

SEPARATE OPINION OF JUDGE DE CASTRO

[Translation]

I have voted in favour of the Advisory Opinion because it states that there are no ties of sovereignty between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity, and that the principle of self-determination should be applied to the said territory, thereby giving a correct, clear and conclusive reply to the real questions put to the Court. On the other hand, I cannot go along with the Advisory Opinion either in its statement regarding the existence of other legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity, nor in all its reasoning. In order to justify my vote, I feel obliged to set out my separate opinion below.

INTRODUCTION

1. Origins of the Case

For the sake of clarity and to avoid repetitions, I think it as well to refer to the more important features of the background to the case before the Court.

The ultimate origins of resolution 3292 (XXIX) of the United Nations General Assembly can be traced back to the determined activity of a most extraordinary personality, Si Allal El Fassi, to whom must be attributed Morocco's interest in the expansion of its frontiers. It would seem that, around 1956, Moroccans firmly believed that the Sherifian Kingdom did not extend beyond the Wad Dra'a. Government ministers were unaware even of the existence of the southern region of the Spanish Protectorate¹. El Fassi, on the other hand, even before Morocco's independence, was advocating the reconstitution of Greater Morocco, by claiming, on the basis of Morocco's historic rights, Mauritania, Río de Oro, the Sakiet El Hamra, part of Algeria – Tindouf and Colomb-Béchar – and part of Mali. Speaking of what he had done, he boasted: "Originally, I was the only person to call for the liberation of the Sahara and I was greeted with laughter²." He considered those rights of Morocco over those territories as stronger than the will of the indigenous people, and stated:

"Mauritania has no right to separate itself from the rest of Morocco. In such an event – which God forbid – the King and the people would

¹ Husson, *La question des frontières terrestres du maroc*, 1960, p. 44. The explanation lies in the fact that Tarfaya, or the area of the Tekna, was at the extreme edge of the Bled Siba, which had been pacified by the French and Spanish armies.

² Speaking to the Beni-Mestara tribe on 16 October 1957; Husson, *op. cit.*, p. 48.

have a duty to constrain the Mauriticians by force to preserve the unity of the homeland¹.”

The theories propounded by El Fassi reached the international level in the Fourth Committee's debate on information to be given on non-self-governing territories, when the representative of Morocco protested against the inclusion of Mauritania, Spanish Sahara and the Ifni enclave among non-self-governing territories. They were, he said, integral parts of Moroccan territory (14 October 1957, A/C.4/SR.670).

It was on the basis of such alleged historic rights, — and similar arguments were to be used subsequently with respect to Western Sahara — that Morocco opposed in the United Nations the declaration of the independence of Mauritania². In the General Assembly, some States were in favour of Morocco's claims; others thought that the principle of self-determination of peoples was paramount. On that occasion, the representative of Senegal pointed out that it would be contradictory for the United Nations to satisfy Morocco's claims at a time when a draft resolution proclaiming the independence of all countries under colonial administration was being prepared (16 November 1960, A/4445).

The draft referred to by the representative of Senegal became General Assembly resolution 1514 (XV) of 14 December 1960; Mauritania was ultimately to be recognized as an independent State and admitted as a Member of the United Nations.

The growing strength of the principle of self-determination duly had its effect upon the status of Western Sahara. Spain and the United Nations agreed to consider the territory as “non-self-governing” and thus subject to decolonization, which in pursuance of General Assembly resolution 2229 (XXI) of 20 December 1966 was to be by means of a referendum carried out on the basis of consultations between the administering Power, the Governments of Morocco and Mauritania and any other interested party.

From 1966, Morocco, too, expressed the wish that the Saharan regions should accede to independence³. From then on, the policy of Morocco was to insist that the administering Power should grant independence to Western Sahara, and it voted for the General Assembly resolutions to that effect (those cited in General Assembly resolution 3292 (XXIX)).

In his book on the subject published in 1974 (see footnote 1 below), Professor Lazrak of the University of Rabat comments that:

“... the change in the Moroccan attitude ... was an important event in Moroccan diplomacy and, indeed, in the general process of decolonization, since the principle of self-determination, as advocated

¹ Criticism of the proposals made by the Crown Prince, 17 September 1958, Husson, *op. cit.*, p. 72.

² See *White Paper on Mauritania*, Rabat 1960, especially pp. 9-11.

³ Statements by the Minister for Foreign Affairs in October 1966 and by the Minister of the Interior dated 7 May 1967. On the meeting held in Addis Ababa on 7 June 1966, see Lazrak, *Le contentieux territorial entre le Maroc et l'Espagne*, 1974, pp. 364-365.

by Morocco, was to become the United Nations doctrine on the subject and, consequently, the only solution adopted for the problem of the Sahara" (p. 365).

In the same book, Professor Lazrak had noted the existence of "new aspects to the problem of the Sahara"—economic aspects (the Bu Craa deposit) and political aspects (Morocco's relations with Mauritania and Algeria) (p. 355 *et seq.*).

But there was a further change. In his message to the Head of the Spanish State, His Majesty King Hassan II complained about Spain's "new policy in the Sahara" (A/9654). The policy announced by the Spanish Minister for Foreign Affairs—which was subsequently embodied in a communication to the Secretary-General of the United Nations—was that a decision had been taken to hold a referendum for the decolonization of the Sahara; the referendum was to be under the auspices of and supervised by the United Nations, and would be held during the first six months of 1975 on a date to be fixed sufficiently long in advance (A/9714, 21 August 1974).

The reaction of the King took the form of a letter, dated 23 September 1974, from the Minister for Foreign Affairs of Morocco to the Minister for Foreign Affairs of Spain. The letter reproduced the text of a statement made by the King to the Press:

"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 then request the arbitration of the International Court of Justice . . . it will state the law of title and will then be able to enlighten the United Nations, enabling it to recommend to Morocco and Spain the course that they should follow."

The Moroccan Government accordingly presented to the Spanish Government a formal proposal:

". . . to submit this question jointly to the arbitration of the International Court of Justice, in accordance with the spirit and the letter of Chapter VI of the United Nations Charter relating to the peaceful settlement of differences" (A/9771, 24 September 1974).

The Spanish Government did not reply; I do not know for what reason.

On 30 September 1974, Mr. Laraki, the representative of Morocco, in a statement to the General Assembly, said that the principle of self-determination was not always applicable in matters of decolonization; "for Morocco, the decolonization of the two Saharan provinces implied their reintegration into the Moroccan State" (A/PV.2249).

In Mr. Laraki's view, a dispute had existed between Morocco and Spain since 1956. To resolve it, he again proposed to submit to the Court the following questions:

"... were the two Territories of the Sahara in question originally, as the Spanish Government claims, '*res nullius*' or Territories without a master, and open to occupation? Or were they at the moment of occupation under the sovereignty and administration of the Moroccan State?" (*Ibid.*)

If that direct method were not adopted, he added, there would remain the method of a request to the Court by the General Assembly for an advisory opinion. He commented: "The opinion given by the supreme international judicial body on a point of law could have just as considerable an effect as its arbitration." (*Ibid.*)

Mr. Laraki, following the lines laid down by the King, as formulated in the letter of 23 September 1974 and relying on the arguments put forward in the General Assembly, claimed the territory of Western Sahara on the grounds of Morocco's historic titles or ties. Thus no more was heard of the "other interested parties", and the right to self-determination of the indigenous population, which had appeared to be guaranteed by the Assembly's resolutions, was ignored.

The political understanding within the African group moderated the reaction against the Moroccan demands, but there was nevertheless a reaction — and a strong one — in favour of the principle of self-determination.

In the General Assembly Mauritania, while referring to its claim to Western Sahara as an integral part of the Islamic Republic of Mauritania, nevertheless emphasized that, whatever the opinion of the Court might be, "the right of self-determination of the people of the Sahara cannot be subject to any impediment" (A/PV.2251). Algeria stated that "the opinion of the population directly concerned will always be the most important element and the decisive factor in any settlement" (A/PV.2265). The representatives of the administering Power expressed the same view (A/PV.2253 and A/PV.2257).

The background to General Assembly resolution 3292 (XXIX) is also worth bearing in mind. Introducing the draft resolution in the Fourth Committee, the representative of Upper Volta said that "it was the fruit of long negotiations among the delegations concerned, particularly those of Mauritania, Morocco and Algeria" (A/C.4/SR.2130). The representative of Senegal — one of the countries of the group of 35 which sponsored the draft — explained that the purpose of the proposed resolution should be to:

"... assist the African countries concerned in finding a solution, even one of waiting, which would respect both the provisions of the Declaration on the Granting of Independence and the possible rights which a given country might have over a territory under foreign domination" (A/C.4/SR.2124).

The representative of the Ivory Coast, also a member of the African group, said that the draft had been prepared "in a spirit of compromise" and that:

"... elements had been introduced into the original text which would enable the General Assembly to be consistent. Those elements were,

firstly, the reaffirmation, in the preamble, of the right to self-determination of the people of Spanish Sahara" (A/C.4/SR.2131).

The nature of the compromise referred to above can also be inferred from the report submitted by the administrative Secretary-General of the Organization of African Unity. According to him, when the Moroccan draft of the request to the Court for an advisory opinion was submitted to the African Group, "many" delegations had expressed concern over the fact that the resolution totally disregarded the right of the people of the Sahara to self-determination and had felt that this could constitute a dangerous precedent for African countries which had fought for the principle of self-determination since their independence (Spanish written statement, para. 250).

Thus, although there was no rejection of the Moroccan proposal that the Court should consider the validity of the legal titles to or legal ties with the territory of Western Sahara at the time of colonization by Spain, the principle of self-determination was reaffirmed in the text of the resolution. But as the representative of the Ivory Coast recognized, "it was an unusual draft resolution that might perhaps not be entirely satisfactory" (A/C.4/SR.2131). For that reason, several members of the Fourth Committee were afraid that the resolution still entailed a threat to the principle of self-determination. Consequently, when voting for or abstaining from voting on the draft, States made a point of putting on record the fact that they were in favour of the principle of self-determination. In addition to Algeria (A/C.4/SR.2125), those adopting this course included the United Republic of Cameroon and the Syrian Arab Republic (A/C.4/SR.2130), Cuba, Grenada, Equatorial Guinea, Colombia, Costa Rica, Malaysia, Venezuela, Portugal, Libyan Arab Republic and Ecuador (A/C.4/SR.2131). The representative of Democratic Yemen, as a sponsor of the draft, did not have to explain his vote, but he stressed that, "only the people of the Territory themselves were entitled to decide the nature and form of their future life" (A/C.4/SR.2131). The representative of Kenya was against the request for an advisory opinion; he complained that "the United Nations was being asked to treat them [the indigenous peoples] as chattels and not as people" (*ibid.*).

The Fourth Committee finally proceeded to vote on the draft resolution, which was adopted by 81 votes to none, with 43 abstentions. In the General Assembly, it was adopted by 87 votes to none, with 43 abstentions (resolution 3292 (XXIX)).

In consequence, the matter came before the Court. It is noteworthy that, in the written statements of Morocco and Mauritania, each of those two States claimed the whole of the territory of Western Sahara. In the course of the oral statements before the Court, the contradictory character of the claims of Morocco and Mauritania disappeared, each State limiting its claim to a part — respectively the north and the south — of Western Sahara. This change of position occurred without any explanation being given to the Court of the reasons prompting it, or of its bearing on the value of the information and documents supplied in the earlier statements claiming the whole of the territory.

2. *Interpretation of the Terms of the Request for an Advisory Opinion*

The two questions put to the Court are apparently simple and clear. An examination of them reveals that they raise delicate problems of interpretation.

(a) *Method of Interpretation*

First of all, there is the preliminary question of the method of interpretation to be followed. Are the questions put to the Court to be isolated from the rest of the resolution in which they are included; or are they, on the contrary, to be considered in the context of the resolution and in the light of its history and background?

It seems clear that, in order to interpret a resolution of the United Nations General Assembly, as when interpreting a law or with any unilateral declaration in general, it is necessary to enquire into its purpose and the reason for its existence¹. It is not therefore permissible to isolate the questions asked from the body of the resolution in which they are inserted. It is the resolution as a whole which expresses the reasons for the request for an advisory opinion and explains the use to which that opinion is to be put by the General Assembly².

The background of the resolution shows that, although the two questions put to the Court were the same as those that had been proposed by H.M. King Hassan II, their purpose and sense changed when they were inserted in the draft of the 35 States. Their object is no longer to obtain a declaration on Morocco's title to claim Western Sahara, but to assist the General Assembly in deciding "on the policy to be followed in order to accelerate the decolonization process in the territory, in accordance with resolution 1514 (XV)". This object is so clearly expressed by the General Assembly that it cannot be ignored when interpreting the questions submitted to the Court for an advisory opinion.

(b) *Complementary Character of the Two Questions Asked*

When two questions are put to the Court it seems natural to ascribe to each of them a distinct and separate meaning of its own. If one and the same question were being asked, what would be the point of repeating it in different words? However, notwithstanding the accuracy of this observation, one must not ignore the fact that the promoters of the request for an advisory opinion, and the parties concerned, gave the two questions a complementary sense which the General Assembly was aware of and accepted when it voted in favour of the resolution.

The General Assembly did not ask whether the territory had belonged to no-one or whether it had been in the possession of independent tribes; its

¹ As Baldus said, "*Ratio in lege sicut anima et spiritus, eius autem verba sunt corpus*".

² "*In civile est nisi tota lege perspecta, una aliqua particula eius proposita judicare, vel respondere*", Celsus, D.1, 3, 24.

interest was confined to the question whether the territory had belonged to no-one because it had no ties with Morocco or Mauritania.

The interconnection of the two questions appears natural in the context of the resolution and has been admitted on a number of occasions by the interested parties.

In view of its origin and purpose, the first question must not be separated from the second; it is the same question, albeit differently drafted. The territory must be considered *nullius* if it was not subjected by legal ties to any State or juridical organization at the time of colonization by Spain; it would not have been *terra nullius* if, at that time, it had been subjected by legal ties to the Kingdom of Morocco or the Mauritanian entity.

It was on the initiative of Morocco, by a declaration of H.M. King Hassan II dated 17 September 1974, and then by the statement made by Mr. Laraki to the General Assembly on 30 September 1974, that the two questions were put separately – a separation that recurs in General Assembly resolution 3292 (XXIX)¹. Following the debate in the General Assembly and the voting of the request for an advisory opinion, the complementary nature of the two questions may be regarded as evident.

The Moroccan Government itself observes, in the introduction to its written statement:

“Clearly, the two questions put to the Court are closely connected. For the Kingdom of Morocco, the proof that Western Sahara was not, at the various times marking the stages of the process of Spanish colonization, a territory belonging to no-one, follows from the fact that, since very ancient times (the 11th century), contemporary with the constitution of the Kingdom itself, this territory was under an effective authority, and that such authority was that of Moroccan sovereignty. It is impossible to separate the demonstration of these two points, since they are concerned with acts of sovereignty of a State which, although appreciably different in structure from European States, was none the less recognized as a sovereign State by them, and has never ceased its resistance to Spanish implantation in Western Sahara.”

¹ The purpose of this initiative seems to have been to present the Moroccan claims in the form of a dispute with Spain regarding the weight of the two countries' respective titles to Western Sahara. The supposition is that Spain bases its title on the territory's having been *terra nullius*. Should the Court reply that the territory was not one belonging to no-one at the time of colonization, this would mean that it had an owner, and that owner – or so the conclusion would appear to be – could only have been Morocco, the sole neighbouring Muslim State. This method of posing the question changes with the introduction of the draft resolution of the group of 35, because of the emphasis placed on the principle of self-determination. For similar reasons it was in Morocco's interest to avoid raising the question of the legality of colonization by Spain, for to do so would have shown that the issue was one proper to the Court's contentious rather than its advisory jurisdiction.

The written statement by the Islamic Republic of Mauritania has this to say:

"If the problem submitted to the Court concerned the legitimacy of Spanish possession or the territorial limits of that possession, there would certainly be some call to apply the realistic concept or fiction-concept of *territorium nullius*.

But it is difficult to see how it fits in with the preoccupations of the General Assembly, which are as follows: how to decolonize the territory of Spanish Sahara? Should this territory be considered, at the time of its colonization, to have belonged to no-one, in which case anything created on it is Spanish and might qualify for a wholly independent and self-governing future, or should it be considered to have been inhabited by tribes which themselves formed part of a larger Moroccan or Mauritanian whole?"

According to the record of the debate in the Fourth Committee, the representative of Spain stated that Spain "had never said that the Sahara was *res nullius*", and "he repeated that the Sahara was populated by Saharans" (A/C.4/SR.2130). When the spokesmen for the Spanish Government speak of the Western Sahara as being *nullius*, they do so to deny the existence of legal ties between that territory and the Kingdom of Morocco or the Mauritanian entity.

Those statements, and the argument addressed to the Court ¹, show that the parties concerned agree in interpreting the first question put to the Court as not being the question whether the territory was *terra nullius* in the sense of having been capable of being colonized under the law in force at the time, and they also agree in considering that the question put to the Court is whether the territory of Western Sahara, at the time of colonization by Spain, was or was not *terra nullius* in the sense of not having, or of having, legal ties with the Kingdom of Morocco or with the Mauritanian entity.

It therefore seems that the Court is competent to reply to the first question

¹ Thus, counsel for Morocco said: "This was the approach followed in the written statement of the Government of Morocco, based on the connection between the notion of *terra nullius* and that of the absence of State sovereignty" (hearing of 3 July) which is considered "... relevant as regards Morocco, a sovereign State" (*ibid*); and he concluded: "Proof of the non-existence of a *terra nullius* in the Sahara necessarily follows from proof of the exercise of Moroccan sovereignty in Western Sahara at the time of colonization" (hearing of 25 July).

Counsel for Mauritania stated: "The problem is not whether Spain could or could not occupy this territory by considering it as *res nullius* but to define the situation of this territory in relation to its Mauritanian and Moroccan surroundings with a view to its decolonization" (hearing of 10 July) and, at the conclusion of his address, he asked the Court to find "... that Western Sahara, at the time of colonization, was not in any part a territory without an owner (*terra nullius*), because it was made up of Mauritanian and Moroccan territories, and consequently, with the exception of a limited overlap area, appertained in its southern part to the Mauritanian entity and in its northern part to the Kingdom of Morocco" (hearing of 28 July).

if it is competent to reply to the question regarding the nature of the legal ties between the territory and the Kingdom of Morocco or the Mauritanian entity.

(c) *Legal Ties with the Territory*

The term *legal ties* is extraordinarily wide, whether one considers all the possible categories of ties, or all the factors that could give those ties a legal character. Ties can arise from proximity, from a treaty or from war, or they can flow from an unlawful act (responsibility). There are territorial ties, personal ties, ties of sovereignty, of servitude, of suzerainty, of fealty, of vassalage, to say nothing of all the other ties of a feudal character. According to their legal source they can be international, ties of public or private law, of State law, of canon law, or of Muslim law (based on the *shari'a*).

It is therefore necessary to enquire into the sense in which the term is used in the resolution, which is possible having regard to the formulation of the second question and to its relation with the first.

The words "the legal ties between *this territory* and the *Kingdom of Morocco*" indicate the category of ties envisaged: a *vinculum juris* between a territory (which is the object of the ties in question) and a body public (which is a State)¹. What is involved is thus State ties relating to two specific areas (the Río de Oro and the Sakiet El Hamra). Their legal nature is made plain by the relation existing between the two questions. In the first question, the Court was asked whether or not the territory had been a territory *belonging to no one* (*sans maître* in the French text). The second question, supplementing the first, amounted to asking *who*, if the territory was not without a master [*maître*], *had been its master [or owner]* at the time of colonization by Spain. Was it Morocco? Was it the Mauritanian entity²? The expression *legal ties* must be understood to mean State ties relating to the territory and capable of having the value of a legal title to lay claim to the territory, that is to say, a right of sovereignty over the territory.

Morocco put the question thus: were the two territories of the Sahara (Río de Oro and Sakiet El Hamra) "at the moment of occupation under the sovereignty and administration of the Moroccan State?" (A/PV.2249). That corresponds to its assertions that the "two provinces" of Western Sahara fall "under our sovereignty" (*ibid.*) and that "prior to Spanish colonization, Morocco had exercised sovereignty over those territories in accordance with the conditions laid down by public international law" (A/C.4/SR.2117).

In the draft resolution and during the debate in the Fourth Committee, the question retained the sense given to it by Morocco. Hence the controversy

¹ The Mauritanian entity raises the question of its existence and its legal status.

² The General Assembly ignored the question of the territory's ties with the independent tribes inhabiting it, as being irrelevant for the purposes of its decision on the decolonization process.

originating in the threat to the principle of self-determination that a number of countries saw in the request for an advisory opinion¹.

In the introduction to its written statement, Morocco maintained that since the eleventh century Western Sahara had been "under an effective authority, and that such authority was that of Moroccan sovereignty". In its oral statements it said that "the only question which has arisen, from our point of view, is whether Morocco . . . was sovereign in Western Sahara at the time of Spanish colonization" (hearing of 26 June) and that, "at the time of colonization by Spain, the Kingdom of Morocco was exercising its sovereignty in Western Sahara" (hearing of 25 July), being "considered to be the immemorial possessor" of the territory (hearing of 3 July).

Mauritania maintained, for its part, that the Sahara under Spanish administration was an integral part of the Mauritanian entity. In its written statement it said, "the legal relation between the two is a simple one of inclusion". In its oral statements, it spoke of a "co-sovereignty of the different constituents of the Shinguitti country" (hearing of 10 July).

In the oral statements of Morocco, we find the assertion that "the Moroccan State . . . conforms to the traditional monarchical idea of personal allegiance" (hearing of 2 July). The bearing of this statement is not clear. The personal allegiance traditional in Morocco conferred rights over persons not territories. The territory of the vassal is not directly subject to the overlord; it is subject to him only indirectly during the period of allegiance and that allegiance ends—and must be renewed—at the death of the lord or the vassal². In the period of colonization by Spain, the Sultans are masters [*maîtres*] of the territory which falls *de facto* under their sovereignty and seek to become masters of the territories which they regard as belonging to them *de jure* in the Bled Siba. In any case a territorial claim such as Morocco's claim to the territory of Western Sahara cannot be founded on a personal allegiance.

Following the understanding between Mauritania and Morocco, reference was made in the oral statements of Mauritania to "tribes of Moroccan fealty" (hearing of 9 July). But the extent of this alleged "fealty" is very limited. According to the testimony of Mr. Vincent Monteil presented by Mauritania, the Wadi Sakiet El Hamra must be taken as the demarcation line between the "Moroccan fealty" and the Mauritanian entity (hearing of 8 July)³.

¹ The African group that prepared the draft was at pains to refer four times to resolution 1514 (XV), to mention the eight resolutions on the decolonization of Western Sahara and to reaffirm the right of Western Sahara to self-determination.

² The claims of Turkey against France in 1881 on the subject of Tunis show clearly how little force the ancient ties of vassalage retained in modern international practice (Hertslet, *The Map of Africa by Treaty (Protest of the Porte against the French Treaty)*, reprint of the third ed., London 1897, p. 118).

³ Neither the ties of personal allegiance nor those of "fealty" between tribes (overlappings of routes) were or could have been the subject of the dispute between Morocco and Spain which "appeared" to exist according to the Order of the Court of 22 May 1975.

(d) *Time of Colonization by Spain*

An important point is how the time of colonization by Spain is to be determined. It is not a question of establishing the "critical date" of a dispute; the Court is not judging a contentious issue. We cannot confine ourselves to the narrow sense of the words. We are concerned with more than a very brief period, for the Spanish colonization of Western Sahara was a process spread over a number of years. In this sense, one can speak of a period of colonization or a "critical period", and it is necessary to take into consideration not only the beginning of the colonization, whether *de facto* or *de jure*, but also the time of its consolidation by occupation or pacification.

The period of colonization must be understood as referring to each of the two territories referred to in the resolution, the Río de Oro and the Sakiet El Hamra. Each has had its own history and its own period of colonization¹. The colonization of Río de Oro was proclaimed by the Royal Decree of 26 December 1884. That of the Sakiet El Hamra had as its starting point the treaty between France and Spain of 27 March 1912. The total pacification of the two territories was accomplished in about 1934.

It should also be noted that, in the language of the period, the words *colony*, *protectorate*, *sphere of influence*, *intervention*, *pacification*, are used indiscriminately. Thus, when there is a reference to the exercise of a protectorate over tribes or indigenous populations, what is meant is a colonization, and not a protectorate in the technical sense like the protectorate which was exercised over Morocco.

The words "at the time of colonization by Spain" impose limits on the investigation of the legal ties with the territory. By basing its claim of sovereignty on immemorial possession, Morocco made it necessary to consider the events of a very distant period, but that should not make us forget that what matters is whether the said possession by Morocco was exercised at the time of colonization by Spain.

PART I

I. Competence of the Court

1. *Legal Question and Questions of Fact*

In its Order of 22 May 1975, the Court considers that the conclusions stated in no way prejudice the question of the Court's competence. At the present stage of the procedure, the Court has to decide on its own competence.

The Court may give an advisory opinion "on any legal question" at the request of whatever body may be authorized to make such a request (Statute,

¹ When suggesting to the General Assembly the questions that should be put to the Court, Mr. Laraki spoke of the "two Territories of the Sahara" (A/PV.2249). This distinction between the two territories of Western Sahara is reflected in resolution 3292 (XXIX) containing the request for an advisory opinion. The first question begins with the words: "Was Western Sahara (Río de Oro and Sakiet El Hamra)..."

Art. 65). According to the Court, it "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; it must decline to give the opinion requested" (*I.C.J. Reports 1962*, p. 155). This dictum of the Court in the case concerning *Certain Expenses of the United Nations* may have been regarded as an interpretation based on argument *a contrario*. In fact, it is binding, because it flows from the nature of the advisory proceedings, which is very different from that of contentious proceedings.

In litigation, the parties are masters of the evidence: the court has a passive role. In the words of the traditional axiom of procedure, the court says to the party: *da mihi factum, dabo tibi jus*. The parties put forward facts and submit the evidence that they consider favourable to their claims, and the court takes them into consideration when making its decision (*secundum allegata et probata*). That is perfectly logical, because the purpose of the judgment is to decide as between the parties, and it "has no binding force except between the parties and in respect of that particular case" (Statute, Art. 59).

The function of the Court with regard to questions of fact in advisory proceedings was considered by the Permanent Court:

"The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy." (*P.C.I.J., Series B, No. 5*, p. 28.)

This cautious approach may perhaps be explained by the old practice of States of submitting their disputes to the Court by means of a request for an advisory opinion. Today, it would seem certain that, when the fact on the existence of which an advisory opinion is requested is disputed or in controversy, the Court has no competence to decide upon its existence. The reason is that the Court cannot content itself with the evidence, which may be biased, supplied by the States interested or concerned; the effect of an advisory opinion is not confined to the parties as though it were a matter of a judgment; the opinion is authoritative *erga omnes*, and is not restricted to the States or organizations that make written or oral statements or submit information or documents to the Court. The Court cannot collaborate with the body that requests an advisory opinion or state the existence of a fact by way of a finding, unless it has itself verified its accuracy.

When faced with a request for an advisory opinion, the Court itself bears the responsibility for verifying the factual data on which it bases its reply. How is it to proceed in a case in which the *quaestio facti* is fundamental to any possible reply? The Court's procedure does not provide the means of conducting investigations. Even if Article 68 of the Statute is interpreted in the broadest manner, it would not seem that in advisory proceedings the Court is entitled to make arrangements connected with the taking of evidence (Statute, Art. 48) or to entrust anyone with the task of carrying out an enquiry or giving an expert opinion (Statute, Art. 50).

The existence of a legal fact or of an act in the law is also a question of fact rather than of law. That was confirmed by the Permanent Court in the case of the *Status of Eastern Carelia* when it ruled that the question whether Finland and Russia had entered into a contract was a question of fact (*P.C.I.J., Series B, No. 5, p. 26*). It would be another matter if the question were one of establishing the legal conditions for the existence of a contract, or ascertaining its legal consequences in time or in space—even in the case of a contract the existence of which is hypothetical.

It is possible that the request for an advisory opinion may relate or seem to relate to a mixed or complex question of fact and law. In that case, the Court will have to interpret, by virtue of its powers, the request for an opinion and see whether, taking account of the background and the purpose, it can set aside the question. As an organ of the United Nations, it has a duty to collaborate with the organ which requests an opinion, and to consider whether it can assist in resolving the difficulties that have given rise to the request.

2. *Is the Question of the Existence of Ties at the Time of Colonization by Spain a Question of Law?*

In the information given and the oral statements made by the parties concerned on the substantive issues, it should be noted that efforts have been concentrated on proving the facts. Morocco and Mauritania have endeavoured to prove the existence of ties between the territory of Western Sahara and their own countries; Spain has done everything in its power to prove the contrary. As a result, there was an erudite and fiercely contested polemic on facts and questions concerning geography, ethnography, linguistics and, above all, history.

Morocco proceeded to “draw an outline of the historical facts” from the year 681 (hearing of 30 June). The role of the Court is “to go into arid problems of geography or history” (hearing of 24 July) and that of Morocco is “to put together a bundle of historical arguments which confirm the existence of legal ties” (hearing of 25 July); it will be “sought to prove the ties which throughout history united Morocco to Western Sahara. In order to do so we based ourselves in particular on the work of recognized historians, specialists in these ancient periods” (hearing of 25 July) and the Court is assured that the statement has been prepared “with the greatest possible historical objectivity” (hearing of 21 July). Mauritania promises to make “a brief contradictory examination of the historic facts” (hearing of 9 July). Spain has filed a voluminous dossier of documents and has endeavoured to contradict the arguments of Morocco and Mauritania. Moreover, the latter two countries, despite their understanding, have opposing points of view on important facts.

Algeria expressed impatience with this view of the case:

"...while taking account of the historical nature of the questions submitted, the subject of the request must nonetheless not be reduced to a mere historical discussion; the Court has better things to do than clear up a historical controversy merely for the satisfaction of the specialists..." (hearing of 15 July).

Algeria proposed that the Court should not answer "a historical question simply to satisfy academic curiosity", and proposed, on the contrary, that the request for an advisory opinion should be regarded as a request for useful enlightenment on a contemporary problem (*ibid.*).

The parties concerned have interpreted the request for an advisory opinion as one that poses an historical question, directed to the verification of the existence of facts in the past—even in the most remote past—in order to establish the existence of the legal ties (titles to sovereignty) between the territory of Western Sahara and Morocco and the Mauritanian entity (hearing of 12 May).

This approach by the parties concerned compels enquiry into the competence of the Court. Reference has been made to the definition of a legal question which we owe to Charles De Visscher, according to whom "it means any question capable of receiving an answer based on law"; he adds that the Court would refrain from replying to a question which "depended upon considerations extraneous to the law" (*Théories et réalités en droit international public*, Paris, 1970, p. 401).

Applying that definition to the present case, it can be seen that the question of the existence of ties at the time of colonization by Spain could not be capable of receiving an answer based on law; the answer would have to be based on *the proof* of historical facts. That is what the parties concerned have given in studying and discussing, for example, the historical consequences of the Almoravid epoch, the geographical and historical reality of the territory known as the Noun, the scope of the expeditions of Al Mamoun and of Moulay Hassan, the significance of the life and exploits of Ma ul-'Aineen and the existence of a group or of two groups of Tekna tribes.

It is true that the old Court was not afraid of studying historic rights, even going back to the year 900 (*P.C.I.J., Series A/B, No. 53*, 1933) and that the present Court has examined titles going back to 1066 (*I.C.J. Reports 1953*, p. 53). But these were cases submitted to the Court under contentious procedure, the nature of which is altogether different from the procedure for advisory opinions.

It is also true that in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court said:

"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, para. 40.)

But it should be noted that the facts referred to in connection with South Africa were not facts that required to be proved; they were facts that were obvious or generally known, such as apartheid — facts affirmed in resolutions adopted by the United Nations General Assembly (*I.C.J. Pleadings, Namibia*, Vol. II, p. 182; *I.C.J. Reports 1971*, separate opinion, pp. 177-179).

The most striking aspect of this case is the Court's difficulty in determining the truth of the facts discussed before it. The statements by the parties concerned have not been confined to the provision of information and documents, but have taken the form of real forensic arguments on behalf of opposing causes — both learned and shrewd, it is true, but naturally biased, and on matters extraneous to the law.

It would have been a heavy task to follow the debates on the historical data and to endeavour to acquaint oneself with the works cited in their entirety and not merely through the extracts chosen by the parties concerned¹; but there was the still greater difficulty of assessing the relative value of the testimony of the historians on the basis of their knowledge and objectivity and of supplementing the information supplied by the parties concerned by research in libraries and archives. Furthermore, several of the works to be consulted were in Arabic.

The same difficulties arose in connection with the geographical, ethnical and linguistic questions.

The impotence of the Court became overwhelmingly clear when it was confronted with conflicting translations of Arabic texts of documents that were considered by the parties concerned to be of fundamental importance to their respective arguments. That was the position with regard to the Hispano-Moroccan Treaty of 28 May 1767 (hearings of 3, 21 and 25 July), the letter from the Sultan to the King of Spain of 28 May 1767 (hearings of 21 and 25 July), the Anglo-Moroccan Treaty of 13 March 1895 (hearings of 10 and 25 July); the reply of Sultan Moulay Hassan on the boundaries of Morocco (hearings of 21 and 25 July), and the evidence of the submission of Ma ul-'Aineen (hearing of 18 July). Note should also be taken of the conflicting views on the existence of a document (hearings of 25 and 30 July), the citations from unpublished works (hearings of 8 and 22 July) and the references to oral traditions and information (hearings of 27 and 30 July). There are indeed many cases where it would have been necessary or useful to have heard witnesses or experts in order to elucidate matters apparently of importance.

3. *Weight of the Evidence*

There are reasons for doubting the competence of the Court. The Court really does not seem to be the appropriate organ to elucidate, by means of an

¹ The presentation of a number of statements was somewhat careless; it may be noted that there were cases where the page references for the works cited were not given.

advisory opinion, questions of fact or questions of which the historical aspect is predominant. However the Court's spirit of collaboration in relation to the other organs of the United Nations, together with the very special nature of a case, may be justification for the Court not applying Article 65 of its Statute strictly.

The General Assembly called upon the interested parties to submit to the Court all such information and documents as might be needed to clarify the questions posed. But the way in which those parties proceeded was not that of *amici curiae*. Throughout the proceedings, the attitude of the interested parties was that of parties in contentious proceedings; which is what makes one think that it would have been appropriate to apply the rules of evidence (*question of law*). Morocco and Mauritania have endeavoured to prove the existence of titles in their favour showing that it was to them that the territory of Western Sahara belonged at the time of colonization by Spain. To that end they have referred to historical facts. Spain has also submitted information and documents, but with a view to disputing the assertions of Morocco and Mauritania.

The question of the burden of proof, which appertains to contentious proceedings, does not arise in advisory proceedings. In the latter form of proceedings, however, it is necessary at least to apply the rules of evidence. Whoever puts forward a point must prove it. The verification of facts was even more necessary in a case like the present one, which assumed a quasi-contentious form ¹, and was not very clearly delineated, and was, from the outset, of a hybrid character. A critical examination of the assertions of the parties concerned reveals that there were statements without sufficient evidence and others contrary to the most authoritative testimony ², that challenges to the evidence were left unanswered, and that there were baseless generalizations and quite obviously arbitrary conclusions.

The Court thus appeared to be in a position to judge whether the evidence which had been submitted to it was sufficient to give rise to a reasonable conviction of the existence of the ties in question, or whether, on the contrary, there were sufficiently convincing indications leading to the conclusion that those ties were non-existent. With a view to that limited objective, it was necessary and sufficient to examine, in accordance with the rules of judicial practice, the value and probative force of the facts relied on before the Court in support of the existence of ties with the territory of Western Sahara at the time of colonization by Spain.

¹ This abnormal situation was favoured by the Order of 22 May 1975, according to which the questions put to the Court "may be considered to be connected" with a dispute existing at the time of the adoption of resolution 3292 (XXIX).

² The Members of the Court had occasion and the opportunity to inform themselves, and not merely study the information and documents submitted by the interested parties.

II. Propriety of the Exercise of the Court's Competence

The Order of 22 May 1975 mentioned that, in the further proceedings, the question of the propriety of the exercise of the Court's competence might fall to be decided.

Article 65 of the Statute lays down that the Court *may* give an advisory opinion. The Court is thus authorized to use its discretion to refuse a request for an advisory opinion. Hitherto, it has not made use of that power. But it has noted that, according to the circumstances of the case (*I.C.J. Reports 1950*, p. 72), it has to consider whether there are "compelling reasons" which would justify a refusal of the request for an advisory opinion (*I.C.J. Reports 1971*, p. 27 and *I.C.J. Reports 1973*, p. 183). The Court has not had occasion to say what such "compelling reasons" are. Nevertheless, it seems evident that there is a compelling reason for refusal when the request for an advisory opinion implies that the advisory function of the Court is being used to get round the difficulty represented by the optional nature of the contentious jurisdiction.

The question of the propriety of acceding to the request for an advisory opinion contained in resolution 3292 (XXIX) could be examined by taking two hypotheses: (1) that there is a dispute between Morocco and Spain, but that there is no dispute between Mauritania and Spain; (2) that there is no dispute between Morocco and Spain, but a mere difference of opinion like that which may exist between Morocco, Spain, Mauritania, Algeria, Zaire and other Members of the United Nations.

1. Hypothesis of a Dispute between Morocco and Spain

The doubts concerning the propriety of giving a reply find considerable support in the Order of 22 May 1975. According to that Order, the material submitted to the Court shows that when resolution 3292 (XXIX) was adopted, there appeared to be a legal dispute between Morocco and Spain regarding Western Sahara and that the questions contained in the request for an advisory opinion might be considered to be connected with that dispute; and that there appeared to be no dispute between Mauritania and Spain.

The hypothesis adopted by the Court on the occasion of the appointment of the judge *ad hoc* appears to be based on the attitude of Morocco to Spain and the request for an advisory opinion. The Spanish Government believes that the time has come to accomplish its task as administering Power and, in implementation of the pressing resolutions of the General Assembly, to organize a referendum for the purpose of decolonizing Western Sahara.

Morocco's representative in the General Assembly explained the dispute with Spain in the following words:

"The formulation of these two attitudes [those of Morocco and Spain] allows us to discern clearly the basis of the dispute between Morocco and Spain since 1956. First of all, we must answer the following questions: were the two territories of the Sahara in question originally, as the

Spanish Government claims, '*res nullius*' or territories without a master, and open to occupation? Or were they at the moment of occupation under the sovereignty and administration of the Moroccan State?" (A/PV.2249.)

Mr. Laraki went on to say:

"The Government of Morocco sent Spain a note dated 23 September 1974 inviting it to join Morocco in submitting a request in accordance with the rules of procedure of the International Court . . . If for one reason or another that direct method had not been adopted, we would still have requested the Court not for an arbitrary decision but simply for an advisory opinion . . . The opinion given by the International Court of Justice on a point of law can have as considerable an effect as a decision of arbitration. In any case the General Assembly would be in a position, on the basis of such opinion, definitively to find a solution to the political question of the future of the two provinces, Sakiat El-Hamra and Rio de Oro." (*Ibid.*)

Morocco appears to have achieved its objective. Being unable to bring its dispute before the Court by contentious proceedings, it has managed to have it submitted to the Court by means of a request for an advisory opinion. For Morocco, the dispute is still the same. At the beginning of the oral proceedings before the Court, counsel for Morocco made a point of indicating that the Court's reply to the request for an advisory opinion would have implications for interests of Morocco which were fundamental "because they involve the principle of territorial unity and integrity" and that in "the advisory opinion asked for in the *Western Sahara* case, we find that the interests of States are involved in a field which concerns the very substance of what makes a State, that is to say, the territorial field" (hearing of 12 May).

In the Order of 22 May, the Court apparently inclined to the view that there was a dispute between Morocco and Spain and not between Mauritania and Spain, taking into account — it seems — Mauritania's reply to a question put by Sir Humphrey Waldock, affirming that Mauritania had not taken part in the Moroccan initiative to have the dispute submitted to the Court.

On the supposition that the Court still thought that there was between Morocco and Spain the same dispute as there was when resolution 3292 (XXIX) was adopted, the Court should have asked itself whether the request for an advisory opinion "touches the merits of those disputes" (*I.C.J. Reports 1950*, p. 72) and to have considered whether answering the questions in the request for an advisory opinion would be equivalent to settling that former dispute between Morocco and Spain.

The Court was thus obliged to take a decision of importance for the future. According to the view expressed by Morocco in the debates in the General Assembly, it was confronted by the question of the admissibility of "an advisory opinion . . . in regard to a dispute between States [which] is nothing else than an unenforceable judgment" (*ibid.*, dissenting opinion of Judge Zoričić, p. 101).

The principle of voluntary jurisdiction, or of the consent of States, invoked by the Permanent Court (*P.C.I.J., Series B, No. 5*, p. 27) is established in the Charter (Art. 2, para. 7) and in the Statute (Art. 36). Can it be circumvented by means of a request for an advisory opinion?

An example will illustrate the meaning of the question. State A claims a territory occupied by State B. State B does not accept the offer of State A to submit its claim to the contentious jurisdiction of the Court. Is State A allowed to bring State B, in spite of its refusal, before the Court, by means of a request for an advisory opinion, thanks to the adoption of a resolution to that effect by a majority of the General Assembly ¹?

2. *Existence of a Controversy in the General Assembly*

However, in my opinion, the question of propriety did not arise; there was no dispute between Morocco and Spain, according to the law which is to be applied.

It is true that Morocco has sought to create the appearance of a dispute with Spain ². It would thus have been possible for it, by placing in the forefront the question of its supposed titles to Western Sahara, to have excluded the process of self-determination.

This skilful approach was in fact no more than a piece of camouflage. Even if Spain had accepted Morocco's proposal to bring before the Court by way of contentious proceedings the two questions raised in the letter of 23 September 1974, the case would not have been viable. Spain did not have at that time, and does not have today, capacity to be party to a dispute with Morocco, or with any other State, as to the present or past titles to sovereignty concerning a territory which has the status of a non-self-governing territory, and of which it is the administering Power. Spain does not have what is called in procedure a *legitimation passive*. Once it is established that the status of Western Sahara is that of a non-self-governing territory, Spain cannot recognize the right of another State to claim the territory, nor can it concede the existence of the titles of sovereignty of any State whatsoever, nor agree to arbitration over the sovereignty, nor make an agreement for partition of the territory, nor decide on its joint exploitation, nor attribute sovereignty over it to itself. Spain could not be party to a dispute involving the settlement, directly or indirectly, of any question concerning the sovereignty over the territory under its administration. Nor could the administering Power disregard the fact that it did not have the power to dispose of the right to self-determination of the Sahrawi, recognized by eight resolutions of the General Assembly and by the parties which are interested or concerned, nor the power to disregard that right.

¹ In this hypothesis, the intervention of Mauritania does not alter the situation: it joined in with Morocco to benefit from the situation created by the latter.

² Morocco began by saying that Spain had claimed that the two territories of Western Sahara were, at the time of colonization, *res nullius*; but Spain did not advance any such contention.

Any doubts which may have existed as to whether the advisory opinion was requested upon a legal question actually pending between Morocco and Spain should have disappeared after the fundamental change made by the African group in the meaning of the questions proposed by Morocco¹. In the Fourth Committee, Morocco stated, through Mr. Slaoui, that it agreed that "the problem of the decolonization of the Sahara was not merely a dispute between Morocco and Spain but concerned another country and came within the competence of the entire United Nations" (A/C.4/SR.2117). In resolution 3292 (XXIX), the General Assembly showed quite unequivocally that the request for an advisory opinion was made for reasons, and with a purpose, different from those of Morocco's earlier proposal. The resolution emphasized that the request was prompted by a *controversy* which *arose during the discussion* in the General Assembly, and that its purpose was to enable the General Assembly to decide, *in the light* of the advisory opinion, "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".

Spain and Morocco have not regarded themselves as parties to a dispute. The General Assembly called 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 Court all such information and documents as might be needed to *clarify* the questions put. In a true dispute between Morocco and Spain, it would have been for the two parties to plead their cases as seemed best to them, with a view to defending their rival contentions. The resolution calls for the collaboration of the three States, and in different capacities, with a view to an objective which pertains to the competence of the General Assembly, namely decolonization. The function of the three States is that of *informateurs*, to use ancient terminology, and not that of parties to a dispute².

If there is no dispute in the legal sense between Morocco and Spain, this causes the most substantial obstacle to the propriety of the Court's giving an advisory opinion to disappear. The purpose of a request for an advisory opinion is "to guide the United Nations in respect of its own action" (*I.C.J. Reports* 1951, p. 19; *I.C.J. Reports* 1971, p. 24)³.

¹ The draft resolution presented by the African group was "the fruit of long negotiations" (representative of Upper Volta, A/C.4/SR.2130), and reflected "a spirit of compromise" (representative of Ivory Coast, A/C.4/SR. 2131).

² It should be noted that resolution 3292 (XXIX) was adopted in the context of item 23 on the agenda of the Twenty-ninth Session, concerning the "Application of the Declaration on the Granting of Independence to Colonial Peoples and Countries". On the other hand, the proposal of the King of Morocco (letter of 23 September 1974) was worded as a request destined to settle the dispute between Morocco and Spain in accordance with the spirit and letter of Chapter VI of the Charter.

³ The Order of the Court of 22 May 1975 does not assert that there was a legal dispute between Morocco and Spain regarding the territory of Western Sahara, but that there "appeared" to be such a dispute; it was given only on the occasion of the applications for the appointments of judges *ad hoc*.

PART II

It was not possible for the Court to carry out an historical investigation as to the existence of legal ties, but, as I have already observed, it was able to examine the evidential value of the information and documents supplied by the parties concerned, in order to attain a reasonable conviction as to the existence of the ties in question.

I. Ties with the Kingdom of Morocco

1. Preliminary Considerations

Concerning the ties of Western Sahara with Morocco, the known facts lead one to believe that Morocco had reason to think, and indeed was right in thinking, that the Sahara (including Mauritania) was a suitable territory for the natural expansion of her Empire; everything seemed to have intended it to be occupied by her. Morocco was a people organized as a State; the Sahara was inhabited by tribes considered "wild" by the Moroccans, and it was the only neighbouring State with the same Muslim faith. There are also the obvious relationships between the two countries throughout history.

It is to be noted that those relationships have this particular feature: only those from south to north have permanent effects; the people of the Sahara who penetrated into Morocco settled there and forgot the poor and difficult territory of the Sahara. On the other hand, the Moroccan expeditions into the Sahara, whether military or trading expeditions, had no future; life in the Sahara was too hard for the Moroccans. At the time of the colonization of the territories of Africa, Morocco did not have the strength to compete with the European Powers, or to oppose the colonization, nor even any interest in doing so. The same may be said with regard to the whole territory of the Sahara, Mauritania and Western Sahara.

Thus there were ties between the Sahara and Morocco, but only of a transient nature and without legal or political significance. In his preface to the book by Mr. Rachid Lazrak, Mr. Paul Reuter refers to those ties as follows:

"... ties perhaps fragile and intermittent, but which were the only ones by which those territories were united with a world which brought them Islamic culture and the elements of a political life" (*Le contentieux territorial entre le Maroc et l'Espagne*, Casablanca, 1974, p. 9).

Mr. Rachid Lazrak gives the reason which made the Sultan's minister oppose the occupation by Mackenzie when he states that: "All the Sahara inhabited by Muslims belonged by virtue of the *shari'a* to the Sultan of Morocco" (p. 142).

In the pages which follow, I am not attempting to go into the facts which were the subject of dispute between the parties concerned; I shall confine

myself to indicating some of the reasons which have led me to the conclusions I have stated.

2. Religious Ties

Belonging to Dar al-Islam is a powerful tie; the world of the Muslim believers is opposed to that of the unbelievers (Dar al-Harb); an opposition which justifies the call for mutual help in cases of a holy war (*jihad*). It is a tie which is not to be confused with legal or political ties¹.

"With the advent of the Abbassids . . . the [Muslim] community system became blurred with the emergence of the provincial spirit: . . . Omeyyad Spain and Idrissi Morocco split off from the rest of the Muslim Empire; other defections took place in the Orient itself; the populations of those countries then considered that they constituted real self-governing entities." (Hajji, "L'idée de nation au Maroc et quelques-uns de ses aspects aux XVI^e et XVII^e siècles", *Hespéris Tamuda*, Rabat, 1968, p. 110; see also pp. 114 f.)

"Over the centuries, the greater part of the Moroccan population was to show itself as faithful to its faith as it was attached to its independence" (Terrasse, *Histoire du Maroc*, II, p. 424)². Islam, which proved unable to cement Moroccan unity, did not deeply bind Morocco to the outside world: "All that Islam did was to give a legal form to the deep-seated xenophobia of the Moroccan populations" (*ibid.*, p. 431)³.

3. Territorial Continuity

It is necessary to pay some attention to the question of the geographical situation of Morocco and the Sahara. The representative of Morocco in the General Assembly maintained that there was a presumption that Western Sahara belonged to Morocco, based on territorial contiguity and continuity (A/C.4/SR.2117).

Such information as I have been able to obtain shows, rather, that there is a well-marked discontinuity between the territory of Morocco and that of Western Sahara.

According to remarkable studies by R. Montagne (*Hespéris*, XI, fascs. 1-2,

¹ With regard to the religious argument, see the criticism made by counsel for Mauritania at the hearing of 9 July.

² "Islam was unable to conquer the spirit of independence of the Muslim peoples" (Hajji, *op. cit.*, p. 110; see also Terrasse, *op. cit.*, II, pp. 424-431). The imperialist ambitions of the Sultans rested upon ties of religion: "All the Sahara inhabited by Muslims, and not belonging to a sovereign, belonged by virtue of the *shari'a* to the Sultan of Morocco" (Miège, *Le Maroc et l'Europe*, III, p. 305). The Sultan also regarded himself as sovereign of the Soudan (*loc. cit.*, note 6).

³ During the reign of Moulay Hassan, Ahmed en-Nasiri, with reference to the Sultan's military reforms, noted that: "The soldiers desire to learn the profession of arms in order to defend the faith, and lose their faith while learning it" (Miège, *op. cit.*, IV, p. 416, note 4).

Rabat, 1930, Conference on the Present State of Sahara Studies, pp. 111 ff.), it seems established that there is a natural frontier marked by the Jebel Bani, and by the Kem-Kem, or little monticules, a series of hills, isolated from each other; it is a veritable wall pierced with embrasures or defiles, it is the line of the R'négats. In those defiles are mountain oases, halts or staging-posts of which the name always begins with the word "foum" (mouth) [Fr. *bouche*]. This line joins up the points by which Morocco debouches on to the Sahara. "It is at the 'foum' that one passes from one world into another. This change is very marked, not to say abrupt." It is shown by innumerable signs: change of vegetation, change of customs, change of way of life, change of costume, architectural differences, geological differences, and, above all, change to a different language (*Hassaniya*) (Thomas, *Sahara et communauté*, Paris, 1960, pp. 31 ff.; Marchat, "Frontière Saharienne du Maroc", *Politique étrangère*, XXII, 1957, No. 6, pp. 638 ff.; *La République islamique de Mauritanie et le royaume du Maroc*; Husson, *Les frontières terrestres du Maroc*, 1960, pp. 37-38).

The existence of the pre-Sahara zone calls for special mention. It is constituted by:

"... successive 'forms' of transition between the life of the men of the north and of the south. He [Montagne] distinguishes five such forms, ending up with the Ait Youssa, who appear to us to be the last transitional type between the minor nomad of the Noun and the great nomad of the Sahara like the Regheibat. Then one crosses the Dra'a and gets to the Hamada, which, still according to Montagne, is the real edge of the western desert" (Marchat, *op. cit.*, p. 638).

After the pre-Sahara zone, one finds the western Sahara, of which we are told that it has an incontestable individuality" (Célérier, "Le Sahara occidental, Problèmes de structure et morphologie", *Hespéris*, XI, fascs. 1-2, 1930, p. 2).

4. Pre-Sahara Zone and Boundaries of the Kingdom of Morocco

The consistent testimony of historians and geographers is that the southern limit of the Moroccan Empire was at the extremity of the pre-Sahara zone. The political status of the zone was singular. The Sultan claimed to be the sovereign, and was considered as such *de jure*, but not *de facto* in the geographical maps and by the European States. It was a strange situation: the boundaries of Morocco remained undetermined. The Moroccan authorities could not state exactly where they were, and gave only delaying answers to the Spaniards' requests for information.

The Bled Siba was in the power of local chiefs or sheikhs, either fighting or allied among themselves, so that relations with the Makhzen were always liable to change according to whether the Sultan's forces were approaching or whether he needed aid in his internal quarrels. The zone of the Souss was in that irregular condition, which was still further complicated by the fact that

the almost independent principalities more or less eluded the Sultan's independent authority. The cartographers knew the coastal zone well, but had to take its variations into account. That explains why in the maps of Morocco, from the seventeenth to the nineteenth century, Morocco's frontier is placed at Cape Noun, to the south of the Noun, to the north of Cape Noun, on the Messa river, at Cape Agulon, at Cape Juby and on the Wad Dra'a, bounded by the region of the independent Moors and by the Kingdom or State of Sidi Hisham and the Wad Noun. On the subject of those principalities, we are told that "Tazeroualt corresponds to the State of Sidi Hisham; . . . [it] includes the township of Iligh and the tomb (Kouba) of Sidi Ahmad-ou-Moussa" (H. de Castries, "Notice sur la région de l'oued Draa", *Bulletin de la société de géographie*, 1880, Vol. XX, p. 500). The country of the Wad Noun (to the south of Tazeroualt) is also called, after the name of the founder of the dynasty, the State of Abid-Allah-Ou-Salem; the representatives thereof in 1880 were the Beyrouk brothers.

"Tazeroualt and the Wad Noun in reality never came under Morocco. However, according to the author of Roud-el-Kartas, the Almohad sovereign Abdel Moumen (1159) extended his authority over that land." (Castries, *op. cit.*, p. 501.)

It is also to be noted that towards 1765 the greater part of the Tekna confederation, which was established at the mouth of the Dra'a, freed itself of Moroccan control¹. The Moroccan Tekna are not to be confused with the free Tekna of the Sahara².

The political situation of the zone is still further complicated by the fact that the chiefs of the zone extended or claimed to have authority over the zone of Tarfaya. Thus Beyrouk made agreements with Mackenzie concerning the establishment of the trading-station at Cape Juby, as an independent authority, and he also tried to urge the European Powers to build a harbour in the region, against the interests and despite the opposition of the Sultan. Nevertheless there was a time, when the differences between the Beyrouks and the Moroccans came to an end, when Beyrouk received from the Sultan an appointment as *caïd*; but, for that very reason, Beyrouk found his authority over the Tekna tribes disappearing (Trout, *Morocco's Saharan Frontiers*, Geneva, 1969, p. 151).

The advance of the French armies changed everything (F. de la Chapelle, "Esquisse d'une histoire du Sahara occidental", *Hespéris*, XI, fascs. 1-2, 1930, p. 90). But, as Miège said in his essay on Morocco, it is to the French forces

¹ Counsel for Mauritania also observed that "the confederation of the Tekna near the mouth of the Dra'a was itself partly liberated from the Sultan's control" (hearing of 9 July).

² The distinction is that of Colonel Lahure, quoted by F. de la Chapelle, "Les Tekna du Sud Marocain", *L'Afrique française*, 1933, p. 791. La Chapelle goes on: "This division, although superficial, gives a good summary picture of the respective positions of the nomads and the settled people", emphasizing that "the borderline between the two ways of life is not always clear."

that Morocco owes the pacification of the unsubjugated zones. "For the first time, the whole of the country came under the same central power. The immediate consequence was the development of a national self-awareness." (Miège, *Le Maroc*, Paris, 1950, p. 43.)

This peculiarity of the Bled Siba affords the explanation and justification of the so-called shipwreck clause for the Souss region ¹. The origin may be found in the Treaty of Peace and Commerce between the Sultan of Morocco and the King of Spain of 28 May 1767 ². Later this became a customary clause in the Treaties between Morocco and European Powers ³. The fact is that the idea that sovereignty implied responsibility for unlawful acts of a sovereign's subjects was well known to Morocco. In order to affirm the concept of Morocco as sovereign in all regions claimed as belonging to it, Moulay Hassan decided, in order that doubt should not be thrown on his authority over those territories, to entertain the requests for indemnity submitted to him, thus exacerbating, as Miège observes, the bleeding of the Moroccan Treasury (*Le Maroc et l'Europe*, III, p. 357; IV, p. 417).

A further consequence of this curious situation of the Bled Siba is that the Moroccan authorities were unable to pinpoint the southern frontier of the Moroccan Empire. The repeated enquiries of European Powers as to the boundaries of Morocco received no precise reply. At best, the old aspirations to empire were invoked (Miège, *op. cit.*, III, pp. 305-306). Sultan El-Hassan Ben Muhammad was to reply to the pressing Spanish enquiries that the frontiers of the territory over which his sovereignty was exercised were: "Egypt on one side, the Soudan on another, and Maghnia on the other" (documents submitted by the Kingdom of Morocco, Nos. 9A, 11 and 12).

The general opinion of the period was that the furthest limit of the Bled Siba was at the Wad Dra'a (Trout, *op. cit.*, p. 137). Sir John Drummond Hay,

¹ It was the custom of the inhabitants of this region to make captive any shipwrecked mariners whom they found on their coasts, and to hand them over only in exchange for large ransoms. Faced with the claims of the States of which the captives were nationals, the Sultans had to assist in ransoming them, if necessary by paying the sum demanded themselves.

² In the text reproduced by Lazrak, Article 18 of the Treaty reads: "His Imperial Majesty refrains from expressing an opinion with regard to the establishment which His Catholic Majesty wishes to found to the south of the river Noun, since he cannot undertake the responsibility for the accidents or misfortunes which may occur, because his sovereignty does not extend so far, and because the nomadic and savage tribes who inhabit the country have continually injured and even made captive the people of the Canary Islands" (*op. cit.*, pp. 389-390); this clause is consistent with the letter of the Sultan to King Carlos III (information and documents supplied by the Spanish Government, Book 3, App. 2 to Ann. 7). Both these texts were, in the course of the oral statements before the Court, the subject of controversy as to the translation and meaning of the Arabic texts. (On the Treaty, see hearings of 3, 21 and 25 July; on the Sultan's letter see hearings of 21 and 25 July.)

³ Such a clause appears in the Treaty between Morocco and the United States of 25 January 1787, in Article 22 of the Treaty of Peace, Friendship, Navigation, Commerce and Fisheries between Morocco and Spain of 1 March 1799, and in Morocco's treaties with Great Britain (8 April 1791), the United States (16 September 1836), and Great Britain (9 December 1856).

a recognized defender of the rights of Morocco, stated that "the legal¹ domination of the Sultan does not extend beyond the Wad Dra'a" (Miège, *op. cit.*, III, p. 305, note 3).

In his oral statement to the Court, one of the counsel for Mauritania, while endeavouring to show that the Bled Siba extended beyond the Dra'a, had to concede that the nearer one got to the Dra'a, "the more allegiance to the Sultan was watered down, and it disappeared altogether at the level of the Wad Sakiet El Hamra" (hearing of 9 July).

The purchase by the Sultan of the Mackenzie trading-station at Cape Juby, under the Treaty of 28 November 1895, did not change the situation in the region. The confederation of the Tekna only recognized the religious authority of the Sultan. The former trading-station at Cape Juby was an enclave in the hands of the Sultan, regarded as an area having extra-territorial status, with an exiguous military garrison, and without influence in the neighbourhood².

5. Maps

The importance of the very special nature of the Bled Siba becomes apparent in the context of international relations. Even if, for years or even for an entire century, the Makhzen had exercised no authority in a territory of the Bled Siba, that territory was still considered by the European Powers as being *de jure* under the authority of the Sultan. Basically, the Powers considered the territories of the Bled Siba as spheres of influence of the Sherifian authority. It is this international recognition which makes it possible to speak of a sovereignty which was hardly ever exercised.

This characteristic of the Bled Siba explains the importance of the maps, which show what the international opinion of the period regarded as the recognized frontiers of the Moroccan Empire. It had the effect of limiting the freedom of the Powers to occupy certain territories, and of obliging them to consider those territories as coming within the purview of the general duty to respect the integrity of the Sherifian Empire (Act of Algeciras of 7 April 1906; Franco-Spanish Declaration of 3 October 1904).

The Court was provided with a considerable number of maps by the Spanish Government, in pursuance of the General Assembly's request to the interested parties to submit to the Court all such information and documents as might be needed to clarify the questions put to it. Annex B-1 contains 44 maps dated from 1630 to 1887 and published in France, England, the Netherlands, Italy, Germany, Austria and North America. Annex B-2 contains a further six maps published in France and Germany. As indicated and explained to the Court, these maps show the southern frontier of Morocco as running along certain capes and rivers of the Bled Siba, but never

¹ That is to say not *de facto* but *de jure*, or by way of zone of lawful influence of authority of the Sultan.

² It should be noted that Cape Juby, although it was beyond the Dra'a, was to the north of the 27° 40' parallel, and further still from the Wad Sakiet El Hamra. The Sultan claimed as against Great Britain that the district fell under his authority, but he conceded that he did not possess there "the slightest power of control" (Miège, *op. cit.*, III, p. 305).

as extending beyond the Wad Dra'a; and this agrees with the written testimony of the period.

Map V of Annex B-2, taken from *Die Deutsche Handelsexpedition 1886*, by Dr. R. Jannasch, Berlin, 1887, clearly shows the old frontiers of Morocco (*alte Grenze von Marokko*), established on the Atlas mountains, and the frontiers of the territories in a situation of dependence upon the Sultan (*Grenze derjenigen Länder, welche zum Sultan von Marokko im Abhängigkeits-Verhältniss stehen*, that is to say the Bled Siba), which follow the course of the Wad Dra'a.

The limits of the Souss country can be seen on map XI (Ann. B-2), taken from R. Montagne, *Les Berbères et le Makhzen dans le sud du Maroc*. They extend from the High Atlas to the Wad Dra'a¹.

The importance of the maps² as evidence of inter-State territorial boundaries is obvious and appears decisive where the testimony is consistent. In the present case, the maps clearly show that the international community considered the Wad Dra'a as the southern limit of Morocco. The knowledge and objectivity of the cartographers of Africa are not in doubt. It is true that there was in the interior of Africa a *terra incognita*, but the situation of the territories near the coasts was well known. These regions were the object of considerable commercial and political interests and information was constantly being supplied by navigators, merchants and travellers.

6. Historic Ties with Morocco

Morocco's assertion of rights of sovereignty over Western Sahara called for the examination, as a question of fact, of the way in which those rights had been acquired and whether they still subsisted at the time of colonization.

It was thus for Morocco as the claimant to prove to the satisfaction of the Court when and how the Moroccan Empire had acquired Western Sahara. Was it by conquest? Was there a true *debellatio* of the tribes of the Sahara? Was it by cession? If so, by what treaties? Was it by occupation? Was the Sahara *terra nullius*?

For the purpose of determining whether Western Sahara was ever incorporated in the Sherifian Empire, it is necessary to enquire how Morocco took possession of it. Such possession must have been effective and neither

¹ Trout reproduces the maps prepared by Renou in 1844 and by the French Ministry of War in 1848 (*op. cit.*, pp. 478-481). Renou's map shows the limits of the State of Sidi Hisham. There are also references to the State of Sidi Hisham and the region of the "independent Moors" in maps XXIII-XXIX, XXXIV, and XLII (1830-1887) of Annex B-1 of information and documents supplied by the Spanish Government.

² The only map supplied by Morocco (placed first in its book of documents) may have proved misleading, since it does not indicate the Moroccan frontier, but a boundary between the French and Spanish zones running through Cabo Blanco, which is also found in another edition of the same map supplied by the Spanish Government and in a map accompanying the report of the French authorities of Senegal in 1891 and delimiting the "French sphere of influence" and the "Spanish protectorate" (supplementary documents submitted by the Spanish Government, Ann. B-2, maps I and IX).

transitory nor temporary. There must be more than a vague *animus possidendi*, and "right of proximity" or the fact of belonging, like Morocco, to the Dar al-Islam.

On the hypothesis that one of the incursions of the Moroccans into Saharan territory was considered as a taking of possession of a territory belonging to no-one or as a conquest, it was necessary to consider whether the withdrawal of the Moroccan forces had had the legal effect of an abandonment. According to the most reasonable point of view, abandonment occurs when the invading State has not established in the territory an administration rendering the continuity of its occupation effective and ensuring the incorporation of the territory into the invader's polity. It is also necessary to prove such incorporation *ab extra* by showing that the State acquiring the territory was responsible vis-à-vis other States for the acts of the territory's authorities and inhabitants¹.

Colonization by Spain occurred during the critical period without Moroccan opposition, whether on the part of the army or on that of the Government. This could explain why Morocco told the Court that "the fact of history, where Morocco is concerned, is none other than the centuries-old existence of the Moroccan State exercising immemorial possession of Western Sahara" and added that "Morocco may rely on the centuries-old and historically proven exercise of sovereignty in Western Sahara" and that "at the time of Spanish colonization Morocco was considered to be the immemorial possessor by the international community" (hearing of 3 July).

Was Morocco in possession of Western Sahara at the time of colonization by Spain? The allegation of immemorial possession does not make proof of possession unnecessary. Immemorial possession *sive indefinita* manifests itself as a present and evident fact the commencement of which is unknown. It requires the fulfilment of two conditions. One condition is positive: proof of a peaceful *possessio* during the critical period, exercised for so long that there is no longer any memory of a time when it did not exist. The other is negative: the uninterrupted—that is to say, neither sporadic nor transitory—character of such possession.

Morocco has not attempted to prove its possession of Western Sahara at the time of colonization by Spain. It has sought to prove its immemorial possession by a series of isolated facts which, it has contended, established continuous possession by the Sultan of Morocco as sovereign. It is therefore necessary to examine these facts and see whether they satisfy the necessary conditions for the formation of a reasonable conviction as to the proof of immemorial possession².

¹ According to Bugeaud's axiom, "In Africa, an expedition not followed by occupation leaves a trace no more lasting than the wake of a vessel on the boundless ocean" (Bernard, *Le Maroc*, Paris, 1915, p. 350).

² The Moroccan allegations prompted a doubt which the hearings failed to dissipate: what value can be attributed to identical facts and arguments used in pursuit of different objectives: the successive claims to Greater Morocco, Mauritania, Western Sahara, the northern portion of Western Sahara?

(a) *Unbroken Relations between Morocco and the Sahara*

The statements submitted to the Court by Morocco mention, as relevant historic ties, immemorial relations existing between Morocco and the Sahara, as well as a series of special facts cited as proofs of Morocco's authority over Western Sahara.

The following quotation in the second part of the written statement of Morocco is italicized to indicate the importance attached to it: "*this basic fact of Moroccan history, the periodic conquest of inner Morocco by outer Morocco . . . In most cases a dynasty that has come into being beyond the Atlas has conquered Atlantic Morocco.*"

The passage quoted is used equivocally; it seems to have been interpreted as meaning that there are two Moroccos, inner Morocco and outer Morocco, and that outer Morocco is the Sahara. The sentence in the Moroccan statement is a word-for-word quotation from *Histoire du Maroc* by Henri Terrasse (Casablanca, 1949, I, p. 13). We must therefore ascertain what Morocco meant for Terrasse. In the hypsometric map of Morocco included in his book (pp. 8-9), the southern boundary of Morocco is the Dra'a. In his view, Morocco has seaward fronts (pp. 4-6) and landward fronts and also access points (pp. 6-10); in his study of them, he refers to the importance of the pre-Saharan front of Morocco, that is to say the place that:

"... these semi-desert areas with their scattering of oases, have occupied in the life of the country. Their role was twofold: the oases of the valleys, situated at intervals from Tafilelt to Wad Dra'a by Charis, the Tadgha and the Dadès, were an invasion corridor and, consequently, one of the gateways to Morocco . . .

The Moroccan oases, which were a hallway and a secondary gateway to Morocco, were also the bridges across the desert. The caravans that crossed Western Sahara terminated at the Dra'a or at Tafilelt." (P. 7.)

"These caravan links with the world of the Sahara and Black Africa, even when they were continuous, remained tenuous and fragile . . .

Morocco, as a whole, is therefore an isolated country. On the outer side it has only three access points of different value . . . ; lastly a long path of oases, which hardly gives direct means of access except at the extreme south of the country, but which is one of the terminal points of the Sahara and the Soudan." (P. 10.)

In the "overall view" with which Terrasse concludes his work, outer Morocco is considered to be constituted by "eastern Morocco" and the "oasis region" (*ibid.*, II, pp. 460-464). Of the oasis region, Terrasse says:

"The two western provinces of this pre-Saharan zone, the Souss and the lower Dra'a, often had a separate existence. Since the Almohads, the Souss was always under the authority of the Makhzen. But from that narrow enclave, in the Bled Siba, it was rare for the Sultans to be able to extend their ascendancy over the mountains and the oases." (P. 463.)

It therefore seems plain that, according to Terrasse (whose authority is tacitly recognized by Morocco), outer Morocco is the pre-Saharan zone, the limit of which is the Dra'a¹, and that Western Sahara is therefore outside the frontiers of Morocco.

(b) *Almoravid Epoch*

In the second part of its written statement the Moroccan Government devotes several pages to showing the importance of the Almoravids in the development of Morocco; its argument is based on citations from the work of Terrasse. The astonishing achievement of the "veiled Sanhaja", and the conquest of Morocco (and also of Muslim Spain) by the Saharans, have been considered decisive, perhaps rightly, in the history of Morocco (Terrasse, *op. cit.*, I, p. 256). But the union and the relationship between Sahara and Morocco were of very short duration. Other passages of Terrasse's book explain how they came to an end. Abou Bekr, who had become the sole chief of the Almoravid movement, wished to settle disputes that had broken out in the Sahara and left the command of Almoravid Morocco to his cousin, Yussif Ibn-Tashfeen "whom he married to Zeinab, who had been previously repudiated in accordance with the law. On Abou Bekr's return, Yussif was to return to him his command and his wife" (*ibid.*, I, p. 222).

"Yussif Ibn-Tashfeen had consolidated his power and established the Almoravid movement in Morocco. The enterprise of the veiled Sanhaja, originally Saharan, became more and more Moroccan. The return of Abou Bekr was to be the occasion for a decisive gesture.

Abou Bekr re-established peace in the desert. Thinking that he had assured the Almoravid movement at its very basis, he returned to Morocco to resume his conquests there. Yussif Ibn-Tashfeen, on the advice of Zeinab, decided not to return the supreme command to Abou Bekr, but also to avoid an armed struggle. He presented himself before Abou Bekr with rich presents and a strong escort. When the two chiefs met each other, Abou Bekr expressed surprise at the gifts: 'they are to make sure you lack nothing in the desert', Yussif Ibn-Tashfeen replied. Abou Bekr understood and returned to the land of the Lemtouna. He had remained a Saharan; Yussif Ibn-Tashfeen had become a Moroccan...

The Almoravid movement in Morocco was practically cut off from

¹ The same limit — following the course of the Wad Dra'a — is shown on the maps of *Le Maroc au temps des Idrissides* (I, p. 111), *Le Maroc entre les Idrissides et les Almoravides* (I, p. 167), *Le peuplement du Maroc au début du XI^e siècle* (I, p. 195), *Le Maroc sous les Almoravides* (I, pp. 233-234), *Le Maroc des Almohades* (I, pp. 264-265), *Le Maroc sous les Mérinides* (II, pp. 24-25), *Les entreprises portugaises au Maroc* (II, p. 133), *Le Maroc sous les Zenatta* (II, pp. 152-153), *Le Maroc sous les Saadiens* (II, pp. 168-169), *Le Maroc sous les Alaouties* (II, pp. 248-249).

It must be noted also that the existence of dynasties of Saharan origin and the conquests of Morocco by the Saharans (Almoravids, Ma ul-'Aineen, al-Hiba) do not signify the annexation of Morocco to the Sahara; they were exploits with no future significance.

the desert; there was only one other course open to it: to complete the conquest of Morocco." (P. 223.)

This quotation, by means of a symbolic anecdote, serves to indicate the fresh schism which occurred between the two worlds: the Sahara was forgotten by the Almoravids, who had become Moroccans. Thus Morocco, under the Almoravids, had the Wad Dra'a as its southern frontier (*vide* map, Terrasse, I, pp. 232-233).

(c) *Conquest of Timbuktu*

The incursions or expeditions of the Sultans of Morocco had a restricted purpose. They were carried out for economic reasons which are well known. Their objectives were the Teghazza saltmines, gum arabic, gold and black slaves from the Soudan. Sultan Moulay Ahmad al-Mansour, it is said, succeeded in establishing his authority in the Sahara after his conquest of Timbuktu. His dazzlingly victorious expedition resounded throughout the Sahara, and thereafter Morocco was able to maintain its influence on the Soudan. That influence lasted from 1591 to 1612. Later, Sultan Moulay Ismail took a new interest in the Soudan, in particular in order to acquire black slaves, and he succeeded in establishing his influence there. On his death in 1727, however, tribute from Timbuktu ceased to be paid.

The Moroccan expeditions to the Soudan had an ephemeral influence in the Sahara. The Sultans had no interest in these desert areas except in so far as they were on the route to the Soudan. The Saharan tribes were in no position to resist, but they regained full freedom once the Moroccan forces had withdrawn. It should also be noted that the Moroccan expeditions followed the regular caravan route, in other words that from Tindouf to Senegal, thus by-passing present-day Western Sahara, the route through which was more roundabout and inhospitable.

Notwithstanding the very limited extent of these conquests, they were to be long remembered. They explain the replies given to the European Powers, by the Moroccan authorities who claimed that the Sultan's domains reached as far as the Senegal River, and included Timbuktu and the surrounding region, on the pretext that the Sultans had been sovereigns of these regions and still regarded themselves as such (Trout, *op. cit.*, p. 137; citing Miège, *op. cit.*, III, p. 305). Those claims were subsequently revived in the concept of Greater Morocco advocated by El Fassi.

(d) *Attempts to Subjugate the Souss*

Sultan Moulay Hassan ("the Bloody") succeeded in establishing Sherifian authority, which had been seriously weakened under Muhammad XVII (1859-1873). In the region of the Souss, the marabout State of Tazeroualt and the principality of the Beyrouk family did not acknowledge their dependence on the Makhzen. The enormous import and export dues levied at the port of Mogador, which had the monopoly of commerce in the region, encouraged the sheikhs of the Souss to enter into relations with Europeans for the purpose of establishing ports along their coasts and thus acquiring duty-free

commercial outlets. In 1879 Beyrouk signed for Mackenzie a concession charter conferring on the North-West African Company the monopoly of sea-borne trade in the territories of the Wad Noun. Si Hussain, the chief of the Berber Kingdom of the Tazeroualt, had extensive negotiations with French traders for the establishment of another port. There were also Spanish, German and Belgian projects with the same objectives and involving the same characters.

All this implied a serious threat to the finances and authority of the Sultan, who decided, apparently on the advice of Sir John Drummond Hay, to take military action. In May 1882 Moulay Hassan entered the plain of the Souss with an army variously estimated at between 40,000 and 70,000 strong. Supply difficulties prevented him from penetrating as far as Qolimeen. There was practically no fighting. The notables of all the tribes of the region presented themselves before the Sultan and promised to oppose the machinations of the foreigners. At the end of July the army withdrew (Miège, *op. cit.*, III, p. 351).

The results of this first campaign were not decisive. In 1884 the caids appointed by the Sultan were driven out by a tribal insurrection. In 1886 Moulay Hassan decided to take the field once more with an army of 40,000 men. The title of caid was conferred on a considerable number of Si Hussain's sheikhs throughout the plain of the Souss. Having made up his mind to occupy the Souss as thoroughly as possible, the Sultan established a series of military posts at Tiznit, Kasbah Ba Amrane, Assaka and Qolimeen (Miège, *op. cit.*, III, pp. 352-354).

The two expeditions of Moulay Hassan¹ resulted in the loss of Tazeroualt's independence and put an end to the influence of the Beyrouk family, but the Sultan's authority, still nominal rather than effective, did not extend to the tribes beyond the Dra'a (Trout, *op. cit.*, pp. 153-155 and map 16).

The decline in the Sultan's power after the Treaty of 1884 accelerated during the reign of Abdul 'Azeez IV (1894-1908), whose European tastes and fondness for increasing taxes made him unpopular and led to rebellions throughout his Empire. In the Bled Siba in general and the Souss in particular, anarchy reigned and acts of pillage became increasingly frequent.

Notwithstanding the Sultan's support, Ma ul-'Aineen encountered opposition not only from the Tekna but also from the 'Ait Moussa of Qolimeen (Trout, *op. cit.*, p. 156). The independence of the Sanhaja, the Regheibat, the Beraber and the Touareg became more pronounced and was the cause of fresh conflicts between Saharan tribes (F. de la Chapelle "Esquisse d'une histoire du Sahara occidental", *Hespéris*, XI, fascs. 1-2, 1930, p. 90).

By the time Spanish colonization of the Sakiet El Hamra could have begun (Treaty of 27 November 1912), the Sultan's authority over the area had

¹ Which did not go beyond Wad Noun (hearing of 2 July).

vanished¹. This was the period of the struggle waged by the sons of Ma ul-'Aineen against the Moroccans, whom they regarded as traitors to the Muslim cause.

There would appear to be good reason for the observation:

"Thus *never*, except in the Soudan at the time of al-Mansour and the Touat-Gourara during the reigns of a few particularly active sultans, was *Moroccan sovereignty exercised over the Sahara*" (Husson, *op. cit.*; italics in original).

(e) *Ma ul-'Aineen*

The spokesmen for the Kingdom of Morocco attached extraordinary importance to the figure of Ma ul-'Aineen, convinced that his life and exploits provide cogent support for the Moroccan thesis of the integration of Western Sahara with the Moroccan Empire².

In the General Assembly, Mr. Laraki recalled the conduct of Ma ul-'Aineen, who had struggled tenaciously against French penetration, and asked "Is there a more striking historical example of the determination of the Moroccan people to preserve their national unity and territorial integrity?" (A/PV.2249.) An account of Ma ul-'Aineen's campaigns against colonialism in Western Sahara and in the service of the Sultan of Morocco was given in the second part of Morocco's written statement.

Morocco's interest in Ma ul-'Aineen is easy to explain. Ma ul-'Aineen, who was born in the Sahara, founded Smara in the territory of the Sakiet El Hamra. He had close and friendly relations with the Sultan of Morocco for many years, and relations with Morocco until the end of his days. Nevertheless, the history of the life of Ma ul-'Aineen and his sons is in glaring contradiction with the view that Ma ul-'Aineen became a subject of the Sultan and that he made the Sakiet El Hamra an integral part of Morocco³.

Ma ul-'Aineen might have been another Yussif Ibn-Tashfeen, the Almoravid hero. Yussif, too, was a native of the Sahara. Like Yussif, Ma ul-'Aineen was both a religious personality and a warrior of enormous prestige exercising a dominating influence over several Saharan tribes. But the circumstances were different from those of the Almoravid epoch. The purpose of his whole life was to be to combat the French penetration which was in ever-increasing evidence in the Sahara. He seems to have been impelled to do so not only by the desire to wage a holy war against the unbeliever, but also because of the need to survive; for the sources of the trade in black slaves, an essential factor in his economy, were threatened, and the

¹ Even the trading station at Cape Juby, which the British Government had sold to the Sultan in 1895, "had been abandoned by the Sultan" in 1911 (information and documents supplied by the Spanish Government, Ann. 19, App. 11).

² In *La République islamique de Mauritanie et Le Royaume du Maroc*, p. 10, Ma ul-'Aineen is mentioned in the historical argument concerning Morocco's ownership of Mauritania.

³ Reference should be made to the information on the life of Ma ul-'Aineen given by Mr. Ould Maouloud and by Mr. Yedali Ould Cheikh (hearing of 9 July).

French advance was progressively and inexorably cutting his trade routes with the south.

Ma ul-'Aineen proceeded to seek allies in all quarters. He asked the Germans and the Spaniards for assistance, and above all he sought alliance with Morocco, which was his neighbour and the closest Muslim Power, and which also felt threatened by France. Morocco, for its part, saw Ma ul-'Aineen as an ally in the Sahara who could be useful in helping to check the progress of the French armies, which were encircling it from the south. It was a natural alliance, but it soon became a difficult one as a result of the growing influence of France on the Moroccan Government.

The power of Ma ul-'Aineen in the Sahara was, however, limited. His policy, which relied upon the authority of the Sultan, and appeals to the tribes to unite around the Sultan in order to resist the French, ran up against the mistrust felt for the Moroccans by the chiefs of the Saharan tribes, as well as against the spirit of independence in the Tekna tribes and the enmity of the powerful Sheikh Sidia. In point of fact, Ma ul-'Aineen never lost his independence or political initiative. He was not a subject of the Sultan, and the Moroccan authorities did not have the slightest influence over the territory he dominated¹.

The letters exchanged between the Sultan and Ma ul-'Aineen, when their alliance was at its zenith, contain numerous expressions of friendship and loyalty, drafted in the flowery style of the period. Ma ul-'Aineen appears in these letters as the envoy of the Sultan sent to unite the Muslims of the Sahara against the invading unbelievers.

But the relations between Ma ul-'Aineen and the Sultans deteriorated steadily as relations between Morocco and France improved. For a time, Morocco's policy was to give clandestine help to Ma ul-'Aineen's resistance by promoting the smuggling of arms to the Saharans through the Moroccan enclave at Cape Juby. France soon lost patience with Morocco's double game and ultimately insisted upon the agreement of 4 March 1910, by Article 10 of which Morocco undertook to prevent all assistance to Ma ul-'Aineen. The immediate consequence of Morocco's new policy was a most vigorous reaction by Ma ul-'Aineen against Morocco. He proclaimed himself Sultan and marched against Fez, but he was halted by General Moinier's army, and defeated at Tadla. After his death, his son al-Hiba proclaimed himself Sultan in 1912 and, invading Morocco, succeeded in capturing Marrakesh; he was eventually defeated by the army of General Mangin. French troops thus prevented the conquest of Morocco by a Saharan army.

The independence of the successors of Ma ul-'Aineen and of the other groups of Saharan tribes that were not among their followers lasted until 1934. The total "pacification" of the Sahara, like that of the pre-Saharan region, was the result of the consolidation of the "colonial fact".

There is no evidence to establish that Ma ul-'Aineen took possession of the

¹ For Ma ul-'Aineen's religious and political independence of the Sultan, see his statements at the time of his first pilgrimage to Mecca (hearing of 9 July).

Sakiet El Hamra or any other Saharan territory in the name of the Sultan of Morocco. There is evidence that the Saharan tribes controlled by Ma ul-'Aineen did not regard themselves as Moroccan subjects and were not so regarded. Their acceptance of the religious authority of the Sultan of Morocco was also precarious: it was invoked while it could be useful to promote the struggle against France. Once all hope had been lost of assistance from Morocco, there was a disavowal of the Sultan's authority that could not have been more complete: Ma ul-'Aineen, and then his son al-Hiba, proclaimed themselves Sultan of the Believers and invaded Morocco.

(f) *The Anglo-Moroccan Agreement of 13 March 1895*

As already mentioned, there is apparently incontrovertible evidence that the extreme southerly frontier of Morocco was nowhere further than the Wad Dra'a at the furthest. This established post must be borne in mind when considering the Anglo-Moroccan Agreement of 1895 (Lazrak, *op. cit.*, p. 172 *et seq.*).

The 1895 agreement brought to an end the difficulties that had arisen between Morocco and Great Britain over Mackenzie's settlement at Cape Juby. In clause I of the agreement, it is said that, if the Moroccan Government buys the said settlement from the North-West African 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" (Lazrak, *op. cit.*, p. 406).

Clause II adds:

"It is agreed that this Government shall give its word to the English Government that they will not give any part of the above-named lands to any one whatsoever without the concurrence of the English Government." (*Ibid.*)

These texts are considered to constitute recognition that the sovereignty of Morocco embraced not only the region between the Dra'a and Cape Bojador, but also the whole of Western Sahara (*ibid.*, p. 173).

With regard to the weight to be attached to the agreement, the following observations must be made concerning its limited purpose and the attitude of Great Britain and France on the question ¹.

The Mackenzie trading-station had been the source of serious incidents and diplomatic difficulties between Morocco and Great Britain. The agreement was reached at a time when, given its unfavourable economic position, it was in the interest of the North-West African Company to sell, and also at a time when British diplomacy was in an awkward situation. How could Britain continue to play the role of protector of Morocco against the

¹ On the polemic concerning the translation of the Arabic text, see hearings of 10 and 25 July.

cupidity of the other Powers while at the same time continuing to occupy Cape Juby against the will of the Moroccan Government ¹?

The clause concerning the extent of Moroccan territory can be explained as an apparent favour to the Moroccan Government ², but in exchange there was reserved to Great Britain a certain influence on the same coast, which could, if necessary, be set up against the other Powers.

The international scope of the statement on the extent of Morocco's sovereignty was strictly limited, since, as Delcassé observed, the agreement was *res inter alios acta* (Trout, *op. cit.*, p. 166), and thus ineffective vis-à-vis the other Powers.

The statement was also in conflict with the previous conduct of the British Government. Mackenzie had in fact established himself at Cape Juby after having been informed that Wad Noun was independent of Morocco and that the territory was under the authority of Sheikh Beyrouk. It was Beyrouk who, in June 1879, granted Mackenzie a small piece of land to establish his trading-station.

It is interesting to read the correspondence on the Cape Juby settlement preserved in the British archives. The Moroccan authorities affirmed the rights of the Sultan over Cape Juby on the grounds that the Muslim tribes that inhabited the territory to the south of the Wad Dra'a as far as the Soudan and at the extreme south of the Niger had no other sovereign, that Moulay Ismail had imposed his authority in the Sahara by force of arms, and that the said tribes, although rebels, mentioned the Sultan in their prayers. The British authorities, while affirming that their Government wished to uphold the integrity of the Sultan's possessions, retorted that the furthest boundary of Morocco's territory had always been at the Wad Noun, that Moroccan control in the Souss itself was very feeble, and that it was absurd to confuse religious authority with political authority. As proof of the latter argument, they pointed out that the name of the Sultan of Turkey was mentioned in prayer by Muslims throughout Asia and Africa, who were not and never could be considered Turkish subjects (information and documents supplied by the Spanish Government, Ann. 20, Apps. 18-29).

It is also important to note the restricted validity that the Powers concerned attributed to the 1895 agreement. The French Government endeavoured to persuade the Moorish Government that the agreement might be against Morocco's own interests and that clause II should be interpreted as referring to Cape Juby itself and not to the rest of the coastline and hinterland (*ibid.*, Ann. 2, App. 35). At the time of the preparatory negotiations for the secret treaty between Spain and France of 1904, France endeavoured to ascertain the attitude of Great Britain. At the beginning of 1904, Ambassador Paul

¹ A point already made by Sir John Drummond Hay to the British Government (Miège, *op. cit.*, III, pp. 302-303).

² The reason for the reference to Cabo Bojador lay apparently in the enmity existing at that time between the Sultan and Beyrouk, who had proclaimed himself to be independent and the master of the principality of Wad Noun, which, according to him, extended as far as the southern extremity of Cabo Bojador.

Cambon, writing to Minister Delcassé following protests in the Spanish press, stated that they were:

"... the more specious in that Morocco's rule between the Wad Dra'a¹ and Cabo Bojador has never been admitted by any Power and it is solely in order to get compensation for its nationals of Cape Juby that the British Government recognized the sovereignty of the Makhzen on this coast" (Husson, *op. cit.*, p. 36)².

Great Britain did not raise any objection to the treaty between France and Spain of 27 November 1912, under which the Sakiet El Hamra region in the south of Morocco (as far as parallel 27° 40' N latitude) is attributed to Spain; the 1912 treaty incorporates, in their entirety, Articles 5 and 6 of the 1904 treaty.

(g) *Letters Annexed to the Franco-German Agreement of 4 November 1911*

In these letters it is said "... 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 ..." (Lazrak, *op. cit.*, p. 416). This phrase has been regarded as an acknowledgment by France and Germany that the Sakiet El Hamra region, and even the whole of Mauritania, lay within the boundaries of Morocco (*ibid.*, p. 177).

The true meaning of those letters becomes apparent when one reads them. The intention of the German Government was to state that it would place no obstacle in the way "in the event of the French Government deeming it necessary to assume a protectorate over Morocco". It states that it has pleasure in adding "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"; after this sentence comes the passage quoted: "it being understood ..." The understanding about what was comprised by "Morocco" had no purpose other than that of specifying the regions of Africa in relation to which Germany waived any interest of its own in favour of France, and which France could place under its protectorate or colonize — unless it entered into agreements about them with Spain; the entire Sahara was included in the area, in other words the Sakiet El Hamra and Mauritania.

It should also be noted that in relations between France and Spain, the Sakiet El Hamra is often regarded as a part of the Río de Oro. Thus, in a letter dated 2 April 1913 from Mr. Pichon, Minister for Foreign Affairs, to the Minister of Colonies, it is said that by virtue of the Franco-Spanish

¹ In the arrangement of 7 June 1905 regarding the boundary between southern Algeria and French West Africa, it is stated that Cape Noun constitutes the frontier of Morocco. Cape Noun is at the mouth of the Dra'a (Cape Dra'a) (Trout, *op. cit.*, pp. 182-188).

² It is also said that "Spain, established at the Río de Oro to the south of Cape Bojador, has always considered the coast up to Cape Juby as belonging to it, and British maps ascribe it to "Spain".

Convention of 3 October 1904 and that of 27 November 1912 the region of Smara is part of the colony of the Río de Oro (Trout, *op. cit.*, p. 212)¹.

II. Legal Ties of the Territory with the Mauritanian Entity

The question of legal ties between the Mauritanian entity and the territory of Western Sahara raises "very difficult problems", as Professor Salmon, one of the spokesmen for the Islamic Republic of Mauritania, acknowledged (hearing of 10 July). That is certainly true if the intention is to maintain that Mauritania has ties of sovereignty with the territory by reason of the ties that the Mauritanian entity had with that territory at the time of colonization by Spain.

First of all, the Court had to satisfy itself of the very existence of the subject to which ties or rights of sovereignty were attributed. At the time of colonization by Spain, was there a Mauritanian entity? Did the Mauritanian entity then have legal personality, so as to be capable of having rights? These are questions to which, despite the bravest attempts, no convincing affirmative answer can be found.

On the basis of the statements made and the information supplied by the parties concerned, it would seem to be an undisputed fact that at the time of colonization by Spain there were in the Sahara a large number of tribes of different ethnic origin – nomadic tribes, semi-nomadic tribes, settled or semi-settled tribes, which were grouped into short-lived confederations and leagues (the Emirate of the Adrar was a temporary exception) and which were engaged in continual struggles among themselves – with the resulting razzias, wars, robberies and feuds. At the time of colonization by Spain it is hard to detect any external or internal signs of an entity. Each tribe, taking no account of the others, concluded treaties, agreements and contracts and made acts of submission or protectorate with the European Powers or with Morocco. The relationships of the tribes between themselves were similar to those of independent powers. It was this or that individual tribe which entered into commitments with another, and not the entity. There is no glimpse of the entity playing any role or serving any purpose; the entity acquired no rights, possessed no rights, had no legal or non-legal responsibilities or duties.

The concept – and even the sociological reality – of the Mauritanian entity came into being after, and as a consequence of, the "colonial fact". In the resolution adopted on 28 August 1960 by the Political Committee of the Arab League at its meeting at Chtaura (Lebanon), Mauritania is considered "an artificial entity" (*White Paper on Mauritania*, Rabat, 1960, p. 129). It did not exist before the French colonization. That is why the Government of the Islamic Republic of Mauritania stressed that: "In the 20th century,

¹ On the Moroccan administrative map of 1934, the Río de Oro begins at the Wad Dra'a (Trout, *op. cit.*, plate 31, pp. 532-533). Cf. the residential decree of 11 January 1935, Art. 2 (a) (documents supplied by Morocco, Ann. 89 (B)).

Mauritania, just like Morocco, underwent profound changes as a result of what has been called the 'French colonial fact' " (*La République islamique de Mauritanie et le Royaume du Maroc*, Paris, p. 29).

The population of the territory which it is sought to call the Bilad Shinguitti was, at the time of the French colonization, an amorphous cluster composed of tribes and sub-tribes—moving and changing, and whose ultimate configuration it was impossible to predict. How then is it possible to apply the term *entity* to what, by the merger and separation of other similar human groups, took shape only as a result of the administrative organization and the pacification imposed by France?

The idea of the Shinguitti entity is attractive, like a beautiful patriotic myth that inspires respect; but a myth can have no legal ties with any territory.

Considerations on the question of nomadism, however interesting they may be from the ethnological point of view and even *de lege ferenda*, cannot make up for the lack of unity of the tribes and the non-existence of any entity capable of legal assessment.

The bold proposition of a co-sovereignty of tribes over particular territories does not seem to stand up. Disparate or even mutually hostile tribes cannot change in a flash into a confederation or a federation. Nor does it really seem possible to conceive of a sovereignty with reference to tribes that are in continual movement on a series of intersecting routes.

The continuity of passage of tribes over the same route might, as a continuous *usus* by consent, give rise to a servitude (such as those recognized by international law), but it is not of such a nature as to create a right of sovereignty over a territory—particularly since, as the Court was informed, these routes vary according to climatic conditions and the relationships between tribes and neighbouring States.

These movements along established routes, crossing the frontiers of present-day States, were effected by consent, and permitted in accordance with good neighbourly relations, but not imposed by law; any time, they could be suspended for an important reason, such as a war.

To endeavour to deduce, from the existence of ethnic, cultural and geographical analogies, the existence of legal ties over a territory is like leaping into an abyss: the spokesmen for Mauritania have not been able to bridge the gap¹.

Lastly, it must be noted that, from the date of the colonization of Mauritania by France and in accordance with the law in force at the time, France alone would have had the status required to establish legal ties between the present territory of Mauritania and the territory of Western Sahara.

¹ "He [the representative of Mauritania] wished to stress the human, geographical, ethnic and cultural aspects, for the legal aspect of the problem was far from being the essential one. The legal aspect could, in any case, be properly appreciated only in the light of a number of fundamental facts ranging from the attachment of the people to the soil and a continuous life in common to the same concerns and way of life." (A/C.4/SR.2117.)

PART III

Even on the hypothesis of the Court concluding that it had no competence to reply to a *quaestio facti*, such as that of the existence of legal ties at the time of colonization by Spain, it would not have followed that the Court had no competence to reply to the request for an advisory opinion.

1. Legal Validity of Resolution 3292 (XXIX)

It is important to interpret General Assembly resolution 3292 (XXIX) most carefully—which is not an easy task. The resolution is the result of a compromise. The representative of the Ivory Coast, who supported the resolution, did not conceal the fact that it is “an unusual resolution” and that “it might perhaps not be entirely satisfactory” (A/C.4/SR.2131). The fact was that the first Moroccan draft, which amounted to a request to the Court to give an opinion on its alleged titles of sovereignty (legal ties) over Western Sahara, met with vigorous opposition. Members of the African Group and other members of the Fourth Committee, were afraid that a possible recognition of those titles by the Court might be considered as having sufficient validity to justify the immediate integration of Western Sahara with the Kingdom of Morocco—in disregard of the rights of the population of the Sahara. Consequently, so as to avoid such a conclusion, at the very beginning of the resolution the General Assembly recalls its resolution 1514 (XV) containing the declaration on the Granting of Independence to Colonial Countries and Peoples. Moreover, there is another reference to the same resolution in operative paragraph 3, which deals with the policy for decolonization to be followed by the General Assembly. Moreover, there is a careful recall of the eight resolutions on decolonization and the independence of Western Sahara. Lastly, the right of the population of Western Sahara to self-determination is reaffirmed, in accordance with resolution 1514 (XV) ¹.

In the text of resolution 3292 (XXIX) two contradictory positions can be seen side by side—or at least apparently. What is to be done? It did not seem to me that the right approach was to adopt a restrictive or negative interpretation that would lead to the conclusion that the request for an advisory opinion was without object. The Court should rather do its best to assist the General Assembly in the task of decolonization. The Court was, in my view, in a position to arrive at a positive interpretation, while taking account of the spirit of compromise that led to the adoption of the resolution, as well as of its purpose, and remaining in harmony with the text of the question put to the Court.

¹ The representative of the Ivory Coast explained that the new elements introduced into the draft of resolution 3292 (XXIX) as compared with the initial text (that of Morocco) were intended to enable the General Assembly “to be consistent. Those elements were, firstly, the reaffirmation, in the preamble, of the right to self-determination of the people of Spanish Sahara” (A/C.4/SR.2131).

The reason for the request for an advisory opinion is, we are told, that it was noted that "during the discussion [in the Assembly] a legal controversy arose". It should be noted that the legal *controversy* arose *during the discussion*, particularly in the Fourth Committee. That clarification is most valuable. It tends to rule out the possibility that the sole object of the question was to ascertain whether ties existed, for that would have been a question of fact and not of legal controversy. The controversy, it is added, arose during the discussion, and the question of the existence of ties was not even touched upon during the discussion in the Fourth Committee. The discussion centred on the clash between two opposing positions—the claim to the territory on the basis of ties said to be in existence at the time of colonization by Spain, and the principle of self-determination.

General Assembly resolution 3292 (XXIX) then justifies the request for an advisory opinion by saying that, in the light of the advisory opinion to be given, the General Assembly will decide 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. On the hypothesis that the question asked concerns the existence of ties, an advisory opinion by the Court stating that Morocco or the Mauritanian entity did have ties with the territory at the time of colonization by Spain would still leave the General Assembly in the same difficulty, that of deciding which of the two arguments—integration or self-determination—it should favour. This would retard the process of decolonization of the territory rather than accelerate it.

The origin of the real difficulty to be removed and of the doubts to be cleared up lies in the weight which Morocco impliedly gives to its alleged legal ties with the territory. Morocco called in question all the resolutions concerning the self-determination of the Sahara when its representative in the General Assembly said:

"All the resolutions and recommendations which have been voted [by the General Assembly in the previous ten years] concern the main question: that of knowing whether the two [Saharan] provinces of Sakiet El Hamra and Río de Oro belong to a certain sovereignty..." (A/PV.2249.)

Does the existence, supposing it proved, of alleged ties of Morocco (or of Mauritania) with the territory at the time of colonization by Spain render the resolutions on the self-determination and the independence of Western Sahara ineffective? That was the underlying question during the General Assembly's debates and there is reason to suppose that it was not unconnected with the request to the Court for an advisory opinion.

These considerations may be of assistance in finding the true meaning of the words "What were the ties?" They may be interpreted as meaning: what was the quality of those ties, what was their strength and their potential validity? To interpret them thus would not be to stretch the literal meaning of the words, and such an interpretation fits most closely with the purpose of the resolution.

To ask what were the ties or rights at a given time is to go into the question of the consequences that they might have in the future. A right exists or has present validity according to the powers which it confers for future exercise. The value of a right lies in the power it gives, its potential content, in space and time, its capacity for continued existence or resistance to new events, changes in the law and possible reasons for its extinction.

2. *Question of Intertemporal Law*

To perform the task entrusted to it by the General Assembly, namely that of casting light on the true difficulty that arose during the discussion, the Court ought, in my view, to have made clear what could have been the potential strength of the ties referred to at the time of the colonization of the territory by Spain. Did they have the validity of acquired rights, unaltered by the passage of time, or of contingent rights (A/C.4/SR.2124) which could still be exercised, or were they subject to the rules of intertemporal law? The question is not a new one; it is a question of the validity of historic rights¹.

The Court has already had to consider the validity of legal ties in accordance with intertemporal law. In the *Minquiers and Ecrehos* case, the Court considered that it was not necessary to deal with pointless historical controversies.

"The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years." (*I.C.J. Reports 1953*, p. 56.)

The Court thus judged that the original title ceases to be valid if there are new facts to be considered on the basis of new law.

The same doctrine had been expressed in the *Island of Palmas* (or *Miangas*) case. Huber had said:

"As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law." (*UNRIIAA*, Vol. II, p. 845.)

¹ One of the counsel for Morocco seems to have considered this point: "What makes this dispute [between Morocco and Spain] actual is that those past legal facts [the alleged legal ties] are titles for many States—titles to sovereignty which have present-day application or which may bring about consequences for the present time." (Hearing of 12 May.)

According to Mr. Gros, the arbitrator had intended to lay down a twofold rule:

“A legal fact must be viewed in the light of the law contemporaneous with it.

When the legal system by virtue of which the title has been validly created disappears, the right can no longer be claimed under the new legal system unless it conforms to the conditions required by that system.” (*I.C.J. Pleadings, Minquiers and Ecrehos*, Vol. II, p. 375.)

Huber's dictum has been the subject of observations by commentators who think that excessive weight was given to the new law; but regardless of the merit of their comments on the way in which Huber expressed his thought, it is clear that his arbitral award was just. Like the Court in 1953, Huber considered that after the original event (the discovery of the island) a new event had occurred (the taking of possession of the island by the Netherlands), which had to be weighed up according to the new law.

The generally accepted principle of intertemporal law, which is contained in the rule *tempus regit factum*, should therefore be considered as a recognized principle of international law. Consequently, the creation of ties with or titles to a territory must be determined according to the law in force at the time. The same law will also determine the nature and validity of the ties at that time. The rule *tempus regit factum* must also be applied to ascertain the legal force of new facts and their impact on the existing situation. New facts will be subject to the rules of law in force at the time when they occur.

3. New Facts and New Law

In the case at present before the Court, changes of facts and changes in the law to be applied cannot be ignored. Just before colonization by Spain, the territory had a status which was governed by the law in force at that time. But that status had not crystallized and was not fixed *ad aeternum*. It was subject to changes in the times.

First of all, there was colonization. Colonization is now condemned to die out; but the colonial fact was a new fact with sociological and legal implications. It has been rightly said: “In the 20th century, Mauritania, just like Morocco, underwent profound transformations as a result of what has been called the ‘French colonial fact’ ” (*La République islamique de Mauritanie et le Royaume du Maroc*, Paris, p. 29.) Colonization created ties and rights that must be judged in accordance with the law in force at the time.

After the entry into force of the United Nations Charter, the territory of Western Sahara became a “non-self-governing territory”, and the administering Power therefore has a duty to recognize the principle that the interests of the inhabitants of the territory are paramount, and to develop self-government (Art. 73 of the Charter).

A new fact was that the General Assembly, in implementation of resolution 1514 (XV), urged the administering Power to take the necessary measures to

put an end to the colonial domination of the territory. That is what emerges from the resolutions cited in resolution 3292 (XXIX)¹. It can be said that, at the date of the latter resolution, the law then in force was based on the principle that the peoples of non-self-governing territories have the right to decide upon their own destiny and to decide freely, and by democratic means, either to become independent or to become integrated with an independent State². The consequence thereof was that it had to be recognized that these

¹ General Assembly resolution 2229 (XXI) of 20 December 1966 draws a distinction between the case of Ifni, with regard to which the administering Power is requested "to take . . . the necessary steps to accelerate the decolonization . . ." and "to determine with the Government of Morocco . . . procedures for the transfer of Powers . . ." and that of Spanish Sahara, with regard to which the administering Power is called upon to determine " . . . 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".

Resolution 2354 (XXII) of 19 December 1967 notes the statement of the administering Power that a dialogue had already begun with the Government of Morocco; and with regard to Spanish Sahara insists on "the holding of a referendum" and on "the right to self-determination" of the "indigenous population of the Territory".

Resolution 2428 (XXIII) of 18 December 1968 notes the intention of the administering Power to sign a treaty with the Government of Morocco on the transfer of the Territory of Ifni; on the subject of the Sahara: "*Reaffirms* the inalienable right of the people of Spanish Sahara to self-determination" and invites the administering Power to determine the procedures for "the holding of a referendum" with a view to enabling the indigenous population of the territory to exercise freely its right to self-determination. This is said while "*Noting* the difference in nature of the legal status of these two territories".

Resolution 2591 (XXIV) of 16 December 1969 contains no further reference to Ifni (the Treaty of Fez was signed on 4 January 1969) and, with regard to the Sahara, insists on the holding of a referendum and on the right to self-determination of the indigenous population of the territory.

Resolution 2711 (XXV) of 14 December 1970 insists—and forcefully—on the holding of a referendum and the right of the population.

Resolution 3162 (XXVII) of 14 December 1973 "*Reaffirms* the legitimacy of the struggle of colonial peoples and its solidarity with, and support for, the people of the Sahara in the *struggle they are waging* in order to exercise their right to self-determination and independence" and "*Repeats* its invitation to the administering Power to determine the procedures for the holding of a referendum".

Resolution 3292 (XXIX) of 13 December 1974 again reaffirms the right of the population of the Spanish Sahara to self-determination in accordance with resolution 1514 (XV).

² Resolution 1541 (XV) of 15 December 1960 laid down in its annex the "principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 (e) of the Charter of the United Nations". The resolution lists the ways by which a non-self-governing territory can be said to have reached a full measure of self-government (principle VI). And, when self-government is acquired by integration with an independent State, integration "should have come about in the following circumstances:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
- (b) The integration should be the result of the freely expressed wishes of the

peoples must be regarded as having the right (either an acquired right or an unconditional *spes juris*) to decide upon their independence. The Court has had occasion to make a statement on the matter:

“Furthermore, 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. The concept of the sacred trust was confirmed and expanded to all ‘territories whose peoples have not yet attained a full measure of self-government’ (Art. 73). Thus it clearly embraced territories under a colonial régime.” (*I.C.J. Reports 1971*, p. 31.)

“These developments [in the law] 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 juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.” (*Ibid.*, pp. 31-32.)

By declaring that the legal ties that Morocco or Mauritania might have had with the territory of Western Sahara at the time of colonization by Spain are subject to the rules of intertemporal law, the Court was not laying down for the General Assembly the policy to be followed in the decolonization of the territory. The advisory opinion of the Court is confined to the statement that, whatever the existing legal ties with the territory may have been at the time of colonization by Spain, *legally* those ties remain subject to intertemporal law and that, as a consequence, they cannot stand in the way of the application of the principle of self-determination.

CONCLUSIONS

I venture to add a few words to sum up my thinking.

I believe that the first question put to the Court, as to whether Western Sahara had the status of a territory belonging to no-one, should not have been considered independently of the second question. In considering it separately, it seems to me, the Court has given it a different meaning from that which it had during the discussions in the General Assembly. If it was nevertheless desired to do this, it would have been preferable to make the answer explicit, by saying that the territory was not a territory belonging to no-one, because it was inhabited at the time of colonization by Spain by independent tribes.

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.”

The second question concerned the legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity, that is to say the nature of those ties, should they have existed: Were they ties of sovereignty? Were they in any case subject to intertemporal law?

The Court has answered rightly, and with a remarkable degree of general agreement, that those ties were not ties of sovereignty, and that thus they could not be considered to be titles to a claim or for a demand for recovery of territory.

To reach that conclusion, the Court had studied carefully all the information available to it, taking into account its value as evidence.

But, in asking itself whether there existed legal ties other than those of sovereignty, the Court interpreted the question which had been put to it in a different sense from that which had been the object of the controversy in the General Assembly.

There is no legal foundation for regarding as ties with the force of *ob-ligare* (*vinculatio*) the personal and sporadic ties of the Sultan with certain unclearly defined tribes. I have not found any firm evidence of the existence of such ties.

The ties of the territory with the Mauritanian entity suggested by the Advisory Opinion result from the ties existing between some independent tribes and the lands through which their nomadic routes passed. It would seem that, if such were the case, there would be ties between each tribe and the territory over which it passed, but nothing more. In any case, as regards the existence of those ties, the Court had nothing to go on, in my opinion, except vivid and touching descriptions of desert life—but no concrete facts about the beneficiary tribes or about the places subject to those ties which would fulfil the conditions required of evidence to be submitted to a court.

(Signed) F. DE CASTRO.
