Shinguitti was the much freer status of women than in neighbouring Islamic societies. The most significant feature of the Bilad Shinguitti was the importance given to the marabout tribes, who created a strong written cultural tradition in religious studies, education, literature and poetry; indeed, its fame in the Arab world derived from the reputation acquired by its scholars.

133. According to Mauritania, two types of political authority were found in the Bilad Shinguitti: the emirates and the tribal groups not formed into emirates. The major part of the Shinguitti country was composed of the four Emirates of the Trarza, the Brakna, the Tagant and the Adrar, where the town of Shinguit is situated. This town was both the centre of Shinguitti culture and a crossroads of the caravan trade, so that the Emirate of the Adrar became the pole of attraction for the important nomadic tribes of the Sahara. At the time of the Spanish colonization of Western Sahara, Mauritania maintains, the Emir of the Adrar was the principal political figure of the north and north-west Shinguitti country, and possessed "an influence extending from the Sakiet El Hamra to the Senegal". In this connection, it invokes the testimony of the Spanish explorer, Captain Cervera, who in 1886 concluded with the Emir at 'Ijil a treaty by which, had it been ratified, Spain would have been recognized as sovereign of the whole Adrar at-Tmarr. He had reported at the time that it was thanks to the Emir that several tribal chiefs were assembled at 'Ijil; that it was under the Emir's protection that the Spanish delegation had been able to attend the meeting safely; and that the parties to the two treaties concluded on that occasion included chiefs not only of tribes of the Adrar but also of tribes from west of the Emirate, i.e., from the territory of the Río de Oro.

134. In addition to the four emirates, Mauritania mentions a number of other tribal groups, not formed into emirates, which existed in Western Sahara at the time of its colonization by Spain. Among these it names as the main tribes the 'Aroussiyeen, Oulad Deleim, Oulad Bu-Sba', Ahil Barik-Allah and Regheibat. It maintains that all these tribes and the four emirates themselves were both autonomous and independent, not acknowledging any tie of political allegiance to the Sultan of Morocco. Their independence, it states, is shown by the numerous treaties which they signed with foreign Powers, and by the fact that "the emirs, sheikhs and other tribal

chiefs were never invested by outside authorities and always derived their powers from the special rules governing the devolution of power in the Shinguitti entity". Each emirate and tribal group was autonomously administered by its ruler, whose appointment and important acts were subject to the assent of the assembly of the Juma'a.

135. Mauritania recognizes that the emirates and the tribes were not under any common hierarchical structure. "In this respect", it has said:

> "... the Shinguitti entity could not be assimilated to a State, nor to a federation, nor even to a confederation, unless one saw fit to give that name to the tenuous political ties linking the various tribes".

Within the entity there were "great confederations of tribes, or emirates whose influence, in the form sometimes of vassalage and sometimes of alliance, extended far beyond their own frontiers". Even so, Mauritania recognizes that this is not a sufficient basis for saying that "the Shinguitti entity was endowed with international personality, or enjoyed any sovereignty as the word was understood at that time".

136. The Bilad Shinguitti, according to Mauritania, was a community having its own cohesion, its own special characteristics, and a common Saharan law concerning the use of water-holes, grazing lands and agricultural lands, the regulation of inter-tribal hostilities and the settlement of disputes. Within this community:

> "It was in reality the component entities which were endowed with the legal personalities or sovereignties, save in so far as these had been wholly or partly alienated, by ties of vassalage or alliance, to other such components. The sovereignty of the different component entities obviously derived from their practice";

each body, as master of a territory, ensured the protection of the territory and of its subjects against acts of war or pillage and, correspondingly, its ruler had the duty to safeguard outsiders who sought his protection. When the emirs or sheikhs formed alliances with or waged war on one another, it was a question of relations between equals. But the existence of the community became apparent when its independence was threatened, as is shown, in the view of Mauritania, by the concerted effort made by the tribes throughout the Shinguitti country to resist French penetration.

137. At the same time, Mauritania lays emphasis on the special characteristics of the Saharan area and the nomadic existence of many of the tribes which have already been referred to in this Opinion. Life in the arid areas of the Shinguitti country, it observes, required the continuous quest for suitable pastures and water-holes; and each tribe had a well-defined migration area with established migration routes determined by the location

of water-holes, burial grounds, cultivated areas and pastures. The colonial Powers, it further observes, in drawing frontiers took no account of these human factors and in particular of the tribal territories and migration routes, which were, as a result, bisected and even trisected by those artificial frontiers. Nevertheless, the tribes of necessity continued to make their traditional migrations, traversing the Shinguitti country comprised within the territory of the present-day Islamic Republic of Mauritania and Western Sahara. The same families and their properties were to be found on either side of the artificial frontier. Some wells, lands and burial grounds of the Río de Oro, for example, belonged to Mauritanian tribes, while watering places and palm oases in what is now part of the Islamic Republic were the properties of tribes of Western Sahara. These facts of life in the region, it points out, were recognized by France and Spain, which, in 1934, concluded an administrative agreement to prevent any obstacles to the nomadic existence of the tribes.

138. If it is thought necessary to have recourse to verbal classifications, Mauritania suggests that the concepts of "nation" and of "people" would be the most appropriate to explain the position of the Shinguitti people at the time of colonization; they would most nearly describe an entity which despite its political diversity bore the characteristics of an independent nation, a people formed of tribes, confederations and emirates jointly exercising co-sovereignty over the Shinguitti country.

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139. As to the legal ties between Western Sahara and the Mauritanian entity, the views of Mauritania are as follows: At the time of Spanish colonization, the Mauritanian entity extended from the Senegal river to the Wad Sakiet El Hamra. That being so, the part of the territories now under Spanish administration which lie "to the south of the Wad Sakiet El Hamra was an integral part of the Mauritanian entity". The legal relation between the part under Spanish administration and the Mauritanian entity was, therefore, "the simple one of inclusion". At that time, the Bilad Shinguitti was an entity united by historical, religious, linguistic, social, cultural and legal ties, and it formed a community having its own cohesion. The territories occupied by Spain, on the other hand, did not form an entity of their own and did not have any identity. The part to the south of the Wad Sakiet El Hamra was, legally speaking, part of the Mauritanian entity. That part and the present territory of the Islamic Republic of Mauritania together constitute "the indissociable parts of the Mauritanian entity".

140. In the light of the foregoing, Mauritania asks the Court to find that "at the time of colonization by Spain the part of the Sahara now under Spanish administration did have legal ties with the Mauritanian entity". At the same

time, it takes the position that where the Mauritanian entity ended the Kingdom of Morocco began. It also makes clear that the finding which it requests is limited to the part of Western Sahara to the south of the Sakiet El Hamra, subject to some overlapping between the legal ties of the Mauritanian entity and those of Morocco solely where they met, owing to the overlapping of the nomadic routes of their respective tribes.

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141. Spain considers that there are a number of obstacles in the way of accepting the views of the Islamic Republic. The Bilad Shinguitti or Shinguitti entity, it says, by no means coincides with what is called the Mauritanian entity. In its broadest sense, the Bilad Shinguitti is the area of an Islamaic culture, and it is a cultural and religious centre which had a certain influence up to the sixteenth century. Spain finds it impossible, however, to accept that a cultural phenomenon, limited in time and space, could be identical with an alleged entity of which the significance was mainly geographical and which had wider limits: Shinguit's religious and cultural influence and its fame in the Islamic world is not to be confused with the political hegemony of the Emirate of the Adrar which, when it came into being in the eighteenth century, included the town of Shinguit in its borders.

142. Again, in the view of Spain, the idea of an entity must express not only a belonging but also the idea that the component parts are homogeneous. The Mauritanian entity, however, is said to have been formed of heterogeneous components, some being mere tribes and others having a more complex degree of integration, such as an emirate. As to the Emirate of the Adrar, which is claimed to have been the nucleus of the Mauritanian entity, Spain maintains that it was a region distinct and independent from all those surrounding it, politically, socially and economically. Spain considers it to have constituted a centre of autonomous power distinct both from the other emirates in the south and from the independent nomad tribes in the north and west. Furthermore, at the period of colonization of Western Sahara, this emirate, according to Spain, was undergoing grave internal troubles and also being harassed by the neighbouring Emirates of the Trarza and the Tagant, and Spain describes the region as having then been in a state of anarchy.

143. Another difficulty, according to Spain, is that the concept of a Mauritanian entity is not accompanied by proof of any tie of allegiance between the tribes inhabiting the territory of Western Sahara and the Mauritanian tribes or between the tribes of the territory and the Emirate of the Adrar. Far from merging into or disappearing within the framework of the so-called Mauritanian entity, Spain maintains, the tribes of Western Sahara led their own life independently of the other Saharan tribes. In its view, there is an almost total lack of evidence which might give support to the Mauritanian argument over and above the mere sociological facts about nomadic life.

144. As to the agreements concluded by the independent tribes of the Sahara with Spanish explorers and with France, Spain considers those documents to run counter to the thesis that there was a "Mauritanian entity" in which tribes of Western Sahara were integrated. It regards the texts of the two treaties signed a 'Ijil on 12 July 1886, one with the independent tribes and the other with the Emir, as decisive on this point. The first was concluded with the tribes living in the area between the Atlantic and the western slopes of the Adrar, who ceded to Spain "all territories between the coast of the Spanish possessions of the Atlantic between Cape Bojador and Cabo Blanco and the western boundary of the Adrar"; the second treaty was concluded with the Emir and "recognizes Spanish sovereignty over the whole territory of the Adrar at-Tmarr". The existence of these two separate treaties, in Spain's view, evidences not only the total independence of those tribes and of the Emirate, but also their independence of each other; and it further proves that the Emir may have exerted influence but never political authority over those tribes. The independence of the tribes as between themselves is held by Spain to be also shown by the signature of the 1884 treaty by one tribe alone with the explorer Bonelli. Furthermore, other participants in this alleged entity, the Emirates of the Brakna, Trarza and Tagant and the tribes of the Hodh, signed with France a long series of treaties throughout the nineteenth century. Spain therefore finds it difficult to appreciate the coherence of the alleged Shinguitti entity.

145. Furthermore Spain rejects the proposition, bound up with the concept of the Mauritanian entity advanced by Mauritania, that the territory under Spanish administration did not itself form an entity or possess an identity of its own. It considers that what is the present territory of Western Sahara was the foundation of a Saharan people with its own well-defined character, made up of autonomous tribes, independent of any external authority; and that this people lived in a fairly well-defined area and had developed an organization and a system of life in common, on the basis of collective self-awareness and mutual solidarity. In Western Sahara, it says, a clear distinction was made by the population and in literature between their own country, the country of the nomads, and other neighbouring countries of a sedentary way of life, such as Shinguitti, Tishit and Timbuktu. The land of the settled people coincided to a large extent, in the north, with the historic frontiers of Morocco and, in the south, with the Emirate of the Adrar at-Tmarr. There was thus, according to Spain, a Sahrawi people at the time of colonization, coherent and distinct from the Mauritanian emirates; and this people in no way regarded itself as part of the Bilad Shinguitti or Mauritanian entity.

146. Another legal difficulty, according to Spain, is that the Islamic Republic could not be regarded as the direct successor to the alleged historical Mauritanian entity; for the notion of Mauritania was born in 1904 at a time when the territory of Western Sahara is said by Spain already to have had an existence well established in fact and in law.

147. On the basis of the foregoing considerations, Spain maintains that at the time of colonization by Spain there were no legal ties between the territory of Western Sahara and the Mauritanian entity.

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148. In the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the Court observed: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community" (*I.C.J. Reports 1949*, p. 178). In examining the propositions of Mauritania regarding the legal nature of the Bilad Shinguitti or Mauritanian entity, the Court gives full weight both to that observation and to the special characteristics of the Saharan region and peoples with which the present proceedings are concerned. Some criterion has, however, to be employed to determine in any particular case whether what confronts the law is or is not legally an "entity". The Court, moreover, notes that in the *Reparation* case the criterion which it applied was to enquire whether the United Nations Organization – the entity involved – was in "such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect" *(ibid.)*. In that Opinion, no doubt, the criterion was applied in a somewhat special context. Nevertheless, it expresses the essential test where a group, whether composed of States, of tribes or of individuals, is claimed to be a legal entity distinct from its members.

149. In the present case, the information before the Court discloses that, at the time of the Spanish colonization, there existed many ties of a racial, linguistic, religious, cultural and economic nature between various tribes and emirates whose peoples dwelt in the Saharan region which today is comprised within the Territory of Western Sahara and the Islamic Republic of Mauritania. It also discloses, however, the independence of the emirates and many of the tribes in relation to one another and, despite some forms of common activity, the absence among them of any common institutions or organs, even of a quite minimal character. Accordingly, the Court is unable to find that the information before it provides any basis for considering the emirates and tribes which existed in the region to have constituted, in another phrase used by the Court in the *Reparation* case, "an entity capable of availing itself of obligations incumbent upon its Members" *(ibid.)*. Whether the Mauritanian entity is described as the Bilad Shinguitti, or as the Shinguitti "nation", as Mauritania suggests, or as some form of league or association, the difficulty remains that it did not have the character of a personality or corporate entity distinct from the several emirates and tribes which composed it. The proposition, therefore, that the Bilad Shinguitti should be considered as having been a Mauritanian "entity" enjoying some form of sovereignty in Western Sahara is not one that can be sustained.

150. In the light of the above considerations, the Court must conclude that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of "simple inclusion" in the same legal entity.

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151. This conclusion does not, however, mean that the reply to Question II should necessarily be that at the time of colonization by Spain no legal ties at all existed between the territory of Western Sahara and the Mauritanian entity. The language employed by the General Assembly in Question II does not appear to the Court to confine the question exclusively to those legal ties which imply territorial sovereignty. On the contrary, the use of the expression "legal ties" in conjunction with "Mauritanian entity" indicates that Question II envisages the possibility of other ties of a legal character. To confine the question to ties of sovereignty would, moreover, be to ignore the special characteristics of the Saharan region and peoples to which reference has been made in paragraphs 87 and 88 above, and also to disregard the possible relevance of other legal ties to the various procedures concerned in the decolonization process.

152. The information before the Court makes it clear that the nomadism of the great majority of the peoples of Western Sahara at the time of its colonization gave rise to certain ties of a legal character between the tribes of the territory and those of neighbouring regions of the Bilad Shinguitti. The migration routes of almost all the nomadic tribes of Western Sahara, the Court was informed, crossed what were to become the colonial frontiers and traversed, *inter alia*, substantial areas of what is today the territory of the Islamic Republic of Mauritania. The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories, and their burial grounds in one or other territory. These basic elements of the nomads' way of life, as stated earlier in this Opinion, were in some measure the subject of tribal rights, and their use was in general regulated by customs. Furthermore, the relations between all the tribes of the region in such matters as inter-tribal clashes and the settlement of disputes were also governed by a body of inter-tribal custom. Before the time of Western Sahara's colonization by Spain, those legal ties neither had nor could have any other source than the usages of the tribes themselves or Koranic law. Accordingly, although the Bilad Shinguitti has not been shown to have existed as a legal entity, the nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated. These rights, the Court concludes, constituted legal ties between the territory of Western Sahara and the "Mauritanian entity", this expression being taken to denote

the various tribes living in the territories of the Bilad Shinguitti which are now comprised within the Islamic Republic of Mauritania. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.

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153. In the oral proceedings, Morocco and Mauritania both laid stress on the overlapping character of the respective legal ties which they claim Western Sahara to have had with them at the time of colonization. Although the view of the Court as to the nature of those ties differs in important respects from those of the two States concerned, the Court is of the opinion that the overlapping character of the ties of the territory with Morocco and the "Mauritanian entity", as defined by the Court, calls for consideration in connection with Question II. This is because the overlapping character of the ties appears to the Court to be a significant element in appreciating their scope and implications.

154. The views of Morocco and Mauritania appear to have evolved considerably since their respective claims to special links with Western Sahara were first raised in the United Nations. It suffices, for the purposes of this Opinion, to note their views as finally formulated before the Court.

155. Morocco's views were explained as follows:

> "Morocco asserts the exercise of its sovereignty, but it does not deny, in so doing, that legal ties of another nature, no less essential having regard to the question put to the Court and to the forms of political life in the region concerned at the time of Spanish colonization, may be asserted by Mauritania.
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> . . . . . .
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> the sovereignty invoked by Morocco and the legal ties invoked by Mauritania were exercised on nomadic tribes and had their first impact on human beings. Of course, these human beings traced in their travels the outline of a territorial entity but, because of the very nature of the relationships between man and the land, some geographical overlappings were inevitable.
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> When Morocco cites dahirs addressed to geographical destinations extending to Cabo Blanco, it is relying on documents attesting the allegiance of tribes finding themselves at given times at certain points in their nomadic itineraries. But it does not mean thereby to claim that, viewed from the standpoint of the destination of the dahir, the strongest link was not with the Mauritanian entity.

Conversely, Morocco does not consider that geographical reference by Mauritania to the outer limits of the nomadic itineraries of Mauritanian tribes rules out the predominance of Moroccan sovereignty in those areas.

In short, there is a north and there is a south which juxtapose in space the legal ties of Western Sahara with Morocco and with Mauritania."

Amplifying this explanation, Morocco said:

"... when Morocco refers to Cabo Blanco and Villa Cisneros in stating arguments of a general character, it is not intending thereby to maintain that its sovereignty extended over those regions at the time of the Spanish colonization; for at the period under consideration those regions were an integral part of the Mauritanian entity, to which the Islamic Republic of Mauritania is the sole successor."

156. The views of Mauritania were explained as follows:

"... the Governments of the Islamic Republic of Mauritania and of the Kingdom of Morocco recognize that there is a north appertaining to Morocco, a south appertaining to Mauritania and that there are some overlappings as a result of the intersection of the nomadic routes from the north and from the south. As a result, therefore, there is no no-man's land between the influence of Morocco and that of the Mauritanian entity..."

"The areas of overlap which have been referred to before the Court implied the superimposition of the Mauritanian entity, the Shinguitti entity, and the Kingdom of Morocco, solely where they met.

Thus the mention of Cabo Blanco and Villa Cisneros by Morocco cannot signify that those regions were, at the time of colonization, under Moroccan sovereignty, as was conceded ... on 25 July ... Similarly, the fact that there may have been this or that Mauritanian nomadic migration in the region of the Sakiet El Hamra cannot be regarded as implying any dispute as to the fact that that region appertains to the Kingdom of Morocco, which, in the view of the Mauritanian Government, did not end at the limits of the Makhzen."

157. It has to be added that Morocco and Mauritania both emphasized that, in their view, the overlapping left "no geographical void" – no "no-man's land" – between their respective ties with Western Sahara.

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158. The Court, as has already been indicated, concurs in the view that Question II does not envisage any form of territorial delimitation by the

Court. It is also evident that the conclusions reached by the Court concerning the ties which existed between Western Sahara and the Kingdom of Morocco or the Mauritanian entity, as defined above, at the time of colonization lead also to the conclusion that there was a certain overlapping of those ties. The findings of the Court, however, regarding the nature of the legal ties of the territory respectively with the Kingdom of Morocco and the Mauritanian entity differ materially from the views advanced in that respect by Morocco and Mauritania. In the opinion of the Court those ties did not involve territorial sovereignty or co-sovereignty or territorial inclusion in a legal entity. In consequence, the "geographical overlapping" drawn attention to by the two States had, in the Court's view, a different character from that envisaged in the statements quoted above.

159. The overlapping arose simply from the geographical locations of the migration routes of the nomadic tribes; and the intersection and overlapping of those routes was a crucial element in the complex situation found in Western Sahara at that time. To speak of a "north" and a "south" and an overlapping with no void in between does not, therefore, reflect the true complexity of that situation. This complexity was, indeed, increased by the independence of some of the nomads, notably the Regheibat, a tribe prominent in Western Sahara. The Regheibat, although they may have had links with the tribes of the Bilad Shinguitti, were essentially an autonomous and independent people in the region with which these proceedings are concerned. Nor is the complexity of the legal relations of Western Sahara with the neighbouring territories at that time fully described unless mention is made of the fact that the nomadic routes of certain tribes passed also within areas of what is present-day Algeria.

160. In the view of the Court, therefore, the significance of the geographical overlapping is not that it indicates a "north" and a "south" without a "no-man's land". Its significance is rather that it indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization by Spain.

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161. As already indicated in paragraph 70 of this Opinion, the General Assembly has made it clear, in resolution 3292 (XXIX), that the right of the population of Western Sahara to self-determination is not prejudiced or affected by the present request for an advisory opinion, nor by any other provision contained in that resolution. It is also clear that, when the General Assembly asks in Question II what were the legal ties between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity, it is addressing an enquiry to the Court as to the nature of these legal ties. This question, as stated in paragraph 85 above, must be understood as referring to

such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. In framing its answer, the Court cannot be unmindful of the purpose for which its opinion is sought. Its answer is requested in order to assist the General Assembly to determine its future decolonization policy and in particular to pronounce on the claims of Morocco and Mauritania to have had legal ties with Western Sahara involving the territorial integrity of their respective countries.

162. The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (cf. paragraphs 54-59 above).

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163. For these reasons,

THE COURT DECIDES,

with regard to Question I,

by 13 votes to 3,

and with regard to Question II,

by 14 votes to 2,

to comply with the request for an advisory opinion;

THE COURT IS OF OPINION,

with regard to Question I,

unanimously,

that Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no-one *(terra nullius)*;

with regard to Question II,

by 14 votes to 2,

that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in paragraph 162 of this Opinion;

by 15 votes to 1,

that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in paragraph 162 of this Opinion.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this sixteenth day of October, one thousand nine hundred and seventy-five, in two copies, of which one will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

Judge GROS makes the following declaration:

[Translation]

The request for advisory opinion, as I understand it, puts to the Court a precise question, relating to a certain legal controversy, to which the Advisory Opinion gives a complex reply; I was in agreement with the Court only in respect of one part of that reply, which I would have preferred to separate from the rest of the operative part of the Opinion. My analysis of the facts of the case and the rules of interpretation which should be applied to them differs from the observations made by the Court, and I consider it necessary to give a brief account of the reasons for my approach to the problems raised by examination of the General Assembly's request, the object of which appears to me to be more limited than that adopted in the Advisory Opinion.

1. In every case, whether contentious or advisory, the first question which arises for a court is: What is being asked for? In the present case, right from

the beginning of the proceedings it was apparent that the General Assembly was asking the Court to give it an opinion on a precise legal question, defined as springing from a "legal controversy [which] arose" during the discussion "over the status of the said Territory at the time of its colonization by Spain"; in the documentation supplied by the Secretary-General concerning the period 1958-1974 there is no trace of any specific legal question between Morocco and Spain, which however the present Advisory Opinion has described as a "legal dispute ... regarding the Territory" (Order of 22 May 1975 and para. 9 of the Opinion). I therefore voted against the Order of 22 May, which, while it was devoted to the composition of the Court, inevitably settled the question of the legal nature of the Opinion, as had already happened in 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, pp. 16 ff.). The problem I will deal with first is that of the definition of the object of the present request for opinion, apart from the consequences of the Order on the composition of the Court (cf. on this point para. 7 below). I consider that there is no dispute—since that is the word used by the Court—between Morocco and Spain, but a legal question raised by the Government of Morocco before the General Assembly, with the support of the Mauritanian Government only in 1974, which may be analysed as a multilateral legal controversy in a debate on the future status of the territory of Western Sahara (hereinafter referred to as the Territory). The subject of that legal question is as follows: is Morocco entitled to claim reintegration of the Territory into the national territory of the Kingdom of Morocco, to which it belonged, according to Morocco, at the time of colonization by Spain? Such is therefore the precise legal question, and the sole question, to be answered by the Court; I therefore regard the reasoning of the Advisory Opinion on other subjects as unrelated to the object of the request.

2. There is no need to dwell at length on the nature of the alleged dispute between two States on such a question. The Court should examine the titles of the Sherifian Empire prior to the time of colonization by Spain, even though the date of 1884 were not a rigid date. Proof of the sovereignty of the Sherifian Empire is necessarily a proof prior to the action of the Government of Spain, and independent thereof; since the claim was based on the detachment of part of the territory of the Empire, it entails the need to prove prior appurtenance to the territory of a State which was then recognized by the community of States. Spain may of course have been one witness, among others, of the situation, but it cannot be a party to a bilateral legal dispute which "continued to subsist" (para. 36 of the Opinion) with the Kingdom of Morocco over facts and a legal situation existing 90 years ago. For a dispute really to exist between two States, it is necessary, as Judge Morelli, and subsequently Judge Sir Gerald Fitzmaurice, have explained, in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 109), and subsequently the case of the Advisory Opinion of 21 June 1971 (*I.C.J. Reports 1971*, p. 314), that:

"... the one party [or parties] should be making, or should have made, a complaint, claim or protest about an act, omission or course of conduct, present or past of the other party, which the latter refutes, rejects or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action or make the reparation, demanded".

It is not enough that two States may have different or even opposing views as to an event or situation for there to be a contentious case, and the end of the passage quoted makes this clear: if it is not possible for any satisfaction for the claim of the one State to be obtained from the other, there is no dispute between them. Now what response could the Government of Spain make to a claim of the Government of Morocco concerning the right of reintegration of the Territory into the Kingdom of Morocco, when these two Governments have specifically agreed to effect the decolonization of the Territory by a procedure set in motion within the United Nations, except to reply that it had no competence to settle by itself this problem which the two Governments, along with many others, are debating in various United Nations bodies. Even if the Government of Spain had agreed to support the claim of the Government of Morocco, such an attitude would have been without any legal effect in the international sphere. The two Governments have explicitly chosen decolonization in the context of the United Nations, in order to study and ultimately settle the future of the Territory, with the other Members of the United Nations. There is no bilateral dispute which is detachable from the United Nations debate on the decolonization; there is no bilateral dispute at all, nor has there ever been any such dispute.

3. In the Advisory Opinion the Court has not re-used the expression "legal dispute ... regarding the Territory" between the Governments of Morocco and Spain, used in the Order of 22 May; paragraphs 34 to 41 slightly modify the analysis, and refer to a legal controversy which arose not in bilateral relations but during the proceedings of the General Assembly, and in relation to matters with which it was dealing. But the ground of the Order of 22 May was an alleged bilateral dispute, since a judge *ad hoc* was accepted for Morocco and refused for Mauritania. Despite the stylistic development in the Opinion, the reasoning is still that a legal controversy continued to subsist between Morocco and Spain, and this is, it seems to me, not maintainable for the reasons of substance which I have briefly outlined. It is also not maintainable in the light of the history of how the alleged dispute took concrete shape. When examining the documents submitted, the Court has correctly noted that between 1958 and 1974 the controversy had several aspects. Between 1966 and 1974 it so far faded away that it was left aside by the claimant State, apart from reservations intended to prevent it being argued that its legal contention had been abandoned. Prior to 1966, however, the opposition of views between Morocco and Spain never got beyond the stage of bilateral diplomatic conversations, or discussions of principle in the United

Nations; the dossier before the Court does not contain a single trace of a negotiation which might appear to be a preliminary to the crystallization of a bilateral dispute. After having tried the way of negotiation with Spain in order to obtain solutions the nature of which the dossier does not make clear, the Government of Morocco stated on 7 June 1966 that it would choose another way, that of "the liberation and independence of the Moroccan people of so-called Spanish Sahara ... in the conviction that unity could be achieved only through liberation and independence..." (A/AC.109/SR.436, p. 8). The alleged dispute had not crystallized up to that time, and in subsequent debates it was not until the 1974 session of the General Assembly that, according to the Court, it "reappeared".

4. In connection with the Advisory Opinion of 21 June 1971 (*I.C.J. Reports 1971*, pp. 329-330), I have enquired into the elements for solution of the problem posed by the parallel existence of a dispute between two or more States and of a situation of which the political organ of the United Nations was seised, and I then took the view that the fact that a general situation was being dealt with within the United Nations could not bring about the disappearance of the element of a dispute between States if there existed such an element, and that in each case the first question was whether one is or is not confronted with what is really a dispute. I do not see that in the present case there is any dispute between Morocco and Spain; there cannot be a dispute over a legal issue which neither of the States can resolve by themselves. The disagreement in all the United Nations debates concerns a problem any solution of which is meaningless unless it is valid *erga omnes*; in the present case there is no bilateral dispute which can be detached from the general discussion of the claim of the Government of Morocco to re-integration of the Territory, but what is detachable from the general discussion is a point of law of general interest on which the General Assembly considers itself insufficiently informed, and which it asks the Court to settle in order to be able to continue its examination of the decolonization of the Territory. This point may of course be of more particular interest to certain member States, and that is the reason why they are mentioned in resolution 3292 (XXIX), but these States are not making specific claims against each other, and there is no dispute.

5. Apart from the important legal interest of principle involved in the discussion of the point, the principal consequence of the difference between the alleged bilateral dispute and a legal question falling within the advisory competence of the Court has been an erroneous decison taken as to the composition of the Court, and further the fact that the presentation of the Advisory Opinion is a precise transposition of what is customary in contentious proceedings. I find it regrettable that the Court should in the Opinion have confirmed the view provisionally taken in the Order of 22 May, and – associating myself with the reservations of other Members of the Court – I maintain that that analysis did not take account of the necessary conditions for the existence of real disputes to be recognized. This is all the more so in that, by conceding in the advisory opinion that the subject of its

examination depended on the interpretation of the decolonization action of the Territory, the Court in effect abandoned the view that there was a bilateral opposition between Morocco and Spain as to the re-integration of the Territory into the Kingdom of Morocco.

6. The question whether, within the decolonization process of Western Sahara commenced by the United Nations, one or two States can invoke a right to re-integration of the Territory so as to come under their sovereignty is a legal question within the meaning of Article 65 of the Statute of the Court, and it is proper to give a reply thereto. But the definition of legal questions within the meaning of Article 65, as formulated in a general way in paragraphs 18 and 19 of the Advisory Opinion, seems to me dangerously inaccurate. I shall merely recall that when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere. In the present case, as defined in the Advisory Opinion, this point is no longer in doubt; since the question put has been found to be a legal one, and since a reply could be regarded as capable of influencing the United Nations action of decolonization of the Territory, the Court could exercise its function as a judicial organ on such a question in the normal way, unlike the case contemplated in 1963 when it stated that: "it is not the function of a Court merely to provide a basis for political action if no question of *actual legal rights* is involved" (*I.C.J. Reports 1963*, p. 37, emphasis added). The Court's reply concerns a claim of right to re-integration of the Territory at the present time, and the fact that the first test of that right was that of the titles prior to colonization does not make such a question abstract or academic. That is not so with regard to the other part of the reply which the Court has given in paragraph 162 of the Opinion, as we shall see in paragraphs 10 and 12 of these observations; it is the application of this theory, which gives an extensive meaning to Article 65 of the Statute, to the operative part of the Opinion which shows how improper it is.

7. To conclude on this aspect of the problems of competence which have arisen for the Court, I shall merely observe that once again the commitments entered into in an Order on a preliminary question have tied the Court's hands. The recitals in the Order of 22 May 1975 were based on the "appearance" of a dispute between Morocco and Spain and of a request on a legal question pending between two or more States within the meaning of Article 89 of the Rules; the verb "appear" is used four times. The Court however then went on to say that its conclusions did not prejudge its position on any of the questions subsequently to be decided, competence, propriety of replying to the request, merits. Despite the effective disappearance of the bilateral dispute in the Court's train of reasoning in its Opinion, and the veil

drawn over the existence of a legal question pending between States, the Court has been unable or unwilling to modify what it said in May 1975, although the reason for the appointment of a judge *ad hoc* does not stand. The third recital in the Order states that the Court "includes upon the Bench a judge of the nationality of Spain, the administering Power of Western Sahara"; I have pointed out in paragraphs 2 and 4 above that Spain was not, on the basis of that or any other status, a party to a bilateral dispute, or to the settlement of a legal question pending between two or more States. By deciding that the question put to the Court was linked to the pursuit of the General Assembly's decolonization process, the Court impliedly admits that the justification for its competence is no longer the dispute which there "appeared" to be in May 1975. Judge Sir Gerald Fitzmaurice and I commented in 1971 on the regrettable effects of these Orders on the composition of the Court which irrevocably prejudge the merits (*I.C.J. Reports 1971*, p. 316, pp. 325-326 and 330). I should add, in the present case, that the Court allowed one of its Members to sit although he had in the United Nations committed himself on one element in the discussion (on this point cf. *I.C.J. Reports 1971*, the dissenting opinion of Sir Gerald Fitzmaurice, p. 309, and my own observations on pp. 311 ff.).

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8. My observations on the problems raised by the Government of Mauritania essentially do not differ from those of the Court; I would however observe that the legal position of the Government of Mauritania in the proceedings before the Court was peculiar, inasmuch as prior to 1974 it did not seek to set up its claim for reintegration of the Territory into its national territory against the normal pursuit of the procedure for self-determination of the population of the Territory in the United Nations context.

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9. The above considerations as to the proper interpretation of Article 65 of the Statute and the precise object of the request for advisory opinion enable me to be brief in explaining my negative vote as to the propriety of replying to the first question in the request. Since the Court decided to reply to this question in the very terms in which it has been put, I took the view that the question was not a legal one, that it was purely academic and served no useful purpose, and I share the views of Judge Dillard as to its being a "loaded" one. The Advisory Opinion rightly recognizes that the concept of *terra nullius* was never relied on by any of the States interested in the status of the Territory at the time of colonization; no treaty or diplomatic document has been produced relying on this concept in connection with Western Sahara, and States at the time spoke only of zones of influence. With regard to a territory

in respect of which the concept makes no appearance in the practice of States, it is a sterile exercise to ask the Court to pronounce on a hypothetical situation; it is not for a court to enquire into what would have happened in 1884 if States had relied on this concept, but into what did happen. If the real question put by the General Assembly, in the thinking of those who drafted it, was what was the legal status of the Territory under international law at the time, it duplicated the second question, to which the Court has, almost unanimously, agreed to reply.

Having said that, since the Court has decided to give a reply to the first question, and since our rules do not permit an abstention, I have voted with all my colleagues that the Territory was not *nullius* before colonization; for I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which was sufficiently recognized for there to have been no *terra nullius*.

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10. The Court has not adopted the simplest way of giving its reply to the second question, since the reply itself, inasmuch as it is effected by cross-reference to paragraph 162 of the reasoning, is enigmatic, as is the paragraph referred to, in which a positive finding of what are said to be legal ties of allegiance between certain nomadic tribes of the territory and the Emperor of Morocco at the time of colonization, and also other ties which are said to be legal, this time between the Mauritanian entity and the Territory, is combined with a negative decision as to the existence of any tie of sovereignty over the territory on the part of the Emperor of Morocco or the Mauritanian entity, the conclusion being that no legal tie exists which could influence the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (with a fresh cross-reference here to paras. 54-59 of the opinion).

The second part of paragraph 162, concerning the question of territorial sovereignty, is the only one which corresponds to the question put in the request for opinion. The object of the request, as I said in my very first paragraph above, was to obtain the opinion of the Court on a claim of the Government of Morocco to the reintegration of the Territory in the national territory of Morocco, and on a parallel claim by the Government of Mauritania based on the concept of the Mauritanian entity at the time in question, which advisory opinion was necessary prior to pursuit of the decolonization of the territory. I agree with the views and decision of the Court on this point of law.

On the other hand, if paragraph 162 had been divided into two, I would have voted against the first part which relates to the "legal ties" other than the tie of territorial sovereignty, because those ties are not legal ties but ethnic, religious or cultural ties, ties of contact of a civilization with what lies on its periphery and outside it, and which do not touch on its own nature. I must

therefore make a few observations on the part of the Court's reply with which I disagree, both as regards the reasoning and the conclusion (for Morocco, paras. 105, 106, 107, 129; for Mauritania, paras. 151 and 152; for the conclusion, para. 162).

11. The description given in the Opinion of the Saharan desert and of nomadic life in 1884 is an idyllic vision of what was a harsh reality. At the time, the Saharan desert was still the frontierless sea of sand used by the caravans as convoys use an ocean, for the purposes of a well-known trade; the desert was a way of access to markets on its periphery. The relation between the territory and human beings was affected by these aspects, and the organization of the populations of the desert reflects these special conditions of life: caravans, the quest for pastures, oases, defence or conquest, protection and submission between tribes – with regard to which testimony produced to the Court, and not disputed, was to the effect that in modern times there are 173 Moorish tribes. Since the Court was unable to carry out any specific research, it is vain to make generalizations, in the absence of any reliable data, on the lines that there was "allegiance" between the Emperor of Morocco and "some" of the nomadic tribes, or "some rights relating to the land", between the Territory and the Mauritanian entity, when the Court would be quite unable to say either what were the tribes concerned in 1884, to what extent and for what period, nor in what effective exercise of rights relating to the land the tribes and the Mauritanian entity were combined, nor what tribes, nor for what period. It is the duty of a court to establish facts, that is to say to make findings as to their existence, and it confers a legal meaning upon them by its decision; a court may neither suppose the existence of facts nor deduce them from hypotheses unsupported by evidence. How can one speak of a legal tie of allegiance, a concept of feudal law in an extremely hierarchical society, in which allegiance was an obligation which was assumed formally and publicly, which was known to all, was relied on on both sides, and was backed by specific procedures and not merely by the force of arms. The political situation, in the broadest sense of the term, of the tribes of the desert is that of independence asserted by arms, independence both between the tribes themselves and with regard to what lay on the periphery of their travelling grounds. To give the term allegiance its traditional sense, more would have to be said than that it was possible that the Sultan displayed some authority over some unidentified tribes of the desert (para. 105 of the Opinion). As to the observations and deductions made as to the role of the various Tekna tribes, also unidentified, these seem to me injudicious, mere *a posteriori* constructions of a little known epoch. On the basis of the dossier as it stands, and of the studies of this period by geographers, historians, explorers and soldiers, the Saharan desert and its tribes did not recognize allegiance in the legal sense of the word, and sporadic contacts or relationships with the outside world did not affect the peculiarity and exclusivity of their way of life. If the desert is a separate world, it is an autonomous world in the conception of its relationships with those who have a different way of life.

12. Contact-relationships of which the duration is unknown, and the existence of which at the period of colonization is supposed rather than proved, do not afford possible material for the Court to examine and on which to reply, and by doing so it oversteps the limits of the powers conferred upon it by Article 65 of its Statute (cf. para. 6 above). By means of the extensive interpretation given to Article 65, whereby the Court was led to put to itself a second question, that of the legal ties other than sovereignty over the Territory at the period under consideration, which was the sole subject of the controversy which gave rise to the request for opinion, the Court purports to be replying to a legal question, but the ties which it describes as legal would only be so if, after having established their existence, the Court could in any way, by determining their significance, produce an effect on the decolonization of the Territory. The Court cannot attribute a legal nature to facts which do not intrinsically possess it; a court does not create the law, it establishes it. If there is no rule of law making it possible for it to assert the existence of the alleged legal ties, the Court oversteps its role as a judicial organ by describing them as legal, and its finding is not a legal finding; the Court's statement in paragraph 73 of the Opinion that questions put in a request for opinion must have "a practical and contemporary effect" if they are not to be "devoid of object or purpose", does not suffice, for the Court does not in this field have capacity to "give advice" to the General Assembly which would have a practical effect. Whether such factors existed in 1884 or not – which has not been "established" in the judicial sense of the word – the General Assembly would be free to take them into account together with other contemporary factors, which also do not fall within the Court's competence, because economics, sociology and human geography are not law. In 1962 the Court said: "in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter" (Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, p. 155).

13. I expressed my view in 1974 as to the current trend in the Court to reply to problems which it raises itself rather than to that which is submitted to it, and can only endorse what I said then (*I.C.J. Reports 1974*, pp. 148-149). In the present case, the way in which the operative part of the Advisory Opinion has been drawn has obliged me to vote in a way as unsatisfactory as that drafting itself, as is shown by the various opinions in relation to the apparent quasi-unanimity. Like other Members of the Court, I was faced only with the choice between agreeing or disagreeing subject in either event to reservations. I voted in favour of the adoption of the operative clause, and thus of paragraph 162, because of the part thereof concerning the object of the request, as I have defined it above, that is to say verification of the existence of legal ties of appurtenance or dependence of the population of the Territory, at the period under consideration, vis-à-vis an external political authority – in short, ties relating to the sovereignty which was claimed before the Court; and the role of the Court went no further than that.

Judge IGNACIO-PINTO makes the following declaration:

[Translation]

I have been able to subscribe only in part to the Opinion of the International Court of Justice dated 16 October 1975 and only because in the final paragraph of its reasoning, paragraph 162, the Court's

> "... conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."

I consequently reject all that part of the Court's statement which declares that at the time of colonization by Spain there were legal ties of allegiance between the Sultan of Morocco and certain tribes of the territory at the same time as other legal ties between the Mauritanian entity and the territory of Western Sahara.

My objection to the Advisory Opinion is due to the fact that I consider that, even if it appears that the Court is justified in declaring itself competent under the provisions of Article 96 of the Charter of the United Nations on the one hand, and of Article 65 of the Statute of the Court on the other, to receive from the United Nations General Assembly the request for an advisory opinion, it would have been proper by reason of certain circumstances in the case *ab initio* for the Court, availing itself of its discretionary power, and after having declared the request receivable as to the form, to reject it as to the substance, because the questions as put are, as it were, loaded questions, leading in any case to the answer awaited in this particular instance, namely the recognition of rights of sovereignty of Morocco on the one hand and of Mauritania on the other over some part or other of Western Sahara.

For the sake of brevity and to avoid useless repetition, I can support the observations of Judge Petrén concerning the interpretation of paragraph 162 of the Opinion and the grounds on which my colleague, like myself, rejects all of that paragraph other than where it deals with the question of any tie of territorial sovereignty between the territory and Morocco and the Mauritanian entity – a part of the paragraph which I can accept.

M. NAGENDRA SINGH, juge, fait la déclaration suivante:

[Traduction]

Bien que je souscrive à l'avis consultatif et que j'approuve son insistance sur la nécessité d'une expression authentique de la volonté des populations,

fondement de l'autodétermination, il n'est peut-être pas inutile de chercher à mieux cerner la nature et le caractère des liens juridiques qui constituent l'objet de la question II de la résolution 3292 (XXIX) de l'Assemblée générale, par laquelle la Cour a été saisie de la présente requête pour avis consultatif. Sans paraître sortir de son rôle judiciaire, un tribunal peut préciser l'effet de ces liens sur la décolonisation, qui demeure le but et le thème essentiel des travaux en cours à l'Assemblée générale. C'est là un aspect vital qui doit être énoncé en détail et sans équivoque afin d'éclairer l'Assemblée générale.

En outre, d'autres aspects, peut-être tout aussi importants, méritent de retenir l'attention et doivent être soulignés comme il convient pour que la portée de l'avis consultatif soit pleinement appréciée. Ces aspects essentiels à mes yeux sont brièvement indiqués ci-dessous.

I

Le Maroc et la Mauritanie ont évoqué l'un et l'autre certains aspects et détails pertinents du processus de décolonisation qu'il importe de relever ici. Dans son exposé oral, l'un des conseils du Maroc s'est exprimé en ces termes:

> « D'ailleurs, même dans l'hypothèse où l'Assemblée générale déciderait que, pour la mise en œuvre du principe de la libre détermination, il convient de recourir à un référendum, dans ce cas-là aussi bien, il serait utile de savoir si, compte tenu de l'existence de liens juridiques avec un pays au moment de la colonisation par l'Espagne de ce territoire, il ne conviendrait pas de poser aux populations le problème de leur rattachement, de leur retour, ou au contraire de leur détachement, à ce qui, par hypothèse, serait leur ancienne mère patrie. » (Audience du 26 juin 1975.)
>
> « *ce problème de l'aménagement des questions dans un éventuel référendum est donc éclairé, dans une certaine mesure, par la nécessité pour l'Assemblée générale d'être au courant de toutes les données de l'affaire* » *(ibid.)* (les italiques sont de moi).

La Cour, étant parvenue à bon droit à la conclusion qu'il n'existait pas de liens juridiques « de nature à modifier l'application de la résolution 1514 ... et en particulier l'application du principe d'autodéterminaton grâce à l'expression libre et authentique de la volonté des populations du territoire », paraît être fondée à aller plus loin pour indiquer dans quelle mesure les liens juridiques qui existaient en fait pourraient avoir une incidence sur le processus de décolonisation et, dans ce cas, sous quelle forme concrète.

Ces liens juridiques entre le Sahara occidental et le Maroc ou la Mauritanie dont la Cour a constaté l'existence au moment de la colonisation espagnole n'étaient pas tels qu'ils puissent justifier aujourd'hui la réintégration ou la rétrocession du territoire sans consultation de ses habitants. La raison essentielle de cette conclusion est simplement la suivante: rien n'indique qu'à

l'époque de la colonisation espagnole un seul Etat, englobant les territoires du Sahara occidental et du Maroc, ou le Sahara occidental et la Mauritanie, ait été démembré par le colonisateur, fait qui justifierait sa reconstitution au stade actuel de la décolonisation. Par suite, les circonstances de l'espèce sortent du cadre du paragraphe 6 de la résolution 1514 (XV), selon lequel la destruction de l'unité nationale et de l'intégrité territoriale d'un pays est incompatible avec la Charte des Nations Unies, ce qui militerait donc en faveur d'une réintégration. Néanmoins, puisque la Cour constate l'existence de certains liens juridiques, il devient nécessaire d'examiner ces liens à seule fin d'apprécier l'importance qu'ils peuvent revêtir dans le processus de décolonisation et de rechercher s'ils appellent l'adoption d'une mesure précise. En un mot, la force et l'effectivité de ces liens, bien que limitées, doivent être considérées comme pouvant donner une indication des options qui pourraient être offertes à la population afin qu'elle exprime sa volonté. Conformément aux résolutions 1541 (XV) et 2625 (XXV), ces options pourraient être soit l'intégration au Maroc ou à la Mauritanie, soit la libre association avec l'un de ces deux Etats, soit encore le choix d'un statut souverain et indépendant pour le territoire. Même si l'on admet que les méthodes de décolonisation sont du ressort exclusif de l'Assemblée générale, il appartient cependant à un tribunal de souligner les rapports entre l'existence de liens juridiques et le processus de décolonisation, afin d'éclairer pleinement l'Assemblée. Agir ainsi, ce n'est pas empiéter sur les prérogatives de l'Assemblée, mais remplir le rôle qui incombe à la Cour comme organe judiciaire principal des Nations Unies.

Il existe d'excellentes raisons d'aller jusque-là mais pas plus loin. Tout d'abord, si l'on tient compte de la raison d'être même de la résolution 3292 (XXIX), il est clair que ce que l'Assemblée générale attend, en réponse à la question II, c'est une évaluation par la Cour de la nature des liens juridiques « qui pourraient influer sur la politique à suivre pour la décolonisation du Sahara occidental ». S'il est vrai que « la Cour ne saurait oublier l'objet en vue duquel l'avis est sollicité », il va sans dire que sans sortir de son rôle de tribunal elle peut aller jusqu'à éclairer ces aspects des options ouvertes à la population du territoire, quel que soit le mode de consultation, à fortiori quand la Cour juge cette consultation essentielle.

La seconde raison est que le Maroc et la Mauritanie ont l'un et l'autre plaidé cet aspect de la question, comme on l'a vu, et qu'il ne faudrait pas totalement le méconnaître.

II

La Cour a reconnu la validité du principe de l'autodétermination, « défini comme répondant à la nécessité de tenir compte de la volonté librement exprimée des peuples ». Elle a en outre conclu à juste titre que la demande d'avis ne diminue en rien la nécessité de déterminer la volonté librement exprimée de la population. A mon sens, la consultation des habitants du

territoire en instance de décolonisation est un impératif absolu, que la méthode suivie pour la décolonisation soit l'intégration, l'association ou l'indépendance. C'est ce qui ressort non seulement des dispositions générales de la Charte des Nations Unies mais aussi de résolutions particulières de l'Assemblée générale consacrées à ce sujet. Outre les articles 1, 2, 55 et 56 de la Charte et les paragraphes 2 et 5 de la résolution 1514 (XV), qui insistent de manière générale sur cet aspect, on trouve des dispositions expresses comme les principes VII et IX de la résolution 1541 (XV), qui énoncent catégoriquement que la libre association ou l'intégration « doit résulter du désir librement exprimé des populations du territoire ». C'est le principe VI *c)* de la résolution 1541 (XV) qui reconnaît que l'intégration peut être une méthode de décolonisation et le principe IX *b)* oblige à consulter la population pour réaliser l'autodétermination par cette voie. De même la résolution 2625 (XXV) sur les relations amicales revient sur la question pour souligner que lors de la décolonisation l'aboutissement à un statut politique quelconque doit être « librement décidé par un peuple ». Ainsi, alors même que l'un des Etats intéressés revendique l'intégration d'un territoire, comme dans la présente affaire, on ne saurait y procéder sans s'être assuré de la volonté librement exprimée des habitants — ce qui constitue le *sine qua non* de toute décolonisation.

Je suis néanmoins d'accord avec les éclaircissements donnés par la Cour sur certains cas où l'Assemblée générale n'a pas cru devoir consulter les habitants d'un territoire. Il en résulte selon moi que le principe de l'autodétermination n'est écarté que dans la mesure où l'on considère comme allant de soi la libre expression de la volonté de la population, en ce sens que l'on sait le résultat acquis d'avance ou que des consultations ont déjà eu lieu sous une forme quelconque ou encore que certaines particularités rendent cette consultation superflue. Des circonstances aussi exceptionnelles sont possibles; elles peuvent se rencontrer, mais elles ne sont pas présentes dans l'affaire actuelle au point que l'on puisse écarter le principe salutaire de la détermination de la volonté librement exprimée de la population du territoire qui, consultée, peut, si elle le souhaite, choisir de s'intégrer à n'importe lequel des Etats intéressés avoisinants.

Je répète que les cas relevant du paragraphe 6 de la résolution 1514 échappent à cette règle. De toute façon, comme on l'a vu, les faits de la cause ne paraissent pas appeler l'application de cette disposition particulière.

III

Un autre aspect qui me paraît également important concerne les observations formulées par la Cour au sujet du principe fondamental du consentement à la juridiction dans le cas où l'on utiliserait la voie consultative pour éluder la nécessité de ce consentement. Dans la présente affaire, l'Espagne n'a pas consenti à ce que les questions énoncées dans la résolution 3292 (XXIX) soient portées devant la Cour. Elle n'avait pas accepté non plus la proposition marocaine de saisir la Cour au contentieux. Il incombait donc à la Cour de

préciser la situation en droit, l'Espagne soutenant qu'il y avait absence de consentement à la juridiction de la Cour. S'il est vrai qu'il y a deux voies d'accès distinctes à la Cour, la voie consultative et la voie contentieuse, et que le consentement des Etats parties à un différend est le fondement de la juridiction en matière contentieuse alors qu'il en est autrement en matière d'avis, puisque l'avis de la Cour n'a qu'un « caractère consultatif » et qu'il est donné « non aux Etats, mais à l'organe habilité pour le lui demander » (*C.I.J. Recueil 1950*, p. 71), il est justifié de conclure que dans certaines circonstances le défaut de consentement d'un Etat intéressé pourrait rendre le prononcé d'un avis consultatif incompatible avec le caractère judiciaire de la Cour. La Cour a donc déclaré que si une demande d'avis consultatif était faite dans des circonstances indiquant clairement que l'intention ou le but était de tourner le principe du consentement, il en résulterait une situation dans laquelle le « pouvoir discrétionnaire que la Cour tient de l'article 65, paragraphe 1, du Statut fournirait des moyens juridiques suffisants pour assurer le respect du principe fondamental du consentement à la juridiction ».

Ce principe salutaire n'a pas été éludé en l'espèce attendu que la demande d'avis visait à obtenir de la Cour des conseils juridiques que l'Assemblée générale estimait utiles pour exercer ses fonctions en vue de la décolonisation prochaine d'un territoire. L'important dans ce contexte est donc d'avoir reconnu que des considérations d'opportunité judiciaire constitueraient une raison « décisive » de refuser d'émettre un avis, si le but de la requête était de tourner le principe suivant lequel un Etat n'est pas tenu de soumettre ses différends au règlement judiciaire contre sa volonté. La Cour renseigne d'autre part l'Assemblée générale sur l'application de l'article 96 de la Charte en déclarant que le consentement d'un Etat reste pertinent, en matière consultative, « pour apprécier s'il est opportun de rendre un avis ».

Vice-President AMMOUN, Judges FORSTER, PETRÉN, DILLARD and DE CASTRO and Judge *ad hoc* BONI append separate opinions to the Opinion of the Court.

Judge RUDA appends a dissenting opinion to the Opinion of the Court.

(Initialled) M.L.

(Initialled) S.A.
