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.