

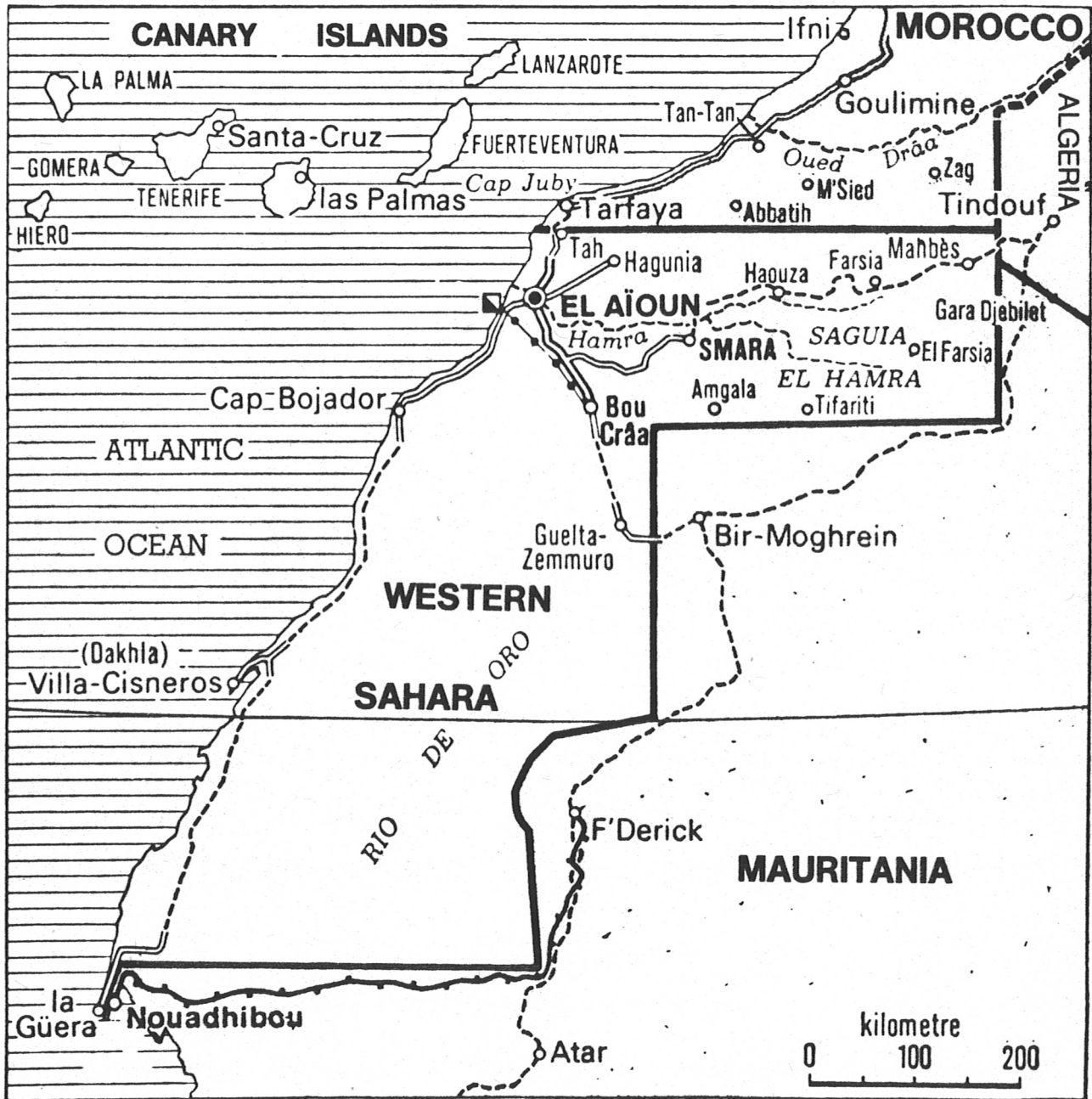
**SESSION**

**ON WESTERN SAHARA**

**BRUSSELS,**

**10-11 NOVEMBER, 1979**

**THE PERMANENT COURT OF PEOPLES**



**CANARY ISLANDS**

**MOROCCO**

**ALGERIA**

**MAURITANIA**

**WESTERN SAHARA**

**SAHARA**

LA PALMA

LANZAROTE

Santa-Cruz

FUERTEVENTURA

GOMERA

TENERIFE

las Palmas

HIERO

Cap Juby

Tarfaya

Abbatih

Tindouf

**EL AÏOUN**

**SMARA**

**SAGUIA**

**EL HAMRA**

Cap-Bojador

ATLANTIC

OCEAN

(Dakhla)

Villa-Cisneros

Guelta-Zemmuro

Bir-Moghrein

RIO DE ORO

F'Derick

la Güera

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Atar

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# **THE PERMANENT COURT OF PEOPLES**

## **SESSION ON WESTERN SAHARA**

Brussels, 10-11 November, 1979

### **Members of the Chamber chosen in conformity with article 9 of the statutes :**

François RIGAUX (Belgium)  
Armando URIBE (Chile)  
Georges CASALIS (France)  
Joe NORDMAN (France)  
Jean KULAKOWSKI (Belgium)  
Richard BAUMLIN (Switzerland)  
Leo MATARASSO (France)

## The permanent court of peoples

Mindful of the Charter of the United Nations ;

Recalling the resolutions of the UN General Assembly, in particular resolution 1514 (XV) containing the Declaration on the Granting of Independence to Colonial Countries and Peoples and resolution 2625 (XXV) on the harmony and cooperation among the States ;

Recalling also the Universal Declaration of the Right of Peoples July 4, 1976 ;

Taking into consideration the International Court of Justice advisory opinion of October 16, 1975 ;

Regarding the Madrid Agreement of November 14, 1975 ;

Considering the Peace Agreement signed in Algiers on August 5, 1979 between the Islamic Republic of Mauritania and the Polisario Front ;

Taking note of the various UN resolutions on Western Sahara in particular resolution 380 (1975) of the Security Council and resolutions 3453 (XXX) and 3327 (XXXIII) of the UN General Assembly, and the resolution passed on November 4, 1979 by the General Assembly Fourth Commission ;

Considering the resolutions passed by the Organization of African Unity and the conference of the Non-aligned countries ;

Taking into consideration the Statutes of the Permanent Court of Peoples ;

Taking into account the written statements collected by the Secretariat on the struggle led by the Sahraoui people for its right to self-determination and the Moroccan position ;

### Having heard the reports of

- Michel Vincineau, professor of international law assistant lecturer at the Université Libre of Brussels ;
- Paulette Pierson-Mathy, professor of international law at the Université Libre of Brussel ;
- Victoria Abellan Henrubia, professor of public and private international law and vice-rector of the University of Barcelona ;
- Antonio Massip, lawyer of Madrid ;
- Colonel Rodriguez de Viguri, Secretary-general of the Spanish Sahara Government and last Governor-general of Spanish Sahara ;
- Mohammed Berrada representative of Istiqlal, a Moroccan political party (at his own request);
- Ould Salek, Secretary of Information of the Democratic Sahraoui Arab Republic and Ahmed Bouhari Chairman of the Sahraoui Democrat Jurists Association.

**Having heard the statement sent by telex-machine of Julio González Campos,**

international law professor at the Madrid University, barrister of the Spanish Government before the International Court of Justice in 1975 ;

**and the statements recorded in Western Sahara**

by J.F. Bastin from the Franco-Belgian Radio Television ;

**Considering the request for an advisory opinion submitted to the Permanent Court on June 20, 1979 by the Polisario Front. Opinion that bears on :**

- 1°– The violation of the right to self-determination and independence of the Sahraoui people by Morocco and Mauritania.
- 2°– The legitimacy and legality of the Sahraoui people's struggle against the colonization of its country -the Democratic Sahraoui Arab Republic- by Morocco and Mauritania, under the guidance of its sole and legitimate representative, the Polisario Front.
- 3°– The nullity of the tripartite Madrid Agreement.
- 4°– The legitimacy and the legality of the proclamation of the Democratic Sahraoui Arab Republic.

**Considering that the above-mentioned request has been deemed admissible by the Permanent Court during its extraordinary constitutive session held in Bologna on June 24, 1979, in conformity with article 4 and 12 of the statutes.**

**Considering that the Court decision has been transmitted immediately to the Moroccan government who had been invited to take part in the proceedings in conformity with article 15 of the statutes; and the invitation has been reiterated through a letter directed on October 30, 1979 to his Excellency the Moroccan Ambassador in Brussels.**

**Considering that these invitations remained without effect and**

**Considering that a delegation from the Istiqlal Party appeared however before the Court upon the opening of the session, requesting a hearing and that the request, though belated, has been conceded.**

**Taking into consideration the numerous duties of the Permanent Court having to pronounce its opinion on seven cases and considering that it is most urgent that the Court should pronounce its advisory opinion before the next proceedings of the UN General Assembly on Western Sahara.**

**Considering that the Presidency convoked, for the present session, a chamber made of seven members in conformity with article 9 of the statutes.**

I.

## Historical account

1

Western Sahara is a part of the desert land spreading from the Atlantic Coast to the Red Sea. Due to the dry climate, its inhabitants were forced to live as nomads depending mainly on cattle breeding. Such was the picture of Western Sahara when the Spaniards arrived. By a royal ordinance dated December 26, 1884, Spain proclaimed that it had taken "under its protection" Rio de Oro which is the southern part of Western Sahara. Through an agreement with France on October 30, 1904, Sakiet El Hamra, the northern part of Western Sahara located between Rio de Oro and the southern part of the Moroccan border became another Spanish territory.

2

When the United Nations tried to implement article 73 of the Charter on committing to strict obligations "all United Nations members responsible for the administration of territories where the populations are not fully self-governed" (non-autonomous), Spain claimed that the African territories under its protection could not be considered as non-autonomous lands. They were "Spanish provinces in accordance with the laws in force". On November 11, 1960, the Spanish delegate declared before the UN General Assembly Fourth Commission that his government had decided to "communicate some informations regarding the territories mentioned in Chapter 9 of the Charter". (See the statement of the Spanish delegate, Session 1048, Nov. 11, 1960). For the first time on May 18, 1961, Spain submitted the aforesaid informations to the UN Secretary-general. They only dealt with Fernando do Po, Rio Muni and Western Sahara. (Comité des Renseignements relatifs aux T.N.A., A.G. Session XVI, Suppl. 15, A/4785)

3

On October 16, 1964, the Special Decolonization Committee passed its first resolution on Western Sahara. It dealt with Ifni and Western Sahara jointly. Although, during the proceedings, Morocco and Mauritania claimed territorial rights regarding Western Sahara, these claims were not taken into account by the special Committee which, on the other hand, emphasized in its unanimously passed resolution the necessity for the Administering Power to :

"immediately take the necessary steps in order to thoroughly implement the provisions of the Declaration on the Granting of Independence to Colonial Countries and Peoples".

On December 16, 1965, within the framework of the actions carried out by the United Nations for the implementation of resolution 1514 concerning the Granting of Independence to Colonial Countries and Peoples, the UN General Assembly passed its first resolution on Western Sahara (Resolution 2072-XX). In that resolution, the Assembly :

"earnestly requests the Spanish government as the Administering Power to take all immediate necessary steps in order to put an end to its colonial domination of Western Sahara and Ifni, and to begin negotiations aimed at working out the problem of sovereignty raised by the two territories in question".

Spain and other countries were opposed to the Assembly's position regarding the problem of sovereignty since it was asking for a joint settlement for the two territories. The provision passed with 25 votes in favour, 2 against and 55 abstentions.

On December 20, 1966, resolution 2229 (XXI) made a clear distinction between Ifni, a territory inside Morocco and Western Sahara. After having reiterated "Ifni's and Western Sahara's inalienable right to self-determination", the resolution requesting from Spain,

"3) That the Administering Power immediately take all the necessary steps in order to accelerate the decolonization process of Ifni and to decide, with the Moroccan Government, of the procedures for the transfer of powers, in conformity with resolution 1514 of the UN General Assembly ...

4) The organization of a referendum under the auspices of the United Nations, to enable the populations of the involved territories to exercise their right to self-determination. The referendum should be organized in collaboration with Morocco, Mauritania, and all other concerned parties".

#### 4

The unwillingness of the Spanish government amplified the movement of opposition against the Spanish colonization. In El Aïoun, about 200 demonstrators died during the bloody repression staged by the colonial forces.

On that occasion, the General Assembly "regretted" these bloody incidents and reminded the Spanish government, as the Administering Power, of its responsibilities and obligations. For the first time, the General Assembly reaffirmed, in a resolution relative to the territory that :

"it recognizes the legitimacy of the struggle led by the colonized peoples for the exercise of their right to self-determination, therefore the Assembly asks all other states to assist them fully".

(Res. 2711 - December 14, 1970)

In its resolution 2983 (XXVII) of December 14, 1972, the Assembly reaffirms :

"the inalienable right to independence and self-determination of the Sahraoui People, in accordance with Resolution 1514 of the General Assembly ... as well as the legitimacy of the struggle of all colonized peoples ; the Assembly reaffirms its solidarity with Western Sahara's inhabitants in the struggle they are leading for the exercise of their right to 'independence' and self-determination, the Assembly, therefore, requests all states to provide the colonized peoples with their material and moral assistance for the benefit and success of their struggles".

In its Resolution 3162, on December 14, 1973, the General Assembly reaffirmed the legitimacy of the struggle of the Sahraoui people, and expressed once more, its full solidarity with Western Sahara.

## 5

Meanwhile, a new political force has appeared on the scene, as the result of the struggle against the Spaniards. That new force is the Polisario Front who, ever since its creation on May 10, 1973, asserts the Western Sahara population's right to self-determination. In its Political Manifesto, the Front states the failure of all non-violent means of opposition to the colonizing nation. (Manfred O Hinz. The right to self-determination of Western Sahara, Bonn, PDW, p. 110).

On May 20, 1974, due to the worsening aggravation of the colonial domination, the repression and scheming aiming at depriving Western Sahara of its right to self-determination by the organization of an internal autonomy plan, the Polisario Front is forced to trigger an armed struggle against the colonizer. Along with that struggle, the Front launches various intensive campaigns aiming at the political mobilization of the masses. The Front, who considers itself "the instrument for national liberation", has won important political and military battles. In August 1974, the Front holds its second congress and reaffirms its determination to lead Western Sahara to independence and national liberation (M.O. Hinz, p. 111-116).

The situation will lead to a retaliation from Morocco and Mauritania whose claims are getting more insistent. They obtain from the General Assembly that, at its request, an advisory opinion be given by the International Court of Justice, in The Hague, bearing mainly on the status of the territory at the time of colonization and on the legal ties of Morocco and Mauritania.

In resolution 3292 (XXIX) of December 13, 1974, the Assembly, although recognizing the existence of a "juridical difficulty" regarding the status of the territory, having requested from Spain to postpone the organization of the referendum, reminds resolution 1514, and its earlier resolutions on Western Sahara, and specifically reaffirms the right to self-determination of Western Sahara. The General Assembly asks the Special Committee on Decolonization to follow the development of the situation in the territory and to dispatch a Visiting Mission.

## 6

The Mission, formed by representatives of three countries : Cuba, Iran and Ivory Coast, has been to Western Sahara and the borderlands in the months of May-June 1975. There, it has contacted a large sector of the population. The Mission states :

"In the territory, the population or, at the very least, the vast majority of the people, declared to be categorically in favor of independence, and against the territorial claims of Morocco and Mauritania. They expressed their hope to see the United Nations, the Organization of African Unity and the League of Arab States help them obtain and preserve their independence. Through their statements and demonstrations, they proved that they were supporting the Polisario Front (Popular Front for the Liberation of Sakiet El Hamra and Rio de Oro) and the Puns (Western Sahara's National Unity Party), both in favor of the independence of the territory. The Mission has been in contact with only two political movements in the territory. The first being the Polisario Front, a liberation movement, and the second, a political party (PUNS). Though both of them are unanimous in demanding that the territory should accede to its independence, each advocates different methods of achieving it. They both reject the territorial rights claimed by Morocco and Mauritania. According to the Polisario Front's leaders and to the PUNS's delegates in the territory, the referendum is no longer necessary since the population has conveyed its aspirations to the Mission. However, the totality of the people encountered have declared that they would accept the



referendum if the United Nations thought it necessary. The Polisario Front, although considered as a clandestine movement, appears as the most dominant political force in the territory. Throughout the country, the Mission has witnessed mass demonstrations of solidarity with the Front.

(M.O. Hinz, p. 74-75)

## 7

In its advisory opinion of October 18, 1975, the International Court of Justice discards, without ambiguity, the territorial claims of Morocco and Mauritania. It reaffirms the pre-eminence of the right to decolonization regarding that non-autonomous territory. Indeed, the Court unanimously declares that the territory of Western Sahara was not a territory belonging to no one (*res nullius*) at the time of colonization by Spain (Question I submitted to the Assembly). In regard to question 2, concerning the legal ties between Western Sahara on the one hand, Morocco and Mauritania on the other hand, the Court almost unanimously (14 votes to 2 in the case of Morocco, 15 votes to 1 in the case of Mauritania) discards the territorial claims of both countries and reaffirms the application, in Western Sahara, of the right to decolonization :

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

(International Court of Justice, Compilation 1975, p. 68)

## 8

On November 14, 1975, a few weeks after the Court's advisory opinion, delegations representing the governments of Spain, Morocco and Mauritania drew up a six-point agreement. According to the terms of article 2 of the agreement, Spain will set up an interim administration in the territory with the participation of Morocco and Mauritania, and the collaboration of the Yema'a (local assembly). The same article provides for the transfer of the powers, from the administering country to the aforesaid interim administration. Spain should leave the territory before February 28, 1976. According to the terms of article 3 of the same agreement, "the opinion of the population of Western Sahara expressed through the Yema'a will be respected". Even before the agreement was signed, on November 6th, the Moroccans, claiming a pacific operation under the leadership of the King of Morocco, stage the "Green March" and cross the border in spite of the Security Council's pressing calls. On November 2nd, the Council had "earnestly asked the implied parties to abstain from any unilateral action that might increase the tension in this area" (Resolution 374 - 1975). Later, on November 6th, the Security Council passes resolution 380 (1975), by which terms

"having observed with anxiety the deterioration of the situation in Western Sahara and seeing with regret that in spite of resolutions 377 (Oct. 22, 1975) and 379 (Nov. 2, 1975) as well as the request formulated by the Security Council's Chairman to the King of Morocco in order to ask him earnestly to put an end immediately to his Green March, the said march having taken place just the same, the Security Council implementing the aforesaid resolutions :

- 1) deplores the carrying out of the march
- 2) asks Morocco to withdraw all the participating forces from Western Sahara ..."

## 9

While the Green March crosses the border on November 6, 1975, the open aggression itself begins, with the occupation of Smara followed by El Aioun, on December 12.

On December 10, the Mauritanian forces take La Guera. The entrance of these armed forces, led with Spain's complicity, provokes the exodus of thousands of refugees of which the Polisario Front will assume responsibility. The Saharian leading citizens members of the Yema'a do not take long before reacting. On November 28, 1975, in Guelta, three members of the Spanish Cortes (Parliament) and 67 members of the Yema'a (among the 102 who take part in the local assembly) and 60 tribe leaders decide to dissolve the Yema'a. They consider it "a non-democratically elected assembly that can not decide the self-determination of the Sahraoui people".

They also decide that the Sahraoui people have been "betrayed" by Spain, consider the Madrid Agreement as a "colonialist convention", and recognize the Polisario Front as the "only legitimate representative of the Sahraoui people".

## 10

In accordance with the Madrid Agreement, the Spanish administration and its forces withdrew from Western Sahara on February 26, 1976. Meanwhile, the Moroccan and the Mauritanian forces had taken over the main cities of the territory and the armed struggle between these forces and the popular Sahraoui army had intensified. On February 27, 1976, the day after Spain, as the Administering Power of a non-autonomous territory, discharged itself from all obligations, the Provisional Sahraoui National Council proclaimed the Democratic Sahraoui Arab Republic whose legitimacy and legality are dealt with in a memorandum under date of May 20, 1976. (M.O. Hinz, p. 89-90 and 91-109).

## 11

On August 5, 1979, the Islamic Republic of Mauritania has signed a peace agreement with the Polisario Front. By the terms of that agreement :

"The Islamic Republic of Mauritania declares solemnly that it does not and will not claim any territorial rights or others concerning Western Sahara."

The Islamic Republic of Mauritania declares its definite withdrawal from the unjust Western Saharan war, in conformity with the modalities jointly decided with the delegate of the Sahraoui people, the Polisario Front.

The Polisario Front solemnly declares that it does not and will not claim any territorial rights or other concerning Mauritania".

This agreement was carried out by Mauritania who withdrew its forces from Western Sahara while Morocco was maintaining its occupation of certain parts of the territory, evacuated by Mauritania.

## 12

Since 1975, the United Nations General Assembly has passed various resolutions on Western Sahara, the last one being resolution 3397 (XXXIII).

More recently, on November 2, 1979, the Political Commission of the Assembly (Fourth Commission) has passed a resolution reaffirming "the inalienable right to self-determination and independence of Western Sahara". The Assembly deplores "the deterioration of the situation due to the persistent occupation of Western Sahara by Morocco, and the extension of such occupation to the territory evacuated recently by Mauritania". To this effect, the Assembly recommends that the Polisario Front "being representative of the Sahraoui people, fully participate in the search for a fair, final and lasting political solution, to the problem of Western Sahara in accordance with the resolutions and declarations of the United Nations, the Organization of African Unity and the Non-aligned Countries".

## II.

### The right to decolonization

#### A. Juridical import of the right to self-determination of the colonized peoples

#### 13

The fundamental principles of the colonized peoples' right to self-determination are clearly stated in the UN resolution 1514 under date of December 14, 1960 headed : "Declaration on the Granting of Independence to Colonial Countries and Peoples".

Before defining the scope and the import of that Declaration, it is necessary to determine its full juridical meaning. The issue concerning the binding aspect of the Assembly's resolutions has formed, for a long time, the subject of a controversy, and the legal aspect of some of these resolutions may still be discussed today. About the rule of principle stating that specific resolutions can formulate a new standard of International law binding all States, and attributing these standards to the right to self-determination of countries and colonized people, no doubt can subsist.

Paragraphs 54 thru 56 of the advisory opinion on Western Sahara which reproduce various passages of the advisory opinion of June 21, 1971 from "the Legal Consequences for the States of the Continuous Presence of South Africa in Namibia notwithstanding resolution 276 (1970) of the Security Council", clearly state that the evolution of international law certified by various UN resolutions, resolution 1514 in particular, have converted the right to self-determination into a principle applicable to all colonized countries and peoples.

"The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV)."

(I.C.J. in The Hague, Comp. 1975, p. 31)

#### 14

The right to self-determination raises two other issues ; to whom will it apply and where are its limits ? How should it be implemented ?

Declaration 1514 and its various provisions regarding colonized countries and peoples, as well as the various practical applications of that declaration to specific cases by the UN General Assembly, generally tend to consider the right to self-determination as a part of the decolonization process.

Since the territory of Sakiet El Hamra and Rio de Oro was under the responsibility of a colonial power, Spain, when the population of that territory intensified its struggle for independence, there is to be no doubt that the questions put before the Court falls within the scope of application of resolution 1514.

After all the very General Assembly in its aforesaid resolution 3292 implemented the December 14, 1960, declaration in the case of Western Sahara. Concerning the request for advisory opinion submitted to the Court, it is not necessary therefore to consider whether the right to self-determination affects situations other than those brought about by decolonization.

## 15

General Assembly's resolution 1514 (XV) provides the basis for the International Court of Justice in The Hague's advisory opinion of October 16, 1975, to describe the mainways :

"by which non-autonomous territory can reach full autonomy, it can :

- 1) emergence as a sovereign independent State,
- b) free association with an independent State, or
- c) integration with an independent State".

(I.C.J. Comp. 1975, p. 32)

In the three aforecited hypotheses the people uses its right to self-determination either to emerge as an independent State or to be integrated with an independent State. Therefore, the constitution of a State appears to be the normal outcome of a decolonization process.

## 16

When the right to self-determination is applied in a different way than in the constitution in the decolonized territory of a sovereign independent State, article 5 of resolution 1514 (XV) assumes its full meaning. That article provides that :

"immediate steps should be taken in Trust and Non-self-governing Territories to transfer all powers to the peoples of those territories without any condition or reservation, in accordance with their freely expressed will and desire, without any distinction as to race, creed, or colour, in order to enable them to enjoy complete independence and freedom".

In its advisory opinion of October 16, 1975, the International Court of Justice in The Hague reproduces the above-mentioned article as well as article 2 of the same resolution by the terms of which "the right to self-determination includes that the peoples freely determine their political status". The Court concludes that "the application of the right to self-determination requires the free and authentic expression of the wishes of the peoples concerned". (I.C.J., Comp. 1975, p. 33).

## 17

The Court then quotes General Assembly resolution 2625 (XXV) headed : Principles of International Law concerning the Harmony and Cooperation among the States in accordance with the Charter of the United Nations. That declaration states "the basic need to take into account the wishes of the peoples concerned" (I.C.J., Comp. 1975, p. 33)

The International Court concludes this part of its advisory opinion with paragraph 59, providing that :

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

## **18**

After having recalled the fundamental principles of the right to decolonization, the International Court of Justice analyzes their various applications by the General Assembly in numerous resolutions on the specific issue of Western Sahara, resolution 2229 (XXI) being among the oldest ones of the Assembly. Paragraph 70 of the advisory opinion concludes this examination by the following terms :

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

(I.C.J. Comp. 1975, p. 36)

## **B. The right to self-determination and the respect of national unity and territorial integrity**

## **19**

By the terms of General Assembly resolution 1514 (XV) article 6 :

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

Morocco's pretensions were based on the invocation of legal ties which allegedly existed at the time of colonization between Morocco and Western Sahara. These ties, according to Morocco, allowed it to prevent or to modify all application of the territory's right to self-determination and decolonization.

## 20

Two members of the Court, Messrs Gros and Petren set the problem in the following manner :

According to Mr Gros, the legal issue to be settled by the Court is to determine whether Morocco has the right "to claim the reintegration of Western Sahara with the national territory of the kingdom of Morocco to which it belonged following the State's claim, at the time of the Spanish colonization" (I.C.J. Comp. 1975, p. 70). On the matter, Mr. Gros will agree with the second part of paragraph 162 of the advisory opinion (not establishing any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco), but will disagree with the first part of the same paragraph (showing the existence of legal ties between Morocco and Western Sahara).

The separated opinion of Judge Petren focuses more precisely on the legal aspect of the issue without, however, proposing a solution. He wonders (p. 110) whether a certain balance should not be maintained between the right to self-determination and the territorial integrity of one or more States, in respect to decolonization. The point is to determine "whether the fact that the territory belonged, at the time of its colonization, to a State which still exists today justifies that State in claiming it on the basis of its territorial integrity". (I.C.J. Comp. p. 110).

Judge Petren, considers that these questions are not ready to be submitted to the Court, and regrets that the advisory opinion, specifically paragraph 162, bears no trace of an analysis of theoretical and practical aspects of "the question of the extent to which, and under what conditions, past legal ties may influence the decolonization of a territory" (p. 112).

## 21

From that point of view, the most characteristic personal opinion is expressed by Judge Dillard who considers that the first conclusion of the Court, related to the legal ties, has been of secondary importance. He totally agrees with the "second conclusion that no tie of territorial sovereignty existed between Western Sahara and the Kingdom of Morocco and the Mauritanian entity" (I.C.J. Comp. 1975, p. 119).

Therefore, Dillard concludes that :

"1) It follows that the image of a kind of colonial amputation beginning in 1884 of a pre-existing territorial unity is distorted.

2) Any claim to what has been called automatic retrocession is not applicable to the Western Sahara and therefore it was unnecessary for the Court to pronounce upon the principle of territorial integrity embedded in paragraph 6 of resolution 1514 (XV)."

(I.C.J. Comp. 1975, p. 120)

According to Judge Dillard, the right to self-determination recognized by the advisory opinion restricts even the powers of the United Nations Assembly

"That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient

'legal ties' of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization can have only a tangential effect in the ultimate choices available to the people. This in turn fortifies the view, expressed earlier, that the first conclusion in paragraph 162 of the Opinion is of limited significance".

(I.C.J. Comp. 1975, p. 122)

**Judge Nagendra Singh states that "the legal ties" established by the Court "were not of such a character as to justify today the reintegration or retrocession of the territory without consulting the people" (I.C.J. Comp. 1975, p. 79). Later on, Mr Singh adds**

"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" (p. 81).

## **22**

However, these various individual opinions remain as ambiguous as the advisory opinion itself on the question of rights which would have been brought up following a contrary decision such as the recognition of existing sovereign ties, prior to colonization, between the Saharan territory and Morocco. In that respect, point 3 of the aforesaid resolution 2229 (XXI) establishes that, in the case of a territory that has been definitely detached from the Sherifian State, the General Assembly should, however, consult the wishes of the territory's population. The reconstruction of the "national unity" which could have existed prior to colonization, must respect the basic principle of decolonization which is the right to self-determination. Only the ways to consult the will of the decolonized population may vary, the referendum not being the only method used for consultation. The duration of colonization and the emergence of national solidarities brought about by the struggle against the colonizer should also be taken into consideration.

### **C. Place of law relative to decolonization within general international law**

## **23**

Article 1 of the Charter of the United Nations which defines the principles and purposes of the Organization, deals secondly with the development of friendship among nations based on the "respect for the principle of equal rights and self-determination of peoples".

Article 55, which bears on social and economic cooperation, closely relates the development of peace to the respect of the principle of equal rights and of self-determination of peoples.



Articles 1 and 55 should be related to article 2 and 56. Article 2 urges the member-states to "willingly" fulfill the obligations they have assumed to the terms of the Chart. Article 56 stipulates their commitment to "take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55".

It should be noted that these provisions should inspire the third States, when assuming their own colonial responsibilities concerning non-autonomous territories, also being expected to comply to the dispositions of Chapter IX of the Charter (see above n° 2).

## **24**

During its very first session, in its resolution 9 (I), the General Assembly clearly states the importance given to the political aspirations of the peoples that are still dependant and not yet represented at the Assembly as well as the vital ties linking the people's problem to the maintenance of peace and universal prosperity. During its fifth session, the Assembly recognizes that the exercise of the right to self-determination of the peoples is a basic preliminary to the respect of human rights. It decides to insert in the Agreement Drafts related to human rights, an article on the right of all peoples, including those of non-autonomous territories to freely determine their political future. (Res. 421D, Dec. 4, 1950). The article later became article I of both Agreement Drafts passed in 1966 by the General Assembly.

In order to immediately apply chapter XI of the Charter, the General Assembly had passed in 1946 the listing of the 74 non-autonomous territories established by the Secretary-general, based on the information submitted by the eight colonial powers, members of the United Nations (Res. 66 '1').

The list enabled the Assembly to determine, since its very first session, the scope of application of article 73 and to progressively affirm its own competence in the determination of non-autonomous territories confronted with colonial powers who were trying to prevail the thesis of exclusive competence if only to discontinue the communication of information.

## **25**

Having passed resolution 1514 (XV), the General Assembly will complete and reinforce the legal system applicable to decolonization on two basic points. The first is related to the legitimacy of any struggle (even armed) launched by the peoples when trying to exercise their right to self-determination. The second one concerns the obligations compelling the third States faced with that inalienable right.

## 26

Regarding these two points, the essential of international law in practice will be found in the Declaration relative to the principle of international law. Concerning the friendly and cooperative relations between states, in accordance with the Charter of the United Nations (Resolution 2625 - XXV - October 24, 1970). This declaration reaffirms the purposes and principles of the Charter taking into account their progressive development since 1945, of which :

- the duty of all States to participate in the process of decolonization and to help the United Nations carry out its responsibilities, entrusted by the Charter, to quickly end colonialism.
- the obligation for all States to abstain from any coercive measure likely to deprive the peoples of their right to independence and self-determination.
- the right of the peoples who react to such coercive measures, when trying to exercise their right to self-determination, to be given the necessary assistance in accordance with the purposes and principles of the Charter of the United Nations.

"Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations".

The resolution also reminds that any colonized territory has its own status, separate and distinct from that of the Administering Power, and that this status will remain as long as the peoples of the territory have not exercised their right to self-determination.

"The territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the State administering it ; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles".

The third States must heed to the existence of that distinct status.

## 27

The program of action for the full application of the Declaration on Independence, adopted ten years later by the Assembly considers a "crime" the maintenance of colonial domination and reaffirms the "inalienable right of the colonized peoples to fight, by every means", the colonial powers that keep them from exercising their right (Res. 2621 'XXV', October 12, 1970).

The definition of the notion of aggression adopted on December 14, 1974 by the General Assembly Res. 3314 (XXIX), calls all States to abstain from any act of aggression or other use of force contrary to the Charter and the Declaration on the Principles of International Law. The Assembly reaffirms that :

"the Nations should abstain from resorting to armed aggression aimed at depriving the peoples of their right to liberty, independence and self-determination or at violating their territorial integrity".

**Article 9 states that :**

"nothing in the present definition can alter or affect the right to self-determination, liberty and independence of the peoples deprived of that right ... and in particular, the peoples dominated by racist and colonial powers, or any other foreign force, or affect their right to fight for these purposes and to seek and receive assistance in accordance with the UN principles".

**28**

The foundation that the right to decolonization will find in the Charter itself, the range and solemnity of the General Assembly's resolutions, not only allow to consider -as has the International Court of Justice (see above n° 13)- that the right of colonized people to self-determination has entered the international customs, universally accepted by all states regardless of their political or economical ways, but also that these fundamental principles have become compulsory rules of general international law from which, in accordance with article 53 of the Vienna Convention of May 23, 1969, no one can derogate.

Such interpretation is confirmed by article 19 of the provisions drafted by the UN International Law Commission regarding the responsibility of the Nations ; which includes the safeguard of the right of peoples to self-determination among the norms of international law and qualifies as an "international crime" the maintenance, through force, of colonial domination (UN International Law Commission, 1974, vol II, 2/a, pp 94)

III.

What were the legal ties between Morocco and the territory or population of Western Sahara prior to colonization ?

**29**

Question II submitted to the International Court of Justice by the UN General Assembly, deals with the determination of the legal ties that allegedly existed at the time of colonization between Morocco and Western Sahara.

On this issue the Court concludes that it has not found legal "sovereign ties" of such a nature likely to affect the decolonization process. However, the wording of the decision, in spite of the link established between that decision and the last paragraph of the advisory opinion has been used toward an abusive interpretation of the whole resolution.

**30**

As to Question II, the Court decides that "there were legal ties between Western Sahara and the Kingdom of Morocco ; of the type described in paragraph 162 of the present Opinion".

Stated by the last sentence of that paragraph, the characteristic of the legal ties have already been mentioned above (n° 7) : "they are not of such nature as to affect the application of resolution 1514 (XV) in the decolonization process of Western Sahara and in particular, in the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (paragraphs 54-59 above).

Also, the preceding sentence of the same paragraph 162 stipulates : "the Court concludes that the materials and informations put before it do not establish any tie of territorial sovereignty between Western Sahara and Morocco or the Mauritanian entity".

**31**

Besides the definite rejection of any tie of territorial sovereignty, that the resolution does not reproduce, the legal ties established are modalized by paragraph 162. If one bears in mind that the two questions presented to the Court did not have an academic or historical characteristic, but dealt with an existing problem of international law, it is possible then, to question, as some members of the Court did, the "legal" aspect of those ties. (M. Gros, I.C.J., Comp. 1975, p. 75-75, and the separated opinions of Ignacio Pinto, p. 78 and Petren, p. 110-112).

The Court was right in abstaining from judging situations previous to colonization, on the basis of contemporary international law or 19th century European public law. The relation that might have existed in 1884 or before do not necessarily fall in the categories of a modern territorial state, which is not the only organized form of power. Justified as it may, this re-statement of the question entails two consequences. According to the right to decolonization, only the ties likely to affect the decolonization process should be qualified as "legal". Historical ties can not be qualified as "legal" if one simultaneously refuses that they be given such incidence.

## 32

The second consequence arises from the stand of Morocco invoked in the 23 page-document submitted to the Court by the delegate from Istiqlad, headed : "The kingdom of Morocco. A unique case in the history of Decolonization". The first page of this document reads as follow :

"What is this crisis about? First of all, it is about Morocco, a nation of long standing existence, existing before to colonization, having always had an international personality as well as known and recognized borders".

It is a fact that, centuries before colonization, Morocco already was a true state by the same standard as the leading European Nations of the time, and that it exercised, over the main parts of the actual territory of the Kingdom of Morocco, a pure and simple territorial sovereignty. However, in what the southern part of the actual territory is concerned -located between the Soous and the Dra'a-, and considering the nomadic aspect of the population, there was no effective and continuous exercise of State functions. On that basis, Morocco has attempted to assert that this zone of influence, exclusive of true State sovereignty, stretched limitlessly to the South, covering part of the territory of Western Sahara.

## 33

The International Court of Justice has fully rejected Morocco's claim. It not only affirms that most of the tribes, the Regheibat for instance, were entirely independent from the Sultan, but with regard to some tribes such as the fractions of the Tekna whose routes of migration are established to include the territory of the Tekna caids within Morocco, their subordination to the Sultan remains doubtful. The information submitted to the Court,

"it does not appear to exlude the possibility that the Sultan displayed authority over some of the tribes in Western Sahara. That this was so with regard to the Regheibat or other independent tribes living in the territory could clearly not be sustained. The position is different, however, with regard to the septs of the Tekna whose routes of migration are established as having included the territory of the Tekna caids within Morocco as well as parts of Western Sahara. True, the territory of the Tekna caids in the Noun and the Dra'a were Bled Siba at the relevant period and the subordination of the Tekna caids to the Sultan was sometimes uncertain. But the fact remains that the Noun and the Dra'a were recognized to be part of the Sherifian State and the Tekna caids to represent the authority of the Sultan".

(I.C.J., Comp. 1975, p. 48)

Thus the "legal ties" established in the advisory opinion amount to the mere possibility that the Tekna fractions in their nomadic journeys in the territory crossed by the border between Morocco and Western Sahara, might have come into contact with the caids displaying their authority over a territory that belongs today to Morocco and whose subordination to the Sultan was "sometimes uncertain".

**34**

As to the "known and recognized boundaries" of Morocco prior to the time of colonization, the Court of Justice also rejects the pretention that Western Sahara would have been included in these boundaries. The proceedings before the Court only establish that the will of expansion of Morocco, towards the south, has always existed though without success or materialization. The decolonization of Western Sahara provided Morocco with the opportunity to claim, in a different way, its long standing pretentions, without succeeding in giving clear indication that the colonization of that territory had somehow disrupted its own territory or affected its national unity.

## IV.

# The legitimacy and the legality of the struggle of the Sahraoui People, under the guidance of its only representative, the Polisario Front

## A. The Sahraoui People

### 35

No definition is given to the notion of "people" in the various provisions passed by international organizations. Resolution 1514 (XV) and article 1, paragraphs 1 & 2 of the two United Nations December 16, 1966 Pacts, although using that notion, do not define it. Neither does the Universal Declaration of the Rights of Peoples. As the comments of that Declaration indicate, it is wiser to let the meaning of the notion arise out of its applications, the Court's jurisprudence being one of the sources of such an elaboration of the notion. Three factors should be taken into account when considering the legitimacy of the quality of "people" :

- the peaceful possession of a submissive territory, under the sway of a colonial domination or a foreign occupant ;
- the creation of an organization or a collective life style based on common awareness and mutual solidarity ;
- in case and at the time of decolonization, the will voiced by the majority of the people to "freely determine its political status and to pursue its own path to social, economic and cultural development". (Resolution 1540-XV, art. 2).

### 36

In regard to the Sahraoui people, the advisory opinion of October 16, 1975 establishes the existence of the first and second above-named factors which can also be found in the pleadings of Spain, Morocco and Mauritania.

The Spanish stand was the most precise (I.C.J. Comp. 1975, p. 62) as to Mauritania, since it did not form a nation, at the time of colonization of Western Sahara it had to establish the legal ties between the "Mauritanian unity" and the Sahraoui people starting by the recognition of the homogeneity of the population established on Spain's colonized territory. Even Morocco has not succeeded in giving evidence of a display of sovereignty over the territories of Sakiet El Hamra and Rio de Oro, showing only ties of allegiance between the population of the territory and the Sultan. Thus the existence of collectivities having the same culture and social organization was one of the basic contentions of Morocco and Mauritania who, prior to colonization, had no other ties than ones of a personal nature, suggesting a form of submissive "subject", origin of the actual people of Sahraoui.

However, the third factor characterizes most clearly the status of people of the Sahraoui. The struggle led by the inhabitants of the territory, their opposition to the Moroccan occupant, the proclamation of the Democratic Sahraoui Arab Republic, and even the Saharaoui victories over the Moroccan and Mauritanian forces, all demonstrate two points. First, the existence of the Saharaoui people through its struggle against the occupants; secondly, the Sahraoui people's clear intention to exercise its right to self-determination, by proclaiming, in its territory, a sovereign and independent state, the Democratic Sahraoui Arab Republic. It is relevant to note that in this respect the Vice-Chairman of the International Court of Justice Mr Ammoun, joining a separate opinion to the October 16, 1975, advisory opinion, emphasized the meaning of "legitimate struggle for freedom from foreign domination" and for the exercise of the right to self-determination

(I.C.J., Comp. 1975, p. 9), and would have wished paragraph 59 of the advisory opinion to be completed as follows : "in particular the legitimate struggle to put an end to the foreign domination" (same p. 100).

## 37

However, while point 2 of resolution 3292 (XXIX) requested from "Spain, in its capacity as Administering Power in particular, and from Morocco and Mauritania being concerned parties, that they submit to the International Court of Justice all informations and documents needed to clarify these questions", no such request had been made to Western Sahara.

During the 27 open sessions devoted to Western Sahara, the delegates for Algeria and Zaire and the representatives of the three above cited nations had been able to present their respective government's position through bulky reports, to such a point that various judges, in their separated opinions, pointed out that the discussions as they were, evoked a litigious procedure instead of a request for an advisory opinion (Judge Gros, I.C.J., Comp. 1975, p. 72). By an ordinance dated May 22, 1975, the Court granted Morocco's request for the designation of an ad hoc judge, while the same request voiced by Mauritania had been rejected on the ground that, in the first case but not in the second, the requested opinion related to a point concerning a legal dispute between the plaintiff state and Spain, country of which a citizen was then a member of the Court.

The most striking element is that, among the "concerned" and interested parties, the Sahraoui people remained the only one not to have been able to voice its opinion. Paradoxically, the advisory opinion itself, will forcefully reaffirm later, the right to self-determination of the colonized peoples. However, the very people whose right was being discussed before the Court, was not allowed in any way to voice its opinion. Here is, undoubtedly, the most original aspect of the mission assumed by the People's Court. While the intergovernmental institutions and the highest court of the United Nations do not allow the representatives of the very people, whose fundamental right are being debated, to speak, the matter is being referred to the People's Court by the very people whose right to self-determination has not been exercised through the creation of a State. Moreover, the People's Court does not dismiss the most essential factor, i.e. the pleading of the very people whose right forms the subject of the request for an advisory opinion.



## B. The legitimacy of the Sahraoui Peoples's struggle

**38**

In this respect, there is no need to further develop the legal considerations dealt with in the second part of the present advisory opinion (above n° 26-27). To be freed from any colonial or foreign domination is an aspiration which, according to the constant and repeated UN resolutions, justifies any struggle even when armed ; this legitimacy is only stronger when, as it will later be seen, the struggle is used in self-defense against the aggression perpetrated by two neighboring states.

## C. The representativeness of the Polisario Front

**39**

As early as 1974, the Visiting Mission sent to Western Sahara by the United Nations General Assembly,

"has concluded that the majority of the population within Western Sahara has categorically been in favor of independence and against the territorial rights claimed by Morocco and Mauritania".

And :

"The Polisario Front, considered clandestine until the Mission's arrival, has appeared to be the strongest political force. Throughout the territory, the Mission witnessed mass demonstrations in its favor (the Front)".

Rodriguez de Viguri, the last Spanish Secretary-General to the Sahara, who served as ad interim Governor General during the last weeks of colonization and who appeared before the Court, had already declared to the Foreign Affairs Commission of the Spanish Cortes (Parliament) that the Sahraouis and the Polisario Front strongly opposed their annexation to Morocco and that the Chairman of the Mission, arriving in Western Sahara convinced of Morocco's rightful view, acquired, during his visit, the opposite conviction (Cortes, Diaro de sesiones del Congreso de los Diputados, 1972, n° 30, p. 5).

Since then, the national and international organizations have multiplied their declarations in favor of the representativeness of the Polisario Front. Along with the declarations of the Organization of African Unity, in particular during the 16th session held in Monrovia from July 17 to July 20, 1979, one may quote the resolution on Western Sahara passed on November 2, 1979, by the Political Commission (4) of the United Nations General Assembly, of which paragraph 7 reads as follows :

"The Assembly thus, recommends that the 'Frente Popular para la Liberación de Saguia El Hamra y Rio de Oro' (the Polisario Front), representative of the Sahraoui people in Western Sahara, actively participates in the search for a just and lasting political solution to the Sahraoui question, in conformity with the declarations and resolutions of the United Nations, the Organization of African Unity and the Conference of Non-aligned Countries".

## V.

The legal value of the Agreement concluded on November 14, 1975, in Madrid, between Spain, Morocco and Mauritania

### 41

This agreement raises three objections :

- the incompatibility of the Madrid Agreement with the decolonization policy of the United Nations ;
- the violation, by this agreement, of the right to self-determination of the Sahraoui people ;
- the fact that the agreement has been signed by nations that are not entitled to claim sovereign rights over Western Sahara.

### 42

The numerous resolutions passed by the United Nations General Assembly and the Security Council on the territory of Sakiet El Hamra and Rio de Oro aimed at applying resolution 1514 (XV) implied, following the above-cited principles, that a consultation be held in the territory. However, the Madrid Agreement pretended to dispose the territory, disregarding the process established by the General Assembly and its competent UN organs.

### 43

The Madrid Agreement was signed a few days after the International Court of Justice had recalled the compulsory aspect of the right to self-determination, according to the International Law.

It is even considered nowadays, that the right in question constitutes a compulsory rule (*ius cogens*) which, according to article 53 of the Vienna Convention, can not be derogated (See above n° 28).

### 44

The principles of "*ius cogens*" are rules which can not be transgressed by the States and other subjects of international law in the exercise of their own rights. The flaw in the Madrid Agreement is reinforced by the fact that it was signed by nations who pretended to dispose of a territory over which they had no sovereignty. As administering Power, Spain should have limited itself to its cooperation in the decolonization process established by the competent organs of the United Nations, and eventually, have transferred its powers to the representatives freely chosen by the populations of the territory. On the other hand, Spain did not have the right to surrender or transfer to neighboring States its authority, as Administering Power, over the non-self-governing territory.

As to Morocco and Mauritania, the signing of the Madrid Agreement is, with all the more reason, contrary to international law, having taken place a few days after the International Court of Justice denied both States any sovereign rights, even prior to colonization, over the territory of Sakiet El Hamra and Rio de Oro. Not being allowed to receive their "title" from Spain, the two states will not find it in the alledged ties which would have existed prior to colonization, between the Sahraoui People, Morocco and the Mauritania Unity.

## VI.

### Violation of the Sahraoui People's right to self-determination and independence by Morocco

#### 45

The Court deems it unnecessary to deal with the request formulated by Mauritania since a peace agreement has been signed between Western Sahara and Mauritania who has withdrawn its troops from the illegally occupied territory.

As to Morocco, the illegality of the presence of Moroccan troops on territories engaged in the process of decolonization is worsened by the occupation of the territory evacuated by Mauritania.

On November 6, 1975, a few weeks after the pronouncement of the International Court of Justice's advisory opinion, resolution 380 (1975) of the Security Council (above n° 8) was passed. It deals with "the Green March" that was condemned by the resolution passed on November 2, 1979 by the Political Commission (above n° 12).

#### 46

The presence of Moroccan troops in Western Sahara and the violence perpetrated against the Sahraoui people who exercise their right of legitimate defense, are contrary to international law. As a matter of fact, Morocco's unilateral decision to occupy a territory in process of decolonization, interrupted its normal course, thus violating resolution 1514 (XV) and article 1 of the International Pacts of December, 16, 1966. Moreover, the launched and pursued action against the Sahraoui people must be considered as a violation of article 2, paragraphs 2, 3 and 4 of the Charter of the United Nations :

–paragraph 2, because the execution in good faith of the obligations assumed by the settlements of the Charter forbade the Moroccan Government to occupy the Western Saharan territory after the International Court of Justice's rejection of all direct territorial claim over the ancient spanish colony, and because -in violation of the same paragraph- Morocco has not cooperated with the Secretary General in the accomplishment of the mandate entrusted to him by the Security Council, following resolutions 377 (1975) and 379 (1975).

–paragraph 3 because, far from having recourse to pacific means, the Moroccan Government has, without respect for the word or spirit of the Security Council and General Assembly's resolutions, violently occupied a territory in the process of decolonization.

– paragraph 4, because the Moroccan Government has resorted to the use of force, in a manner which is incompatible with the United Nation's goals, in the circumstances of the pacific decolonization process of Western Sahara and of the right to self-determination, recognized by the Security Council and the International Court of Justice, of the territory's people.

## 47

Specifically regarding the occupation of the territory evacuated by Mauritania, one must emphasize that, before the International Court of Justice, Morocco has itself denied the existence of legal ties prior to colonization. The International Court heeding Morocco's views has worded them as follows :

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

(I.C.J. Comp. 1975, p. 66)

Therefore, the withdrawal of Mauritania, in conformity with international law, can not entail an alleged "pre-emption right" in the benefit of Morocco. Not only because the invalid Madrid Agreement also cancels the non-alleged pact by which one of the two parties, having contracted with Spain, would have transferred its rights to the other, but also because Morocco admitted before the Court that it had no right over that part of Western Sahara's territory.

## 48

The very notion of "pre-emption right" evokes another aspect of the Madrid Agreement which would have, according to Victoria Avillan Henrubia, Vice-rector of the University of Barcelona, entailed a "sale". The Madrid Agreement, whose text was communicated to the Court, was accompanied by other agreements qualified "secret", bearing on economic matters (Statement of Rodriguez de Viguri, before the Cortes Commission, Diario de Seniores del Congreso de Diputados, 13 March 1978, n° 30, p. 9). These texts were the counterpart, for Spain, of a "transfer" of sovereignty which remains, all the same, null and void.

## 49

One will recognize that, between Morocco and the Sahraoui people, there is a true state of belligerence to which the rules of the right of war must be applied, on condition -this being verified by the documents submitted to the Court- that the Sahraoui People of the territory subject to Morocco's invasion openly bears weapons and respects the laws and customs of war.

It should be observed that the fundamental rules of the humanitarian Conventions (Geneva Conventions of August, 12, 1949, art. 3), being applicable to civil wars and non-international armed conflicts, apply with greater reason, to the Sahraoui People's legitimate struggle for self-determination.

The war between Morocco and Western Sahara is not merely an ordinary war, it is an armed conflict between a State and its colonized people who exercises its right to self-determination. This situation entails, as seen above (23-27) rules specific to the third States. The third States have the duty to help the colonized people achieve its independence chosen in the exercise of its right to self-determination. It is therefore, legitimate to support the Polisario Front, as have Algeria and various other governments.

On the other hand, the different ways of support brought to the Moroccan government, in its will to destroy the Sahraoui people's resistance, should be qualified as acts of complicity with the international crime that arises from the violation of the rights to self-determination of the peoples. In such a way can one define the attitude of the American government who promises the delivery of war equipment, as well as the assistance brought by France to Morocco through shipments of war material and technicians.

## VII.

### Legitimacy of the proclamation of the Democratic Sahraoui Arab Republic

#### 51

On February 27, 1976, the Democratic Sahraoui Arab Republic was proclaimed.

Having proclaimed the liberated part of its territory a state, the Sahraoui people has exercised its right to self-determination in the shape considered the most usual by the International Court in its advisory opinion of October 16, 1975. The proclamation of the Republic has arisen after, by the Madrid Agreement and by Morocco and Mauritania's joint aggression, the two neighboring states had resorted to armed violence to conquer the sahraoui's territory. Since the Organization of United Nations could not impose to the allegedly interested parties the resolution of the General Assembly and the Security Council as well as the advisory opinion of the International Court, the legitimate representative of the Sahraoui people could only resort to the proclamation of their Republic ; in conformity with the advisory opinion.

It should be observed that the Republic was proclaimed the day after Spain's withdrawal from Western Sahara. It devolved upon the representatives of the Sahraouis to fill the institutional vacancy so created since the Madrid Agreement could not, in effect, set a new administration in place.

A precedent was set on September 21, 1973 by the PAIGC who proclaimed on that date the Republic of Guinea Bissau which was recognized at once by over 80 countries and approved by the UN General Assembly in resolution passed on November 2, 1973, with 93 votes in favor.

On that occasion the Assembly expressed its satisfaction at "the recent accession to the independence of the Guinean people who proclaimed the sovereign State of Guinea Bissau", approval followed by Guinea's admittance to the organization of African Unity.

Up to November 11, 1979, 34 states had already recognized the Democratic Sahraoui Arab Republic.



The permanent Court accordingly decides that :

1

The right to self-determination of the peoples is a compulsory rule of international law described in particular in articles 1, §2 and 55 of the Charter of the United Nations as well as article 1 § 1 of the International Pact regarding economic, social and cultural rights and article 1 § 1 of the International Pact on civil and political rights. That principle has been applied by the United Nations General Assembly in articles 1514 (XV) and 2635 (XXV) related to the right to self-determination of the colonized peoples.

The population of the Western Saharan territory, i.e. the Sahraoui people, has the right to freely determine its political status and to choose its own economic and social system in conformity with articles 5, 6 and 11 of the Universal Declaration of the Rights of Peoples.

2

The Frente para la liberación de Saguia al Hamra and Rio de Oro (the Polisario Front), under the guidance of which the Sahraoui people is struggling for the liberation of the territory illegally occupied by Morocco, is its sole and legitimate representative recognized as such by the O.A.U., the Conference of non-aligned countries, the United Nations and by various other states, the Islamic Republic of Mauritania, namely.

The Polisario Front should benefit from the protection of the humanitarian right to war as defined by the Geneva Convention of 1949, revised in 1977.

3

As it has already been decided by the International Court of Justice in its October 16, 1975 advisory opinion, the ties existing at the time of colonization between Western Sahara and the Kingdom of Morocco have never been ties of territorial sovereignty nor ties of allegiance with equivalent effect, and therefore do not affect the present right to self-determination of the Sahraoui people ; the exercise of that right will not affect, even partly, the national unity or the territorial integrity of Morocco ; the eventual existence of a certain influence could not be the token of a bond of sovereignty.

4

Even if the right to self-determination of a people should conflict with any legal ties or, should the case arise, with a relationship of sovereignty prior to colonization, it would remain necessary to verify, at the time of decolonization, if the re-integration of the territory with an existing state satisfies the free and authentic will of the majority of the territory's inhabitants.

5

The agreement signed in Madrid on November 14, 1975 by Spain, Morocco and Mauritania, completed with secret clauses which aroused strong and persistent protest among Spanish people, is null and void since Spain, as the Administering Power of a non-self-governing territory in process of decolonization, did not have the right to yield or transfer any sovereign right over the territory, all the less when the Madrid Agreement violates an imperative rule of international law (*ius cogens*).

The conclusion of that agreement a few weeks after the confirmation by the advisory opinion of the International Court requested by Morocco, which reaffirms the right to self-determination of Western Sahara, constitutes a violation of the commitment to willingly fulfill the provisions of the Charter of the United Nations (article 2 § 2).

6

The Moroccan aggression constitutes a resort to violence forbidden by the article 2 § 4 of the Charter of the United Nations.

This aggression is all the more condemnable as it aims at depriving a people of its right to self-determination, a right that was asserted by a legitimate struggle and that had been recognized by the United Nations and its competent organs.

The aggression contradicts the resolutions of the United Nations General Assembly and Security Council as well as the advisory opinion of the International Court of Justice who has recognized the Sahraoui people's right to self-determination. Therefore, the aggression is in violation with the commitment of the members of United Nations to willingly carry out their obligations (Charter, article 2, § 2).

7

The Peace Agreement signed in Algiers on August, 5, 1979, between the Polisario Front and the Islamic Republic of Mauritania, has ended the armed conflict in conformity with the Sahraoui people's right to self-determination.

The invasion by Moroccan armies of the territory legally evacuated by the Mauritanian troops, not only violates the international obligations found in point 6, but also concerns regions over which, according to the Moroccan statements made to the international Court of Justice, Morocco does not sustain the existence of sovereign bonds at the time of the Spanish colonization.

8

The Sahraoui people by exercising its right to self-determination has legally proclaimed its Democratic Sahraoui Arab Republic, a state recognized by 34 nations.

9

The right to self-determination submits the states to two obligations :

- The abstention of all military cooperation or other toward the repression of a movement of national liberation,
- The duty of favoring decolonization and self-determination by providing all material and diplomatic support.

The above-cited obligations in conformity with article 1 § 2 of the Charter were unanimously approved by the member states of the United Nations in resolution 2625 (XXV) and in resolution 3314 (XXIX) of December 14, 1974 defining the notion of aggression.

Accordingly the Court decides that :

- The military assistance furnished to Morocco in its aggression of Western Sahara by certain states, namely France and the United States of America makes them accomplices of the aggression in question ;
- To support the Polisario Front in its struggle for national liberation is legitimate and in conformity with the principles and purposes of the United Nations Charter and is necessary for the maintenance of justice and friendship between the nations, founded on the respect of the equality of all people's rights and of their right to self-determination.

Brussels, November 11, 1979