M. IGNACIO-PINTO, juge, fait la déclaration suivante:

Je n'ai pu souscrire qu'en partie à l'avis de la Cour internationale de Justice en date du 16 octobre 1975 et seulement parce que, en son dernier considérant (par. 162), la Cour

> « conclut que les éléments et renseignements portés à sa connaissance n'établissent l'existence d'aucun lien de souveraineté territoriale entre le territoire du Sahara occidental d'une part, le Royaume du Maroc ou l'ensemble mauritanien d'autre part. La Cour n'a donc pas constaté l'existence de liens juridiques de nature à modifier l'application de la résolution 1514 (XV) quant à la décolonisation et en particulier l'application du principe de l'autodétermination grâce à l'expression libre et authentique de la volonté des populations du territoire. »

Je rejette en conséquence toute la partie de l'exposé de la Cour qui déclare qu'au moment de la colonisation espagnole il y avait des liens juridiques d'allégeance entre le sultan du Maroc et certaines tribus du territoire en même temps que d'autres liens juridiques entre l'ensemble mauritanien et le territoire du Sahara occidental.

Mon opposition contre l'avis consultatif provient de ce que je considère que, s'il appert que la Cour est fondée à se déclarer compétente aux termes des dispositions de l'article 96 de la Charte des Nations Unies d'une part et de l'article 65 du Statut de la Cour d'autre part pour recevoir de l'Assemblée générale des Nations Unies la requête d'avis consultatif, il eût été opportun qu'en raison de certaines circonstances de la cause *ab initio* la Cour, usant de son pouvoir discrétionnaire, après avoir déclaré recevable la requête quant à la forme, la rejette quant au fond parce que les questions telles qu'elles étaient posées constituent une sorte de questions pièges, lesquelles amenaient de toute manière à la réponse attendue en l'espèce, la reconnaissance de droits de souveraineté au Maroc d'une part et à la Mauritanie d'autre part sur telle ou telle autre partie du Sahara occidental.

Pour abréger et éviter des répétitions inutiles, je puis me rallier aux observations de M. Petrén portant sur l'interprétation du paragraphe 162 de l'avis et les raisons pour lesquelles mon collègue, comme moi-même, rejette dans ce paragraphe tout ce qui ne concerne pas les liens de souveraineté sur le territoire de la part du Maroc ou de l'ensemble mauritanien, partie du paragraphe que je puis accepter.

Judge NAGENDRA SINGH makes the following declaration:

While agreeing with the Advisory Opinion and the emphasis that it places on ascertainment of the will of the people "genuinely expressed" as the basic

pillar of self-determination it may be worthwhile to throw more light on the nature and character of the legal ties which remain the subject-matter of Question II of General Assembly resolution 3292 (XXIX) by which the Court is seised of the present request for an Advisory Opinion. No tribunal would appear to depart from its judicial character if it were to state precisely the implications of those ties in terms of decolonization which is the very object and the main theme of the exercise pending before the General Assembly. This is a vital aspect which has to be stated fully and in clear and unambiguous terms to enlighten the General Assembly.

In addition there are other aspects, perhaps equally important; which merit attention and require to be appropriately emphasized to convey the full significance of the Advisory Opinion. These matters which weigh with me are briefly stated below.

I

Both Morocco and Mauritania have pleaded on certain pertinent aspects and details of the decolonization process which need to be emphasized. Counsel for Morocco in his oral argument before the Court stated:

> "Even in the event that the General Assembly should decide that for the implementation of the principle of self-determination, a referendum should be held, even in such a case, it would be useful to know whether, bearing in mind the existence of legal ties with a country at the time of colonization of this territory by Spain, it would not be as well to lay before the populations the problem of their future re-attachment, of their return, or on the contrary of their detachment from, *ex hypothesi*, their former mother country." (Hearing of 26 June 1975.)

> "... *this problem of the wording of the questions to be put in some future referendum is to some extent clarified by the need for the General Assembly to be in possession of all the elements of this matter ...*" *(ibid.)* (emphasis added).

The Court, having reached the correct conclusion that there were no legal ties of such a nature as might "affect the application of resolution 1514 (XV) and, in particular, of the application of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory" would appear to be justified in proceeding further by indicating the extent to which those legal ties that did exist could have a bearing on the decolonization process and if so what concrete shape it could take.

Those legal ties which the Court found to exist at the time of Spanish colonization between Western Sahara and Morocco or Mauritania were not of such a character as to justify today the reintegration or retrocession of the territory without consulting the people. The main reason for this conclusion is simply that, at the time of Spanish colonization, there was no evidence of the

existence of one single State comprising the territory of Western Sahara and Morocco, or Western Sahara and Mauritania, which would have been dismembered by the colonizer and thus justify reunion on decolonization at the present time. Accordingly, the facts and circumstances of this case would not attract the provisions of paragraph 6 of resolution 1514 (XV) which holds disruption of national unity or territorial integrity of a country as incompatible with the Charter of the United Nations and thus points to reintegration of territory. Nevertheless, as the Court finds that there were certain legal ties in existence, it becomes necessary to proceed to assess them with the sole purpose of evaluating them to ascertain if they indicate a definite step in terms of the decolonization process. In short the strength and efficacy of these ties though limited must still be held to be of such an order as to point in the direction of the possible options which could be afforded to the population in ascertaining the will of the people. These options, in accordance with resolution 1541 (XV) as well as 2625 (XXV), could be either integration with Morocco or with Mauritania or having free association with any one of them or for opting in favour of a sovereign independent status of the territory. Even if it is conceded that the procedures for decolonization lie within the exclusive province of the General Assembly it is yet appropriate for a court to point out the relationship between the existence of the legal ties and the decolonization process in order fully to enlighten the General Assembly. To do so is not to trespass on the prerogatives of the General Assembly but to fulfil the role as the principal judicial organ of the United Nations.

There are some valid reasons for going this far but no farther. First, taking into consideration the very *raison d'être* of resolution 3292 (XXIX) it is clear what the General Assembly expects in the answer to Question II is the Court's appraisal of the nature of these legal ties "which must be understood as referring to such legal ties as may materially affect the method or the policies and procedures to be applied in the decolonization of Western Sahara". If the Court cannot be "unmindful of the purpose for which its opinion is sought" it stands to reason that while remaining well within its judicial bounds the Court should proceed far enough to make clear those aspects of the available options which are open to the people of the territory in any method of their consultation particularly when the Court holds that consultation is essential.

The second reason is that there have been specific pleadings on this matter both by Morocco and Mauritania, as cited above, and these need not be totally ignored.

II

The Court has recognized the validity of the principle of self-determination, "defined as the need to pay regard to the freely expressed will of the peoples". Furthermore the Court has rightly concluded that the need for ascertaining the freely expressed will of the people is not in any way affected by the present request of the General Assembly for an advisory

opinion. In my opinion the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. This is established by not only the general provisions of the United Nations Charter but also by specific resolutions of the General Assembly on this subject. Apart from Articles 1, 2, 55 and 56 of the Charter and paragraphs 2 and 5 of resolution 1514 (XV) which bring out this aspect generally there are also specific provisions such as contained in principles VII and IX of resolution 1541 (XV) which categorically state "integration should be the result of the freely expressed wishes of the territory's peoples". It is principle VI *(c)* of resolution 1541 (XV) which prescribes integration as a method of decolonization and principle IX *(b)* imposes the condition of consultation of the people as the means of achieving self-determination by integration. Again resolution 2625 (XXV) concerning friendly relations goes a long way to further emphasize the point that on decolonization the "emergence into any political status" has to be "freely determined by a people". Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.

However, I am in agreement with the clarification given by the Court to that aspect of the matter which relates to certain cases in which the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. It follows, in my view, that the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary. Such exceptional circumstances are possible and could exist but they do not appear to be present in this case so as to do away with the salutary principle of ascertainment of the freely expressed will of the people of the territory who could, on consultations, elect to integrate with any one of the adjoining interested States if they so desired.

Again, cases falling under paragraph 6 of resolution 1514 would remain outside this rule. In any event, as stated earlier, the facts disclosed here do not point to the application of that particular provision of the said resolution.

III

Another aspect which is equally important to me relates to the Court's observations concerning respect for the fundamental principle of consent to jurisdiction if in any case the requirement of such consent was circumvented by resorting to the advisory proceedings of the Court. In this case Spain has not given its consent to adjudication of the questions formulated in resolution 3292 (XXIX). Furthermore, it did not agree to Morocco's proposal to move the Court in contentious proceedings. It was necessary, therefore, for the

Court to clarify the legal position resulting from the Spanish contention that there was lack of consent to invoke the Court's jurisdiction. The conclusion is warranted that although there are two distinct channels of the Court's jurisdiction, namely advisory and contentious and although "consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases while the situation is different in regard to advisory proceedings" since the Court's reply is only of an "advisory character" and given "not to States but to the organ entitled to request it" (*I.C.J. Reports 1950,* p. 71), there could still be certain circumstances in which lack of consent of an interested State could render the giving of an advisory opinion incompatible with the Court's judicial character. The Court, therefore, has stated that if a request for an advisory opinion was made in circumstances which clearly disclosed that the intention or the purpose was to circumvent the principle of consent a situation would arise in which "the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction".

No such bypassing of this salutary principle has taken place in the present proceedings because the object of the request for an opinion has been to obtain from the Court legal advice which the General Assembly considers of assistance in the discharge of its functions in relation to the pending decolonization of a territory. What is of importance, therefore, in this context is the recognition given to the principle of judicial propriety which would oblige the Court to refuse an opinion on the ground of the existence of a "compelling reason" for doing so, if the purpose behind the request for an opinion was to defeat the principle that a State is not obliged to submit its disputes to judicial settlement without its consent. This also enlightens the General Assembly in the use of Article 96 of the Charter by asserting that consent of an interested State still continues to be relevant even in advisory proceedings, "for the appreciation of the propriety of giving an opinion".

M. AMMOUN, Vice-Président, MM. FORSTER, PETRÉN, DILLARD, DE CASTRO, juges, et M. BONI, juge *ad hoc*, joignent à l'avis consultatif les exposés de leur opinion individuelle.

M. RUDA, juge, joint à l'avis consultatif l'exposé de son opinion dissidente.

(Paraphé) M.L.

(Paraphé) S.A.