SEPARATE OPINION OF VICE-PRESIDENT AMMOUN

[Translation]

While subscribing to the Opinion arrived at by the Court, I feel obliged to deal in this opinion with certain questions to which the Court did not address itself, and with certain others that need to be developed at greater length, or which received a solution or treatment that I am unable to agree with.

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The Court has rightly held that legal ties existed, at the time of colonization by Spain, between Morocco and Western Sahara.

Without sufficiently convincing reasons, however, it minimizes the nature of those ties by maintaining that they consisted in an allegiance of the Saharan population to the Sultan of Morocco. Paragraphs 95, 107 and 129 quite properly speak of "political" allegiance to the Sultan.

I shall develop the objections to this thesis at length. For the moment, I should like to define the notion of allegiance to the Moroccan sovereign more precisely in order to determine its exact bearing.

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In itself, allegiance to the sovereign is of a political and constitutional character, as in certain countries that were subject to a military feudal system. Furthermore, at the time of colonization by Spain, that is to say towards the end of the nineteenth century, the Sultan combined in his person the legislative and executive powers, to which was added the spiritual power. He exercised those powers by means of dahirs, which were issued – a significant fact – under his sole signature.

Does this not mean that the Sultan at that time personified the State, all of whose powers he exercised? Therefore allegiance to the Sultan, or sovereign, was equivalent to allegiance to the State. This entails acknowledging that the legal ties between Morocco and Western Sahara recognized by the Court took the form of political ties, indeed ties of sovereignty.

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We must, however, realize that these ties, which are of a political character, are to be considered as such directly and not in the round about way adopted in the Advisory Opinion, *via* allegiance to the Sultan.

This follows, on the international level, from international instruments—treaties and unilateral declarations of foreign governments—and internally, from acts of Moroccan authority.

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It is first necessary to clear the ground by disposing of the thesis according to which Western Sahara was not *terra nullius*, not because it had legal ties with Morocco and Mauritania, but because the tribes inhabiting it were politically organized and signed agreements with Spain (the 'Ijil Agreements).

I shall not pause to discuss the legal validity of those Agreements, which were signed by private persons who had not been invested prior to the act of signature with powers conferred by the Spanish State.

Even supposing them to be legally valid, one could not conclude from them that Western Sahara, being the master of its own destiny, had no legal ties with Morocco and Mauritania. For the capacity to sign agreements is not incompatible with the existence of an authority superimposed on the local authority.

In any case, if Western Sahara found itself cut off from any external political power, this would certainly seem to be the effect of colonization.

This was generally the policy of colonialism: it let the local and regional languages, literature and civilizations fall into decay, including the Arab civilization of the countries of the Maghreb, upon whose philosophical and scientific sources Europe drew from the Middle Ages up until the beginning of the Renaissance.

In a second stage, the colonizers sought to win over the colonized peoples to their own civilization, in order to bind them more closely to themselves.

In Western Sahara, this policy of encroachment did not, however, suppress all ties with the other Arabs. Relations continued to exist from the Muslim conquest onwards and under the successive Maghreb dynasties up until the reigning 'Alaweet dynasty.

If this is indeed the explanation for the origin of a certain autonomous way of life on the part of the tribal populations in Western Sahara, one can similarly suppose that the present separatist tendencies pointed to by counsel for Spain (hearing of 22 July 1975, morning), namely the document sent by the Jum'a to the Head of the Spanish State on 23 March 1973, and the statements made by various local groups, are also the result of a foreign presence. We shall see, moreover (*infra*, p. 101), why Spain is so keen on a referendum.

Mr. Benjelloun, *Procureur général* of the Supreme Court of Morocco, who is well acquainted with the geography and history of his country, refuted this argument in a learned address; he disposed of the argument which denies the natural and human relationships and, in fact, the legal ties which make the northern part of Western Sahara a territory forming part of the Empire of

Morocco. The *Procureur général* concluded, very rightly, that, between the Sahrawi and their Moroccan compatriots there existed something which made of them one and the same nation, namely:

> "... the shared past which they have wrought, the struggles carried out side by side, the same shared ideal, a culture based on a concerted effort and lasting will, a real determination to live together ..." (hearing of 30 June 1975).

Thus from the point of view of Morocco, the Spanish argument is contradicted by a body of evidence based on diplomatic instruments, ethnic considerations, common customs, one and the same social and cultural life, a single language, common religion and religious practices, struggles carried out side by side, submission to the authority of Moroccan Sultans, and finally and above all the common aspirations which have ultimately constituted the ties which as a matter of law link together the elements of one and the same nation.

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"TERRA NULLIUS"

Mr. Bayona-Ba-Meya, Senior President of the Supreme Court of Zaire, and Mr. Mohammed Bedjaoui, Algerian Ambassador in Paris, representatives respectively of the Republic of Zaire and the Democratic and Popular Republic of Algeria, both expressed penetrating views which compel our attention with regard to the concept of *terra nullius*.

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Anyone familiar with the philosophy of Zeno of Sidon or Citium and his Stoic school cannot but be struck by the similarity between the ideas of that philosopher and the views of Mr. Bayona-Ba-Meya as to the links between human beings and nature, between man and the cosmos. Further, the spirituality of the thinking of the representative of Zaire echoes the spirituality of the African Bantu revealed to us by Father Placide Tempels, a Belgian Franciscan, in his work *Philosophie bantoue*. The author sees therein a "striking analogy" with "that intense spiritual doctrine which quickens and nourishes souls within the Catholic Church".

Mr. Bayona-Ba-Meya goes on to dismiss the materialistic concept of *terra nullius*, which led to this dismemberment of Africa following the Berlin Conference of 1885. Mr. Bayona-Ba-Meya substitutes for this a spiritual notion: the ancestral tie between the land, or "mother nature", and the man

who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of *terra nullius* in the sense of a land which is capable of being appropriated by someone who is not born therefrom. It is a condemnation of the modern concept, as defined by Pasquale Fiore, which regards as *terrae nullius* territories inhabited by populations whose civilization, in the sense of the public law of Europe, is backward, and whose political organization is not conceived according to Western norms.

One might go still further in analysing the statement of the representative of Zaire so as to say that he would exclude from the concept of *terra nullius* any inhabited territory. His view thus agrees with that of Vattel, who defined *terra nullius* as a land empty of inhabitants.

This is the reply which may be given to the participants in the Berlin Conference of 1885, who, during the fierce blaze of nineteenth-century colonialism, the success of which they sought to ensure by eliminating competition, regarded sub-Saharan Africa as an immense *terra nullius* available for the first occupier, whereas that continent had been inhabited since prehistoric times, and flourishing kingdoms had there been established – Ghana, Mali, Bornu – whose civilization survived until the colonial period, and only succumbed to the wounds inflicted by colonization and the slave trade (*I.C.J. Reports 1971*, p. 86, separate opinion). It was in the southern part of this continent and in Kenya that the ethnologists discovered the remains of the first hominoids.

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As for Mr. Mohammed Bedjaoui, in a bold survey of history from antiquity up to modern times, he distinguishes, with consummate skill, three major epochs:

(1) Roman antiquity, when any territory which was not Roman was *nullius*.
(2) The epoch of the great discoveries of the sixteenth and seventeenth centuries, during which any territory not belonging to a Christian sovereign was *nullius*.
(3) The nineteenth century, during which any territory which did not belong to a so-called civilized State was *nullius*.

In short, the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century Francisco de Vittoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*.

This approach by the eminent Spanish jurist and canonist, which was adopted by Vattel in the nineteenth century, was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be

adopted today. The Advisory Opinion, after mentioning the great diversity of views among modern jurists, takes, in paragraph 80, a considerable step along the path marked out by Vittoria, Vattel, Mr. Bedjaoui and Mr. Bayona-ba-Meya.

RECOGNITION BY THE INTERNATIONAL COMMUNITY OF THE LEGAL TIES BETWEEN MOROCCO AND WESTERN SAHARA

The Treaties

It must first be pointed out that the Advisory Opinion has left out of account, or has misinterpreted, certain relevant treaties.

An analysis of these instruments points to the existence of a Moroccan political or State authority extending as far as Cabo Bojador and embracing the Sakiet El Hamra.

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1. To begin with, there are two sixteenth-century treaties, quoted by the historian Romeu (Vol. I): the Treaty of Alcaçovas and the Treaty of Cintra, between Spain and Portugal.

The Treaty of Alcaçovas fixed, by agreement between the two Powers, the limits of the Kingdom of Marrakesh to the south of Cabo Bojador.

The Treaty of Cintra does the same thing for what it calls the Kingdom of Fez.

These two treaties, whose relevance appears manifest, are not even mentioned in the Advisory Opinion.

They do not simply record an allegiance to the Sultan, but recognize that the authority of Morocco extended beyond Cabo Bojador.

2. Then there is the treaty between Morocco and Spain of 1 March 1767.

This treaty, according to Article 18 of which Sherifian sovereignty extended beyond the Wad Noun, i.e., further south into the neighbouring region of Sakiet El Hamra, gave rise to a controversy between Morocco and Spain; it is rejected by the Advisory Opinion, the Court not having found it necessary to resolve the controversy on the ground that Article 18 had been superseded by Article 38 of the Hispano-Moroccan Treaty of 20 November 1861: in other words, that it had been abrogated. It was not, however, expressly abrogated by any provision of the Treaty of 1861, nor does it appear to have been tacitly abrogated by Article 38 of that Treaty, the function of which was rather to supplement and reinforce it. I shall have more to say about Article 38 later on. Furthermore, the recognition of the extent of Moroccan territory in Article 18 was established, and could not subsequently be denied.

We must therefore abide by Article 18 of the Treaty of 1767, which Spain misinterprets on the basis of the Spanish text of the Treaty.

Morocco contended, in conformity with settled case-law, that, where two texts of a treaty do not agree, it is the more limited text that should prevail – in the present case, the Arabic text.

The Advisory Opinion mentions this contention by Morocco but does not answer it. It could not reject it because, as I have said, it is based on settled case-law. This is what the Arabic text says:

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

Spain disputes the sense of this text, alleging it to mean, not that the nomads were beyond the Sultan's power to enforce *decisions* with respect to them, but that they were beyond his *jurisdiction.*

The controversy turns on the word *ahkam* translated by the word "decisions".

A decisive argument in support of the Moroccan contention is that the sense which Spain wishes to give to the plural *ahkam,* that of *jurisdiction,* is one which it can bear only in the singular *hukm,* whereas it is in the plural in the text of Article 18. In French one speaks of the *juridiction* of the Sultan or of the State, and not of the *juridictions.* In Arabic, similarly one says *hukm as-sultan* or *hukm ad-dawla* in the singular, and not *ahkam* in the plural. This signifies that *ahkam* in the text has the meaning of *decisions* in the plural.

A second argument:

One might have hesitated about the meaning given by Spain and Morocco to the term *ahkam* independently of the above argument, but such hesitation would only have been permissible if the term were taken out of its context.

For Article 18 includes in its terms an explanation: it is the nomadic character of the populations of the Wad Noun and the regions beyond. Now the nomadic character of those populations, which often makes it impossible to catch them after the illegal act imputed to them, does not do away with the authority which exists over the territory through which they pass. Their nomadic existence can only render difficult the application and implementation of the decisions of the governing authority that pronounces them.

Morocco rightly deduces from that the existence, in addition to allegiance to the Sultan, of Sherifian authority over the Wad Noun and the regions beyond in Western Sahara.

3. Furthermore, the Treaty of 20 November 1861, far from weakening the Moroccan argument, is, as has been said, calculated to strengthen it. It contains the following provision:

"If a Spanish vessel be wrecked at Wad Noun or on any other part of its coast, the Sultan of Morocco shall make use of his authority to save and protect the master and crew until they return to their country, and the Spanish Consul-General, Consul, Vice-Consul, Consular Agent, or person appointed by them shall be allowd to collect every information they may require . . ."

To begin with, if the Sultan of Morocco is called upon to use his authority to save the crew of the wrecked vessel, it must mean that he has authority in the place where the shipwreck occurred. Moreover, if authorization or permission is sought to enable the consul, etc., to collect information, it is clearly because the Sultan possesses an authority with which the Spaniards must treat.

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4. The Treaty of 1 March 1767 is supported by several international treaties, but they do not give us any more information about the limit to which Moroccan sovereignty extends beyond the Wad Noun. They include that between Morocco and Spain of 1 March 1799, Article 22; that between Morocco and the United States of 16 September 1836, Article 10; and, finally, the two treaties between Morocco and Great Britain, both of 9 December 1856, Articles 33 and 12 respectively.

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5. Treaties likely to throw light on the limits of the confines of Morocco and thereby to enable us to assess the ties that existed between that country and Western Sahara are, however, not lacking.

To begin with, there is the Anglo-Moroccan Agreement of 13 March 1895. Clause I of that agreement reads as follows:

"If this Government buy the building, etc., in the place above-named from the above-named 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."

Great Britain thus recognizes that Moroccan territory extends to Cabo Bojador, including Sakiet El Hamra.

The representatives of Spain have questioned the meaning of this text. The Court has said that the provisions of the treaty appear to it to represent an agreement by Great Britain not to question in future any pretension of the

Sultan to the lands between the Dra'a and Cape Bojador, and not a recognition by Great Britain of previously existing Moroccan sovereignty over those lands.

The Court does not say "represent" but "appear to represent" and on the ground of this "appearance" which is not asserted as a fact proceeds to set aside the treaty on the clear text of which Morocco relies. How, in the absence of any premise whatever, was the Court able to decide what the provisions of the treaty "appeared" to represent?

Moreover, according to settled case-law, a clear text is not to be interpreted.

Where the chink in the armour appears is where Spain contends that the agreement cannot be invoked against it, being *res inter alios acta*—as if what was in question was a mere bilateral agreement and not one of the elements in the international community's recognition of the frontiers of a country.

Furthermore, did the statement that the text of the agreement did not appear to be in a pure English style imply that in a bilateral agreement the collaboration of the two parties in its drafting is not to be considered?

We thus see how inconsistent are the arguments to which Spain has resorted in order to reject the clear text of the 1895 Treaty.

One is entitled to riposte by asking how a Government, after solemnly recognizing a fact in an authentic instrument, can deny it through the voice of its representatives. It is necessary to seek the motives for this *volte-face.*

They are to be found in the concerns of the Powers at the time when colonialist expansion was at its height.

Under the Treaty of 8 April 1904, France undertook not to interfere with the action of England in Egypt, in return for which England undertook not to interfere with the action of France in Morocco. A similar agreement was concluded between Germany and France, which abandoned Gabon to Germany in return for freedom of action in Morocco.

Morocco rightly protested against the Anglo-French Treaty of 8 April 1904, which had been kept secret.

It is true that European colonialist law at that time did not forbid secret treaties; but international morality has always condemned them; and it is the precepts of morality that have justly received the consecration of positive law in this case as in so many others.

The Treaty of 8 April 1904 was also morally wrong because it empowered third parties to dispose of Moroccan sovereignty by secret negotiations, unknown to Morocco.

This treaty explains the change in the attitude of England to Morocco, in which, with the exception of Tangier, it ceased to take any political interest. For England was obliged, under the provisions of the third of the secret articles of the Anglo-French Treaty of 8 April 1904, to facilitate the understanding which France was proposing to enter into with Spain for the establishment of spheres of influence in Morocco with a view to its partition. Great Britain was obliged to remove any obstacle to the conclusion of that

understanding. It therefore waived its rights under the Anglo-Moroccan Treaty of 1895; and British officials were to be heard denying the official recognition of the Moroccan boundary at Cape Bojador.

The Advisory Opinion has thus taken account of the statements of one party to the treaty in order to attribute to it a meaning to which the text in no way lends itself in the absence of any intrinsic basis deduced from the terms of the Convention: a meaning which appears to have sprung from nowhere and to be, to say the least, a pure figment of the imagination. What is worse, the interpretation has been made *contra legem*. Such an interpretation is calculated to undermine the very foundation of relations between States, namely the respect due to treaties.

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Moreover, Spain itself had recognized that extension of Sherifian authority to Cape Bojador, in the two treaties of Alcaçovas and Cintra already mentioned. Nevertheless, in the Franco-Spanish Treaty (also secret) of 3 October 1904, the two contracting parties conceded to one another spheres of influence in Morocco. They were obliged to keep this arrangement secret for, on the very day of its signature, they published a declaration whose tenor, contrary to the provisions of the treaty, was intended to allay the apprehensions of the Moroccans, and which affirmed the determination, contrary to the real intentions, of France and Spain, to guarantee the integrity of Moroccan territory. This Treaty of 3 October 1904 incurred, in addition to a reiteration of the criticisms of the Treaty of 8 April 1904, that of duplicity because of the conflict—hidden from Morocco—between the Treaty of 3 October and the declaration issued that same day.

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The Advisory Opinion also brushes aside without adequate justification a text in which it is recognized that the territory of Morocco included the Sakiet El Hamra. I have in mind the letters annexed to the Treaty of 4 November 1911 between France and Germany. These letters state:

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

It is in vain that Spain has attempted to give to the expression "Río de Oro" the meaning of Western Sahara. The Río de Oro stops at the southern

boundary of Sakiet El Hamra, which is recognized in the exchange of letters as forming part of the territory of Morocco.

As with the Anglo-Moroccan Treaty of 1895, the Advisory Opinion makes the Franco-German letters say something other than what they clearly state. It attributes to them, by a pure figment of the imagination, the purpose of simply recognizing spheres of influence over Moroccan territory, whereas the letters make no allusion whatever to this stillborn practice of an expiring colonialism.

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Besides the treaties, there are other international instruments that are no less conclusive. They consist of two declarations of international scope emanating respectively from Spain and from France, both of which recognize the Sakiet El Hamra as belonging to Morocco.

As early as 1454, at the time when Portugal was in competition with Spain, the latter asserted that the limit of the Kingdom of Morocco was situated at Cabo Blanco, and therefore included Sakiet El Hamra.

The Advisory Opinion makes no reference to this declaration. Had it done so, it would no doubt have attributed the declaration to Spain's wish to discourage any Portuguese ambitions with regard to the territory in question. This does not, however, make the declaration any less conclusive.

This point of view was shared by the French Government: in the *Instructions nautiques* published by that Government in 1849 there is a paragraph headed: "On the west coast of Africa, from Cape Spartel to Cape Bojador (coast of Morocco)." The reference to the coast of Morocco is significant.

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Internal Manifestations of Moroccan Authority over Western Sahara

Having dealt with the diplomatic activities that support the existence of the legal ties between Morocco and Western Sahara (Sakiet El Hamra), I now turn to an examination of the manifestations of that sovereignty by the exercise of legislative, executive and spiritual authority.

Legislative Activity

The Sultans legislated for the Sakiet El Hamra as they did for the national territory north of the Dra'a. That legislation took the form of dahirs of the Sultan.

It extended to economic activity through the control of trade and production, in particular as regards fishing, the monopoly of which was generally reserved to the Sultan's subjects, except in the case of special concessions to foreigners; it also extended to the administration of the ports, in order to open and close them to foreign trade, according to the requirements of national policy.

The Sultan's legislative authority also related to raw materials and fiscal matters through the assessment, imposition and collection of taxes and dues.

Thus the Spanish historian Huici says in his political history of the Almohad Empire (p. 193) that the Sultan Abdulmoumey levied taxes in the Souss al-Aksa, or farthest Souss, which straddles the valley of the Sakiet El Hamra.

Executive Power

The Sultans exercised executive power by means of dahirs, as in matters of legislation. That was how they appointed and dismissed the caids to whom they entrusted responsibilities of government in a region, on a coast, or over a group of tribes. The caids are, according to the etymological meaning of the term, military commanders who also have administrative functions.

The choice of the sovereign could fall on a personage because of his local influence or family or tribal connections. That does not mean that the title of caid tended to be an honorary one, as has been alleged. It is a practice current in quite a number of countries, in the absence of a centralized authority, to choose persons to govern who have the qualifications which enable them to make their authority felt and carry out their tasks.

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It is the dahirs of the nineteenth century which are primarily of interest to us.

Of those dahirs submitted by Morocco, five relate to the regions of Western Sahara. It is the dahirs in documents 4, 5 and 8 which appoint caids with authority over the Sahara tribes of the Tidrareen and Oulad Tidrareen, whose nomadic migration routes extend to the whole of Western Sahara according to Mauritania's maps numbers 2 and 3, and go beyond Cabo Bojador; the dahir in document 4 also appoints the caid with authority over the Saharan Tekna, whose nomadic migration route extends to the northern part of the Sahara, or the Sakiet El Hamra, according to map number 3.

Then there were a whole series of caids in the Sakiet El Hamra, who were mentioned in connection with the deeds attributed to them in the history of Western Sahara, whether they held their post in the Sakiet El Hamra itself, or governed it from a post which they held in the interior. And that was the case

throughout the eighth, the eleventh, twelfth and fourteenth centuries, as recounted by the historians Vernet, Domenech, Huici and Seco de Lucena, to whom we shall refer in the pages which follow.

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Historians

Five historians – a Frenchman, Vernet, and four Spaniards, Domenech Lafuente, Seco de Lucena, Huici and Romeu – who inspire great confidence with regard to the facts, supporting the Moroccan case, which they relate, particularly in view of their nationality, tell of events going back, in the case of Vernet, to the seventh century, concerning Western Sahara and its legal ties with Morocco. Recourse has already been had to some of them, and will be to all, depending on the subject.

Mention will also be made of a geographer of world-wide renown, El Idrissi.

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Vernet tells on page 36 of his work *Islamisation* how, after the Arab conquest of Morocco by Okba in 681, Moussa ben Nosaïr (a Lebanese chief converted to Islam, who was the companion of Tarek ben Ziad in the passage of the Straits of Gibraltar and in the conquest of Spain) sent his son Merouana to the furthest Souss. We know that the furthest Souss, or Sous al-Aksa, is situated within the boundary of the Sakiet El Hamra.

Vernet also relates the following facts: in 740, the Moroccan governor (or caid) called Ismaïl ben Obeidetallah was appointed to Sakiet El Hamra (p. 48).

In 745, Okba's great-nephew went as far as 'Ijil, and dug the first wells in the Sahara (p. 53), thus clearly showing occupation of the territory.

From the eighth to the eleventh centuries, that occupation was reinforced by the building of roads across the Sahara (p. 138).

In 757, the town of Sijilmassa was founded and its governor extended his authority over the Sahara *(ibid.)*.

In 761, the Sahara had a Moroccan governor (or caid), called Mohamed Sonjaï, who conducted a campaign in the Sudan (p. 55).

From that time on, continues Vernet, the dynasty of the Idrissids did not cease to govern the Sahara, until the advent of the following dynasty.

The Spanish historian Domenech Lafuente, no less illustrious than Vernet, confirms in his book *Quelque chose sur le Río de Oro,* the events related by the latter, and goes on with the story.

He mentions that Sultan Abdullah ben Yasseen administered the south until his death in 1040 (p. 19).

The Spanish historian Huici continues the list of facts which bear witness to Moroccan authority over Western Sahara.

First of all, there is the information appearing in his *Histoire politique de l'empire almohade* that the whole of the south was governed by the capital of the Souss (p. 65); later he mentions that desert troops responded to the call of Sultan Abdul Moumen and beseiged the town of Igli (p. 68).

Another Spanish historian, Seco de Lucena, in his work *Le Maroc au début du XIV^e siècle* (p. 94), related that the Sultan Habib ben Othman, who reigned from 1331 to 1351, made Sijilmassa the capital of the territory of Sahara.

One cannot conclude this list of the facts recorded by the historians, providing indisputable evidence of the extension of the authority of Morocco to the Sakiet El Hamra as far as Cape Bojador, without mentioning the decisive support they received from the geographer El Idrissi.

El Idrissi, following in the tradition of Marinos of Tyre, the founder of mathematic geography based on the calculation of longitudes and latitudes, and precursor of the great Ptolemy, was the most illustrious geographer in the Arab world and Europe of the Middle Ages. His knowledge was highly esteemed by the Norman kings of Sicily, in whose kingdom he wrote, in 1154, a great work describing the geography of northern Africa, *Nouzhat al Mouchtak*. Taking the facts strictly into account, he situates the western Sahara within the confines of Morocco.

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Roads

Spain has alleged, in order to show that Western Sahara was distinct from Morocco and had no ties with it, that the latter Power had left there no building of the Moroccan architectural type. That is to forget that typical Moroccan architecture belongs to the cities, and has nowhere left traces in the desert.

On the other hand, Morocco built roads in Western Sahara which went right across it, from north to south. Two main roads in particular have been mentioned: the Lemtouna road and that of Jouder. Could it claim that they were built by the Bedouin tribes? As far as the Lemtouna road is concerned, there is no need to quote the historians who speak of it, for, 900 years after it was built, it can still be used. In 1678 Sultan Moulay Rasheed used that road in two of his expeditions beyond Western Sahara (Domenech, *op. cit.*, p. 30).

The Jouder road was built later, in the time of Sultan Ahmad al-Mansour, on the occasion of his expedition to the Soudan.

One can conclude definitely from the foregoing that three dynasties of the Idrissids, the Almoravids and the Almohads have extended their authority without a break over at any rate the north of the Sahara, at Sakiet El Hamra.

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The Military Expeditions

The authority of the Sultans over Western Sahara, recognized by the international community of former times, could not fail to make itself known through the presence of armed forces.

The expeditions of the Sultans were of two kinds: some had as their purpose control of Western Sahara, and more particularly the Sakiet El Hamra. The expeditions of 1882 and 1886 are examples of these. The others went through Western Sahara in order to go to the countries in the south, as far as the River Niger and Timbuktu.

In her work *Avec les rois Alaouites* (p. 35), Odette de Puigaudeau notes that "the Sherifian interventions lost their character of conquest and only retained that of tours of inspection and prestige".

This was at the time which is considered in the Opinion to be the time of colonization by Spain.

The documents of the time show that history and the reports of diplomats agree. For example, the French Consul in Mogador, in his report of 7 June 1886 to the French Minister in Tangier, wrote:

> "The expedition of Sultan Moulay Hassan to the Souss can be regarded as fully completed. It was a triumphal progress all the way. All the tribes made their submission and swore allegiance to him. Even the very nomads of the Sahara were bent on bringing him fast camels and offering him their help in the Holy War." (Documents submitted by the Kingdom of Morocco, No. 115.)

What should be noted in this report are the passages concerning the oaths of allegiance of the tribes and the help which the tribes of the Sahara offered the Sultan in connection with the Holy War. I shall revert to the point in relation to the religious solidarity between Sahrawi and Moroccans.

It should also be stressed that the reason why the Sultan's forces in 1882 and 1886 did not go right on into the heart of the Sahara was that only the Sakiet El Hamra appertained to Morocco, and it was a matter, as has been recalled, of tours of inspection and prestige.

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The other expeditions used the Saharan territory as a way through to the Soudan (or Mali), Timbuktu and the Niger.

Those expeditions passed through Western Sahara without hindrance as the armies which undertook them were on home territory. Sometimes Saharan contingents joined the Moroccan forces and, in any case, the latter received from the Saharans all the help they needed along the way.

Saharans even joined the Sultan's troops in order to fight at their side. For instance, Sultan Abdul Moumen got help, at the siege of Igli, from troops who came from south of the Atlas and from the desert (Huici, p. 68).

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It is in the writings of historians worthy of confidence that information about those expeditions must be sought.

One reads in Vernet that in 707 Moussa ben Nosaïr, the Lebanese converted to Islam, the companion of Tarek Ben Ziad in the historic passage of the Straits of Gibraltar which is named after the latter, and also in the conquest of Spain, sent his son Merouan to the furthest Souss to the Sakiet El Hamra (*op. cit.*, p. 36).

In 721, still according to Vernet, a nephew of Okba, the conqueror of Morocco, penetrated as far as the Soudan (p. 71).

He adds that the Moroccan governor (or caid) of the Sahara, Muhammad Sonjaï and also Caid Mussa Ben Ali El Afia, went there, the former in 701 and the latter in 1032, passing through the Sahara on their way (*op. cit.*, pp. 55 and 216 ff.).

Domenech Lafuente, too, relates that in 1584 and 1589 Ahmad al-Mansour el-Assadi undertook two expeditions to the Soudan (*op. cit.*, pp. 28 and 30).

In 1618, Moulay Zidane sent an expedition through the Sahara which reached Timbuktu.

In 1665, Moulay Rasheed, of the reigning 'Alaweet dynasty, commanded an expedition to the Soudan (*op. cit.*, p. 33).

In 1678, he commanded two expeditions which followed the Lemtouna route to the south *(ibid.)*.

Between 1734 and 1736, Moulay Abdullah organized an expedition to the Soudan *(ibid.)*.

In 1730, Moulay Abdullah commanded a first expedition to the Senegal, which went by way of Massa, Wadi Noun and the Sakiet El Hamra, and a second between 1734 and 1736, to the Soudan *(ibid.)*.

Between 1802 and 1809, Moulay Suleiman sent two expeditions to the south *(ibid.)*.

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The Sahrawi, moreover, themselves asked the Sultan for help in repelling attacks by foreign forces, namely those of Spain and France.

Domenech, on page 33 of the work already quoted, writes that the Moors considered that their ties with the Sultan of Morocco were so close that, when the French troops arrived on the confines of Mauritania and the Hodh, the threatened troops requested help and assistance from Moulay Abdul-'Azeez, the King of Morocco, who had claimed those regions as coming under his sovereignty. The Sultan who succeeded him sent his own uncle, Moulay Idriss, with arms and munitions to support the Holy War against the French, whom he beseiged at Tijiqja.

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Religious Ties

Religious feeling does not preclude ethnic or national solidarity between Sahrawi and Moroccans. It tends, rather, to consolidate it.

That tie has been neglected in the Opinion. Yet there is no doubt that the religious tie is one of the constituent elements in legal ties and in those of nationality, being additional to ethnic, social, cultural and economic ties and national aspirations, and making them more binding: the more so in that the Sultan possessed both temporal and spiritual powers, and appointed the caids who applied Muslim law. Modern examples showing the strength of religious ties abound: Ireland, Pakistan, Bangladesh and the States with constitutions which determine the religion of the Head of State or establish a State religion.

The religious tie is thus a constituent element of the legal tie.

Notwithstanding the Spanish allegations, the documentation already mentioned shows that the religious ties between the Sahrawi and the Moroccans found expression even in recourse to the holy war. That was the case even though holy wars, rendered illustrious by the crusading spirit and later by the great epic of Saladin, each concerned with the holy places of Christendom or Islam, had lost much of their zeal and effectiveness – witness the attitude of the Powers, both Christian and Muslim, which remained deaf to the appeal to rescue the holy places of Jerusalem.

The spirit of a holy war nevertheless remained more alive in Morocco and Western Sahara, confronted with the Christian colonialist powers. I would refer again to the historian Domenech (*supra*, p. 94 ff.) and to the report from the French consul in Mogador (*supra*, p. 96).

To prove the existence of the religious tie between Sahrawi and the Moroccans, one must quote in particular Paul Cambon, the French Ambassador in Madrid, who reported the following observation in a despatch to his Minister of Foreign Affairs:

> "It has always been recognized that the territorial sovereignty of the Sultan extends as far as his religious suzerainty, and as it is beyond doubt that the peoples of Cape Juby are subject to him from the religious point

of view, we could consider his sovereignty as indisputable." (*Documents diplomatiques français*, 1871-1914, first series, Vol. VIII).

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Finally, let us recall that the Islamisation of the States of Western Africa (Mali, Ghana, Nigeria, Senegal, etc.) was the continuation of that Arab conquest which generally set out from or through the province detached by colonization under the name of Spanish Sahara. The Kingdoms of Mali and of Ghana were thereby consolidated and remained strong and prosperous until the European conquest, which undermined their foundations by the partitioning of Africa and its colonization, and by the massive slave trade to North and South America, which was on a scale without precedent since the ancient days of Greece and Rome, and of which vestiges remain in *apartheid* in South Africa and in racial discrimination and segregation there and elsewhere.

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The Opinion deals with the right of self-determination in paragraphs 54 to 59.

The latter paragraph ends by referring to certain instances where consultation in application of the principle of self-determination was dispensed with by the General Assembly. Such instances are very numerous.

The paragraph is certainly in fairly general terms, since it mentions *in fine* "the conviction that a consultation was totally unnecessary in view of special circumstances".

Nevertheless, it seems to me that there is one case which deserves to be mentioned specifically: that is the legitimate struggle for liberation from foreign domination.

The General Assembly has affirmed the legitimacy of that struggle in at least four resolutions, namely resolutions 2372 (XXII), 2403 (XXIII), 2498 and 2517 (XXIV), which taken together already constitute a custom. Furthermore the Security Council too has affirmed it in resolution 269 (1969).

This recognition by the United Nations of the legitimacy of that struggle comes within the framework of the developments in law affirmed by the Court in its Advisory Opinion on *Namibia* (*I.C.J. Reports 1971*, p. 31). The Court there explained that: "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.)*.

I upheld this point of view on the occasion of the Advisory Opinion on *Namibia* in 1971. I was not followed. I return to the charge, and I would have

liked the last sentence of paragraph 59 to be completed as follows: "and in particular the legitimate struggle for liberation from foreign domination."

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Nothing could show more clearly the will for emancipation than the struggle undertaken in common, with the risks and immense sacrifices it entails. That struggle is more decisive than a referendum, being absolutely sincere and authentic. Many are the peoples who have had recourse to it to make their right prevail. It is, one need hardly repeat, that thousand-year struggle which has established the right of peoples to decide their own fate, a right which jurists, statesmen, constitutions and declarations, and the United Nations Charter, have merely recognized and solemnly proclaimed.

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In the forefront we find Algeria and Morocco.

Algeria, which, after having heroically resisted conquest, was purely and simply annexed; Algeria, which sacrificed a million of its children to reconquer its freedom.

As for Morocco, it fought for centuries to maintain its independence and the integrity of its territory in the face of a coalition of the mighty ones of the day; and when the State had to give way to superior force, the people, in the felicitous phrase of Professor Dupuy, took over from the State, continuing the fight on all fronts until the final victory, which showed, better than any referendum, the irresistible will of the nation.

Going back through history, one can mention instances of liberation without a referendum through the legitimate struggle of numerous countries.

The struggle is still being untiringly pursued for the liberation of the peoples of Namibia and Arab Palestine.

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Among the grounds put forward by Spain to convince the Court that it should refuse to answer the General Assembly's request for an advisory opinion, it mentions the fact that the Assembly has already decided that a referendum should be carried out, and that it cannot go back on that decision which is binding on it; the Advisory Opinion would, it is alleged, in those circumstances only be of academic interest.

That argument was rightly rejected by the Court.

But why is Spain so keen on the referendum?

One can find the explanation in the memorandum from the Spanish Minister for Foreign Affairs to Morocco's Ambassador in Madrid dated 5 April 1957, which lays down the procedures to be adopted for Spain's evacuation of the territory, which the memorandum states in the following terms:

> "4. The recognition in favour of Spain, in consideration of what it has achieved, and in a form to be agreed, of special privileges, as well as the grant of a right preferential to that of other countries with regard to the economic development and joint exploitation of the said territory." (Hearing of 1 July 1975.)

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Reference can be made again to the mention I made above of certain of the struggles which the Sahrawi undertook in common with the Moroccans to repel the Spanish and French troops (*supra*, p. 97). That joint struggle shows their determination to be reintegrated into the mother country *(ibid).*

Allegiance to the Sultan and the Operative Part of the Opinion

While having agreed with the Court that Western Sahara has legal ties with the Kingdom of Morocco and the Mauritanian entity, I do not accept that those ties represented for Morocco nothing more than ties of allegiance between the Sultan of Morocco and some of the nomadic tribes living in the territory of Western Sahara.

The allegiance to the Sultan is only one of the elements of the legal ties.

Those ties were of a State or political character, as the Court has said.

On close examination of the text of paragraph 162, to which the operative part of the Opinion refers, one notes, further, the following:

1. That text completely disregards the notion of territory in saying that Morocco had legal ties with certain peoples.

Those peoples did not live suspended between the sky and the ground.

The territory of the Sakiet El Hamra which they have always inhabited and traversed in all directions, exploiting its agricultural resources (palm groves, grazing grounds, seasonal crops, water-holes, etc.) and its economic resources (routes of communication and commercial transit)—is that territory not theirs?

After all, Spain based itself on agreements with sheikhs to extend its protectorate over the *territory* which they inhabited.

2. Further, one must refer to the question put by the General Assembly in order to give it an appropriate answer: but Question II is worded as follows: "What were the legal ties between this *territory* and the Kingdom of Morocco and the Mauritanian entity?"

The ties which the General Assembly request should be determined are the legal ties of the territory, which (as obviously intended by the General Assembly) includes the population, not solely the ties with that population.

3. The reply, as worded in the operative part, with the reference to the grounds as stated, contains an internal contradiction.

Mention is made there of the *territory* of the Sahara, but it is immediately explained, by the cross-reference, that it is the tribes that are meant.

In short, the considerations which I have set forth throughout my Opinion establish that there exist legal ties of a political character between the territory of Western Sahara and the Kingdom of Morocco. I would emphasize: that territory with the population living there.

At all events, allegiance to the Sultan was equivalent to allegiance to the State, as has been explained above.

As regards the Mauritanian entity, the ethnic, social, cultural, economic and religious ties indicated in the Opinion constitute the elements of the political ties between Western Sahara and the Mauritanian entity.

(Signed) Fouad AMMOUN.