ABHANDLUNGEN

Judicial Opinion-Writing in the World Court and the Western Sahara Advisory Opinion

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In the Advisory Opinion rendered on October 16, 1975, in the *Western Sahara* affair[1]), the Judges of the International Court of Justice are philosophically divided among themselves. But the Court, it may be suggested, demonstrates itself as an international institution in evolution, as the awareness of the opportunities for the Court as an international law-making, and not simply law-applying, institution in an era of rapid change in the World Community has become more widespread after the bitter political recriminations directed against the Court in the aftermath of its 1966 *South West Africa* decision[2]).

1. The World Court qua Court

The International Court of Justice, and its lineal predecessor the Permanent Court of International Justice, considered as Courts, are in so many respects *sui generis.* Those of the Court's current critics who would like to increase its political *rôle* and sponsor a more activist, legislative, policy-making

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[1]) *Western Sahara,* Advisory Opinion, I.C.J. Reports 1975, p. 12. And see Judicial Decisions, Territorial status of Spanish Sahara prior to colonization, 70 A.J.I.L. 366 (1976).

[2]) *South West Africa,* Second Phase, Judgment, I.C.J. Reports 1966, p. 6. And see the comments by Dr. (now Judge) E l i a s, in: Judicial Settlement of International Disputes (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 62), p. 19, at pp. 26—7 (1974).

approach on the part of the judges in their decisions and Advisory Opinions, so often cite that most political of all Courts, the United States Supreme Court, as a model. Yet when one compares basic elements of constitutional structure and internal organisation and actual decision-making practices, it is apparent that the United States Supreme Court represents a polar extreme, as a final tribunal, to the World Court, the one element of the openly political character of the nomination and election of the judges on the Court excepted. It is this "political" election of the members of the Court, it might be argued, that gives a tribunal its own affirmative mandate to fill the gaps in the law and legislate interstitially or even avowedly – what has been identified as a Court's political legitimacy[3]). Yet in all other respects the World Court seems to differentiate itself clearly from the American Court and indeed from all other "Anglo-Saxon" tribunals; so that purported analogies from their experience may run the risk of being inaccurate and also misleading in terms of the concrete conclusions to be drawn from their experience.

Much more, of course, the World Court resembles a classical Continental European Civil Law tribunal – something that is not surprising considering the strongly Continental European roots of the Permanent Court of International Justice above all but also of the successor International Court of Justice. In addition, as detailed examination of the record of membership of the two successive World tribunals over the years amply confirms, the overwhelming majority of the judges have been, in their professional training and specialist expertise, Continental European Civil Law jurists[4]). Even in more recent years when the Continental European component in the Court's membership has been diluted numerically as the World Community has broadened to include the Third World, the new judicial recruits from the Third World have been preponderingly drawn from European-derived Civil Law systems[5]), with the special qualities of legal reasoning and legal method and legal thought-ways generally deriving therefrom. If, however, the World Court is a Civil Law tribunal in its basic character and style, it is, after all, a Civil Law tribunal with a difference. Its judges are elected for a term of years only, without the continuity of service that fairly generally characterises Continental European tribunals; they will not always have

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[3]) See, in this regard, Pescatore, Le droit de l'intégration (1972), at p. 73 *et seq.*

[4]) See generally Rosenne, Documents on the International Court of Justice (1974), at p. 329 *et seq.*; Wehberg/Goldschmidt, Der Internationale Gerichtshof, Entstehungsgeschichte, Analyse, Dokumentation (1973), p. 18 *et seq.*

[5]) Wehberg/Goldschmidt, *op. cit.*, p. 82 *et seq.*

the specialised, in-service, career judicial training imposed under the Continental European legal *régime;* and they may also be, in measure, public figures, in contrast to the conscious anonymity that normally pervades Continental European tribunals. Beyond that, in terms of Court collegiality and notions of internal self-discipline and cohesion, the World Court does break away significantly from Continental European stereotypes. While the World Court's official opinion renders service to the concept of collegiality of decision-making and opinion-writing, with its actual authorship or draftmanship being only with difficulty and under certain specialised circumstances discernible[6]), the members of the Court, even where they formally adhere to the official opinion of the Court, feel free to exercise their right to file ancillary Declarations or Separate Opinions under their own individual names[7]); and those who disagree with the Court's official opinion will usually file formal Dissenting Opinions[8]). The World Court's work thus lacks the benefits of the modest virtues that normally characterise the opinions of Continental European Civil Law

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[6]) Rules of Court. Adopted on 6 May 1946, as amended on 10 May 1972: —

"Article 33. 1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give".

"Article 79. I. The judgment shall contain: . . . the names of the judges participating; . . . the number of the judges constituting the majority".

Resolution concerning the internal judicial practice of the Court. (Rules of Court, Article 33) adopted on 5 July 1968: — "Article 6. On the basis of the views expressed in the final deliberation, in the written notes, and in prior deliberations, the Court proceeds to choose a drafting committee by secret ballot and by an absolute majority of votes. Two judges are elected from among those Members of the Court whose oral statements and written notes have most closely and effectively reflected the opinion of the Court as a whole.

The President shall *ex officio* be a member of the drafting committee unless he does not share the majority opinion of the Court as it appears then to exist, in which case his place shall be taken by the Vice-President. If the Vice-President is ineligible for the same reason, the Court shall proceed, by the process already employed, to the election of a third member, in which case the senior elected judge shall preside in the drafting committee . . .".

[7]) Rules of Court. Adopted on 6 May 1946, as amended on 10 May 1972: —

"Article 79.2. Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent".

[8]) The parameters of permissible disagreement, whether by way of a formal dissent or of a Separate Opinion not being a dissent, would seem only marginally controllable. Resolution concerning the internal judicial practice of the Court, *op. cit.* (note 6): —

"Article 7. (i) A preliminary draft of the decision is circulated to the judges, who may submit to the drafting committee amendments in writing . . .

tribunals: a concise, succinct statement of the Court's decision and of the basis for the Court's reasoning leading to the decision; and the elimination of "Byzantinism" and of the temptation to take purely rhetorical positions, through the essentially anonymous, consensus-based decision-making and opinion-writing that finally emerge. No doubt, some greater disposition on the part of the members of the World Court to cooperate in implementing those parts of the Rules of Court dealing with the office and functions of *rapporteur* for the Court's opinion in any case could help fill the gap between the World Court's practice and that of more classical, Continental European models. But the fact remains that half a century of the World Court's own practice the other way suggests that the Court make an affirmative virtue of the freedom its members have always claimed and exercised to file individual opinions, whether dissenting or specially concurring, under their own names with the consequent extra opportunities for developing or projecting new trends in International Law doctrine and for testing experimental hypotheses as to what International Law ought to be in any new problem-situation.

In the *Western Sahara* affair, the advantages and disadvantages of this essentially unique pattern of internal practice that the World Court's members have developed over the years – neither wholly Civil Law nor yet Common Law – are readily apparent. In the Advisory Opinion there is the official Opinion of Court, signed by the then President of the Court, Judge Lachs[9]). But, in addition, there are three separate Declarations, filed respectively by Judges Gros[10]), Ignacio-Pinto[11]), and Nagendra Singh[12]); six separate Opinions, filed respectively by Vice-President Ammoun[13]), and Judges Forster[14]), Petrén[15]), Dillard[16]), De Castro[17]), and *ad hoc* Judge Boni[18]); and one Dissenting Opinion filed by Judge Ruda[19]). With a bench of sixteen Judges (including the *ad hoc*

(ii) Judges who wish to deliver separate or dissenting opinions make the text thereof available to the Court after the first reading is concluded and within a time-limit fixed by the Court . . .

(iv) In the course of the second reading, judges who are delivering separate or dissenting opinions inform the Court of changes they propose to introduce into the text of their opinions by reason of changes made in the draft judgment".

9) I.C.J. Reports 1975, pp. 12–69.
10) *Ibid.*, pp. 69–77.
11) *Ibid.*, p. 78.
12) *Ibid.*, pp. 78–82.
13) *Ibid.*, pp. 83–102.
14) *Ibid.*, p. 103.
15) *Ibid.*, pp. 104–115.
16) *Ibid.*, pp. 116–126.
17) *Ibid.*, pp. 127–172.
18) *Ibid.*, pp. 173–4.
19) *Ibid.*, pp. 175–6.

Judge) participating in the rendering of the Court's Advisory Opinion, ten separate Declarations or Opinions apart from the official Opinion of Court, make it difficult to speak meaningfully of any Common Law-style *ratio decidendi* and to discover for just what the Court's ruling stands as authority. Yet, the actual votes of the Judges are revealed, on the two preliminary, procedural questions of whether to render an Advisory Opinion on the two main issues involved, as having been by 13 to 3 and 14 to 2 respectively[20]); and on the two substantive issues themselves, the latter issue being in two parts, as having been by 16 to 0, 14 to 2, and 15 to 1, respectively[21]). The plethora of separate judicial opinions on issues on which, when it came to the showdown, there was very little division in the actual judicial votes, is, it may be suggested, only in part a consequence of the differences in legal traditions (Common Law, Civil Law, received Common Law, received Civil Law), among the members of the Court today. In measure, however, it reflects ideological differences among the members of the Court as to the future trends and directions of the World Community and the desired movement of International Law doctrine itself; and these differences of viewpoint, it may be suggested, can expect to be augmented, in the future, as the new political majorities in the United Nations General Assembly and Security Council become aware of the opportunities for novation or re-writing of International Law through the World Court and ultimately, therefore, through the political processes of nomination and election of the Court's Judges. Finally, it may be suggested, there is an extra, casual or fortuitous element in the Court's work today, facilitated perhaps by special features of the Court's own Rules and exacerbated by the intellectual strains of the Court's members having to decide, as Judges, in an era of rapid societal change in the World Community, — a tendency to indulge in what may be characterised as pejorative special opinions in which there may be a temptation to score debating points off one's judicial colleagues and even a Court majority of which one has oneself formed part[22]). Such a practice, if sustained, must certainly dissipate a good deal of the creative intellectual energies of the Court, and certainly weaken the impact of its majority opinions as to what the law is and what, beyond that, it ought to be in the future.

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[20]) *Ibid.*, (Opinion of Court), p. 68.

[21]) *Ibid.*, (Opinion of Court), pp. 68—9.

[22]) Pound, *Cacoethes Dissentiendi* — The Heated Judicial Dissent, 39 American Bar Association Journal 794 (1953). And see generally the author's discussion, Supreme Courts and Opinion-Writing: Specially Concurring and Dissenting Judicial Opinions, Judicial Review 225 *et seq.* (4th ed. 1969).

2. *The World Court and its Choice of Jurisdiction*

The *Western Sahara* question came to the World Court on an Advisory Opinion reference from the U.N. General Assembly (Resolution 3292 (XXIX) of December 13, 1974) requesting a judicial response to the two questions[23]): —

"I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one *(terra nullius)*?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity"?

The General Assembly Resolution requesting the Advisory Opinion made specific reference, in its Preamble, to Resolution 1514 (XV) of December 14, 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples), and also "reaffirmed" the right of the population of the Spanish Sahara to self-determination in accordance with Resolution 1514 (XV)[24]). It also called upon Spain, as the administering Power, to postpone the referendum it then contemplated holding in Western Sahara — "until the General Assembly decides on the policy to be followed in order to accelerate the decolonisation process in the territory, in accordance with resolution 1514 (XV), in the best possible conditions, in the light of the advisory opinion to be given by the International Court of Justice"[25]).

The World Court divided, as we have noted, on the preliminary, procedural issue of whether to render an Advisory Opinion at all — 13 to 3 on the first question, whether Western Sahara was *terra nullius* at the time of colonisation by Spain; and 14 to 2 on the second question, of the legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity. The points of contention, within the Court, may be resumed under two main heads — the nature of the Court's Advisory Opinion jurisdiction, and the importance of not confusing Advisory Opinion jurisdiction with jurisdiction as to contentious proceedings or allowing it to be used as a cover for the same; and, again, the nature of a "legal question" and the importance of not allowing the Court either to be drawn into discussion of abstract, philosophical issues remote from actual problem-solving, or else to venture upon high political issues where the Court's intervention might actually impede or delay eventual political solutions.

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[23]) I.C.J. Reports 1975, p. 14. [24]) *Ibid.*, p. 13. [25]) *Ibid.*, p. 14.

The first of these points of contention involved a re-examination of a leading holding of the predecessor Permanent Court of International Justice, in the matter of the *Status of Eastern Carelia,* in 1923[26]). In that matter, the Court had declined to exercise Advisory Opinion jurisdiction on the basis, apparently, of the principle that a State – there the Soviet Union – could not be compelled, without its consent, to submit its disputes with other States, – there Finland – to the Court's jurisdiction. This was the substance of Spain's argument against the Court's exercise of Advisory Opinion jurisdiction in the *Western Sahara* matter, namely that the moving parties, Morocco and Mauritania, were attempting to achieve indirectly through the Advisory Opinion route, what they could not achieve directly through contentious proceedings in view of Spain's lack of consent to any such contentious jurisdiction. Was that in fact the basis of the P.C.I.J. holding in the *Eastern Carelia* matter, in 1923? The I.C.J., in the current, *Western Sahara* matter, proceeded, in the Opinion of Court, to distinguish and limit the *Eastern Carelia* holding on the basis that, there, one of the States concerned, the Soviet Union, was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations:

". . . lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction"[27]).

The Court went on to cite, with approval, its own earlier ruling in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* in 1950[28]), when it had also had to consider the question of the continued relevance of the Permanent Court's holding in the *Status of Eastern Carelia.* The Court, in the *Interpretation of Peace Treaties,* had spoken of a –

"confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a

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[26]) *Status of Eastern Carelia,* Advisory Opinion of 23 July 1923, P.C.I.J. Series B, No. 5, p. 7.

[27]) I.C.J. Reports 1975, p. 24.

[28]) I.C.J. Reports 1950, p. 65.

Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the organisation, and, in principle, should not be refused"[29]).

In taking this broader, more flexible view of its Advisory Opinion jurisdiction, the Court also rejected a further Spanish argument as to the relevance of Spain's own lack of consent to the proceedings, namely that the matter at issue was a territorial dispute and that — "the consent of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary"[30]), presumably whatever the procedural origin of the Court's jurisdiction. The Court rejected this argument on the score that the request for an opinion did not call for adjudication upon existing territorial rights or sovereignty over territory[31]).

Still another Spanish objection went to the limitations of fact-finding in Advisory Opinion-based proceedings. Although noting that this consideration had played a *rôle* in the Court's declining jurisdiction in *Status of Eastern Carelia,* the Soviet Union's refusal to participate having there created the difficulty of making an enquiry into facts concerning the main point of controversy[32]), the Court felt that the situation in the present matter was entirely different and distinguishable, Mauritania, Morocco, and Spain having furnished — "very extensive documentary evidence of the facts"[33]) and also, together with Algeria and Zaire, having presented their views on these facts and on the observations of the others; while the Secretary-General of the United Nations had also furnished a dossier of documents concerning the discussion of the question of the Western Sahara in the competent U.N. organs[34]).

A more limited and technical Spanish objection to the Court's accepting jurisdiction related to the interpretation of the actual definition of the Court's Advisory Opinion jurisdiction in the U.N. Charter itself and in the Court Statute. Art. 96 of the U.N. Charter authorises the giving of an

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29) I.C.J. Reports 1950, p. 65, at p. 71; adopted by the Court in *Western Sahara,* I.C.J. Reports 1975, p. 12, at p. 24.

30) I.C.J. Reports 1975, at pp. 27–8.

31) *Ibid.,* p. 28.

32) *Ibid.*

33) *Ibid.,* p. 29.

34) *Ibid.*

Advisory Opinion — "on any legal question"[35]), as does Art. 65 (1) of the Court Statute[36]). The Spanish argument, here, was that the two substantive questions now referred by the General Assembly to the Court for Advisory Opinion were — "not legal, but are either factual or are questions of a purely historical or academic character"[37]).

As to this, the Court responded by suggesting, on the authority of its holding in *Namibia* in 1971[38]), that — "a mixed question of law and fact is none the less a legal question" within the meaning of Art. 96 of the Charter and Art. 65 (1) of the Court Statute[39]). Citing its holding in *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*[40]), the Court rejected the contention that it should not deal with a "question couched in abstract terms", pointing to its *dictum* there that the Court — "may give an advisory opinion on any legal question, abstract or otherwise"[41]), in order to reject the restrictive view of the scope of its Advisory jurisdiction[42]). At the same time the Court recorded, on the facts, its conclusion that the matters on which the General Assembly now sought its opinion were — "for a practical and contemporary purpose"[43]). In the same vein, the Court also rejected the further Spanish contention, addressed to jurisdiction, that the proceedings were "devoid of purpose", the United Nations having already, according to this Spanish contention, affirmed the nature of the decolonisation process applicable to Western Sahara in accordance with the General Assembly's Resolution 1514 (XV) establishing the general principles of Decolonisation: the Court, here, accepted Moroccan and Algerian arguments to the effect that the General

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35) Charter of the United Nations, "Article 96.1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question".

36) Statute of the International Court of Justice: "Article 65.1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request".

37) I.C.J. Reports 1975, p. 12, at p. 19.

38) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* I.C.J. Reports 1971, p. 27.

39) I.C.J. Reports 1975, p. 19.

40) I.C.J. Reports 1947—1948, p. 61.

41) I.C.J. Reports 1975, p. 19.

42) *Ibid.,* pp. 20—1.

43) *Ibid.,* p. 20.

Assembly had not finally settled the principles and techniques to be followed, being free to choose from a wide range of solutions compatible with the two basic principles of self-determination and of national unity and territorial integrity[44]). The final Spanish argument as to jurisdiction — that the questions posed by the General Assembly were "academic and legally irrelevant"[45]), was rejected by the Court on the basis that while General Assembly Resolution 1514 (XV) provided the basis for the process of decolonisation since 1960, it was complemented by Resolution 1541 (XV) which opened up a choice of options for non-self-governing territories, — emergence as a sovereign independent State; free association with an independent State; or integration with an independent State[46]); and the Advisory Opinion given by the Court in the present proceedings would — "furnish the General Assembly with elements of a legal character" relevant to its further treatment of these alternative possibilities[47]).

3. The Court and International Problem-Solving: the Opinion of the Court

The first substantive question posed to the Court by the U.N. General Assembly was whether Western Sahara was, at the time of colonisation by Spain, a territory belonging to no one *(terra nullius).* The Court concluded, for these purposes, that the time of colonisation by Spain should be considered as the period beginning in 1884 when Spain proclaimed a protectorate over the Rio de Oro. While Spain had mentioned certain earlier acts of alleged display of its sovereignty in the 15th and 16th centuries, it had done so, as the Court noted, only to enlighten the Court as to the remote antecedents of the Spanish presence on the West African coast and not to prove any continuity between those acts and the Spanish proclamation of the protectorate in 1884. The period beginning in 1884 thus constituted the temporal context within which the two substantive questions addressed to the Court by the General Assembly should be answered[48]).

On this basis, the Court reasoned that the question whether or not Western Sahara was *terra nullius* at the time of colonisation by Spain was to be interpreted by reference to the law in force at that period, 1884. But a determination that Western Sahara was *terra nullius* in this case would be possible only if it were established that at that time the territory belonged

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44) *Ibid.*, p. 29.
45) *Ibid.*, p. 30.
46) *Ibid.*, p. 32.
47) *Ibid.*, p. 37.
48) *Ibid.*, p. 38.

to no one. On the specific facts, the Court found that at the time of colonisation Western Sahara was inhabited by peoples who, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them. Further, in colonising Western Sahara, Spain itself did not proceed on the basis that it was establishing its sovereignty over *terra nullius;* for, even in the Royal Order of 1884, it was proclaimed that the King of Spain was taking Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes, the Order expressly referring to the "documents which the independent tribes of this part of the coast" had signed with Spain and also announcing that the King of Spain had confirmed the "deeds of adherence" to Spain. Likewise, as the Court noted, in negotiating with France the limits of the Spanish territory of Rio de Oro with French colonial territories to the North, Spain did not rely upon any claim to the acquisition of sovereignty over a *terra nullius*[49]). For these reasons, the Court was able very quickly to respond to question I and to conclude that Western Sahara was not, at the time of colonisation by Spain, a "territory belonging to no one *(terra nullius)*"[50]).

The second question referred to the Court by the General Assembly asked the Court to state what were the "legal ties" between Western Sahara and "the Kingdom of Morocco and the Mauritanian entity". Noting that the meaning of the term "legal ties" would also have to be decided in the temporal context of the time of colonisation by Spain — 1884, — the Court observed that that term, unlike *terra nullius* in the first question, did not have in itself a very precise meaning. Its meaning would therefore have to be found in the object and purpose of the General Assembly Resolution 3292 (XXIX) referring the request for the present Advisory Opinion to the Court[51]).

At the time of its colonisation by Spain, the Court found, Western Sahara, as an area of desert with low and spasmodic rainfall, was being exploited almost exclusively by nomads. The sparcity of the resources and the spasmodic character of the rainfall compelled all those nomadic tribes to traverse very wide areas of the desert, with the consequence that the nomadic routes of none of them were confined to Western Sahara. Not infrequently, the Court noted, one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorials ties or ties of allegiance or vassalage[52]).

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[49]) *Ibid.*, p. 39.
[50]) *Ibid.*, p. 40.
[51]) *Ibid.*
[52]) *Ibid.*, pp. 41—2.

Morocco's claims to "legal ties" with Western Sahara at the time of colonisation by Spain had been argued to the Court as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory, this immemorial possession itself being based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested for centuries – indeed, and this in reliance on historical works, on a series of events stretching back to the Arab conquest of North Africa in the 7th Century A.D. To refute the suggestion that the "far-flung, spasmodic and often transitory character of many of these events" rendered the historical material somewhat equivocal as evidence of possession of the territory, Morocco invoked the Permanent Court's decision in the *Legal Status of Eastern Greenland* case[53]), pointing both to the geographical contiguity of Western Sahara to Morocco and the desert character of the territory as sufficient to establish Morocco's claim to a title based "upon continued display of authority"[54]). But while the Court did accept that its predecessor, the Permanent Court, had recognised, in the *Eastern Greenland* case, that in the case of claims to sovereignty over areas in thinly populated or unsettled countries, "very little in the way of actual exercise of sovereign rights" might be sufficient in the absence of a competing claim[55]), the Court still felt that the present case was distinguishable from the facts of *Eastern Greenland.* Even if somewhat sparsely populated, the Western Sahara was a territory across which socially and politically organised tribes were in constant movement and where armed incidents between these tribes were frequent; and there was a paucity of evidence of actual display of authority unambiguously relating to Western Sahara. Nor was the difficulty cured by introducing the argument of geographical unity or contiguity, the argument of geographical unity also being somewhat debatable[56]).

In perhaps the most interesting and novel part of its argument on the substantive issues, Morocco asked the Court to take account of the special structure of the Sherifian State, its special character consisting in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan through their c a i d s or sheiks, rather than on the notion of territory[57]). Morocco also invoked certain acts claimed to point to the internal display of

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[53]) P.C.I.J., Series A/B, No. 53.
[54]) *Ibid.,* p. 45; I.C.J. Reports 1975, p. 12, at p. 42.
[55]) P.C.I.J., Series A/B, No. 53, at p. 46.
[56]) I.C.J. Reports 1975, p. 12, at p. 43.
[57]) *Ibid.,* at pp. 43–4.

Moroccan authority and also certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of the territory — variously, documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, certain "military decisions" constituting resistance to foreign penetration of the territory, visits by the Sultan of Morocco in person in 1882 and 1886. In general, the Moroccan argument was that Western Sahara has always been linked to the interior of Morocco by common ethnological, cultural and religious ties[58]).

By contrast, Spain denied any documentary evidence or other traces of a display of political authority by Morocco with respect to Western Sahara: the so-called appointments of caids by Morocco were, in the Spanish view, only titles of honour bestowed on existing and *de facto* independent local rulers; and Spain also challenged the evidence of the payment of taxes by tribes of Western Sahara. Even the acts of resistance in Western Sahara to foreign penetration, cited by Morocco, were said by Spain to have been nothing more than occasional raids to obtain booty or hostages for ransom and to have nothing to do with display of Moroccan authority. Spain finally questioned, on geographical and other grounds, the unity of the Saharan region with the regions of southern Morocco[59]).

The Court, for its part, concluded that the conflicting evidence did not support Morocco's claim to have exercised territorial sovereignty over Western Sahara[60]). The evidence did not, in the Court's view, show that Morocco displayed effective and exclusive State activity in Western Sahara: it did, however, provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan of Morocco and some, but only some, of the nomadic peoples of the territory[61]).

The Court then turned to various international acts invoked by Morocco as showing that the Sultan's sovereignty was directly or indirectly recognised by foreign countries as extending to the Western Sahara: a series of Moroccan treaties, including a treaty with Spain of 1767, and treaties of 1836, 1856 and 1861, with the United States, Great Britain and Spain respectively, dealing with the rescue and safety of mariners shipwrecked on the coast of Western Sahara; a Moroccan treaty with Great Britain of 1895; diplomatic correspondence with Spain; a Franco-German exchange of letters of 1911[62]). The Treaty of 1767 between Morocco and Spain raised some interesting issues of interpretation, including an apparent con-

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58) *Ibid.*, at p. 45.
59) *Ibid.*, at p. 46.
60) *Ibid.*, at p. 48.
61) *Ibid.*, at p. 49.
62) *Ibid.*, at p. 49.

flict between the Arabic text which Morocco maintained was the only "official text", and the Spanish text which Spain contended was also an official text[63]). In the Court's view, however, the sum total of all this documentary material was not to establish international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonisation. Some of the documents, for example, the Franco-German exchange of letters in 1911, were directed rather to definition of rival European political interests[64]). On the other hand, though not meeting the tests of international recognition of territorial sovereignty on the part of Morocco, some elements, and more especially the material relating to the recovery of shipwrecked sailors, did provide international recognition, at the time of Spanish colonisation, of authority or influence of the Sultan of Morocco over some nomads in Western Sahara. If not any legal tie of territorial sovereignty between Western Sahara and the Moroccan State, at least there were indications of a legal tie of allegiance between the Sultan of Morocco, and some, though only some, of the tribes of the territory, and also of some display of the Sultan's authority or influence with respect to those tribes[65]).

The Court then turned to the question of the legal ties, if any, existing between Western Sahara at the time of its colonisation by Spain, and the Mauritanian entity[66]). It was admitted by Mauritania that, at the time of Spanish colonisation, there was no Mauritanian State in existence and that the present statehood of Mauritania "is not retroactive"[67]). In the Court's view, there could therefore be no question of legal ties of State sovereignty with the Mauritanian entity, but only some other, (lesser), type of legal ties[68]). The Court noted that the "Mauritanian entity" — a term first employed in the U.N. General Assembly debates in 1974 — was, at the time of colonisation, in the view of the present Mauritanian Government, a distinct human unit characterised by a common language, way of life and religion, and having a uniform social structure[69]). Within the entity, there were, according to the Mauritanian Government, "great confederations of tribes, or emirates whose influence, in the form sometimes of vassalage and sometimes of alliance, extended far beyond their own frontiers"[70]). According to Mauritania, it was a community having its own cohesion, its own special

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63) *Ibid.*, at p. 50.
64) *Ibid.*, at p. 56.
65) *Ibid.*, at pp. 56–7.
66) *Ibid.*, at p. 57.
67) *Ibid.*
68) *Ibid.*
69) *Ibid.*, p. 58.
70) *Ibid.*, p. 59.

characteristics, and a common Saharan law concerning the use of water-holes, grazing lands and agricultural lands, the regulation of inter-tribal hostilities and the settlement of disputes[71]). Mauritania also laid emphasis on the special characteristics of the Saharan area and the nomadic existence of many of the tribes, life in the arid areas requiring the continuous quest for suitable pastures and water-holes and each tribe having a well-defined migration area with established migration routes determined by the location of water-holes, burial grounds, cultivated areas and pastures[72]). As the Mauritanian Government contended, "the colonial Powers, . . . in drawing frontiers took no account of these human factors and in particular of the tribal territories and migration routes, which were, as a result, bisected and even trisected by these artificial frontiers". The tribes continued nevertheless to make their traditional migrations, these facts of life of the region being finally recognised by France and Spain in 1934 in concluding an administrative agreement to prevent any obstacles to the nomadic existence of the tribes. The Mauritanian argument was thus that at the time of Spanish colonisation, the concepts of "nation" and of "people" explained the position of the inhabitants of the Mauritanian entity, an entity which, despite its political diversity, bore the characteristics of an independent nation, "formed of tribes, confederations and emirates jointly exercising co-sovereignty"[73]).

The Spanish Government, in reply, argued that this was a mere "cultural phenomenon, limited in time and space" which could not be "identical with an alleged entity of which the significance was mainly geographical and which had wider limits"; further, that the "idea of an entity must express not only a belonging but also the idea that the component parts are homogeneous"[74]). In sum, according to Spain, there was no proof of any tie of allegiance between the tribes inhabiting the territory of Western Sahara and the Mauritanian tribes, — "over and above the mere sociological facts of nomadic life"[75]). Finally, the present Islamic Republic of Mauritania could not, in Spain's view, be regarded as the direct successor to the alleged historical Mauritanian entity, since the notion of Mauritania was born in 1904 at a time when the territory of Western Sahara was claimed by Spain already to have had an existence well established in fact and in law[76]).

The Court, for its part, while finding that, at the time of the Spanish colonisation, there existed many ties of a racial, linguistic, religious, cultural

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71) *Ibid.*
72) *Ibid.*, pp. 59—60.
73) *Ibid.*, p. 60.
74) *Ibid.*, p. 61.
75) *Ibid.*, p. 61.
76) *Ibid.*, p. 62.

and economic nature between various tribes and emirates whose peoples dwelt in the Saharan region today comprised within the Territory of Western Sahara and the Islamic Republic of Mauritania[77]), nevertheless concluded that there was no "tie of sovereignty, or of allegiance of tribes, or of 'simple inclusion' in the same legal entity"[78]). The Court, in looking to the existence of "legal ties" other than sovereignty, expressly took note of the fact that the migration routes of almost all the nomadic tribes of Western Sahara crossed what were to become the colonial frontiers and traversed, *inter alia*, substantial areas of what is today the territory of the Islamic Republic of Mauritania[79]). The basic elements of the nomads' way of life, the Court found, were —

> "in some measure the subject of tribal rights, and their use was in general regulated by customs. Furthermore, the relations between all the tribes of the region in such matters as inter-tribal clashes and the settlement of disputes were also governed by a body of inter-tribal custom"[80]).

These legal ties between the territory of Western Sahara and the "Mauritanian entity" were thus, in the Court's view, — "ties which knew no frontier between the territories and were vital to the very maintenance of life in the region"[81]).

While concluding, therefore, that no tie of territorial sovereignty had been established, on the evidence presented, between the territory of Western Sahara and either Morocco or the Mauritanian entity, the Court also ruled that legal ties of allegiance did exist, at the time of Spanish colonisation, between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara; and that rights existed, 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[82]). As the Court concluded its response to the second question posed by the U.N. General Assembly in its request for Advisory Opinion:

> "Thus the Court has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonisation 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"[83]).

The Court had, in passing, dealt with the problem of the overlapping character of the respective legal ties claimed by both Morocco and Mauritania in respect to Western Sahara at the time of Spanish colonisation[84]).

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77) *Ibid.*, p. 63.
78) *Ibid.*, p. 64.
79) *Ibid.*
80) *Ibid.*
81) *Ibid.*, p. 65.
82) *Ibid.*, p. 68.
83) *Ibid.*
84) *Ibid.*, p. 65.

Both Morocco and Mauritania had emphasised that, in their view, the overlapping left "no geographical void" — no "no-man's-land" — between their respective ties with Western Sahara[85]). In the Court's view, the overlapping arose simply from the geographical locations of the migration routes of the nomadic tribes; nor was the complexity of the legal relations of Western Sahara with the neighbouring territories at that time fully described without mentioning that the nomadic routes of certain tribes passed also within areas of what is present-day Algeria[86]). In the Court's view, therefore, the significance of the geographical overlapping was not that it indicated a "north" and a "south" without a "no-man's-land": its significance was rather that it indicated the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonisation by Spain[87]). The Court had already indicated its view that the questions posed to the Court by the U.N. General Assembly with the request for Advisory Opinion did not envisage — "any form of territorial delimitation by the Court"[88]). In framing its answers to the questions, the Court could not be unmindful of the purpose for which the Court's opinion was sought — "to assist the General Assembly to determine its future decolonisation policy and in particular to pronounce on the claims of Morocco and Mauritania to have had legal ties with Western Sahara involving the territorial integrity of their respective countries"[89]).

4. Divisions within the Court: the preliminary, jurisdictional issue

The Court's holdings on the two substantive questions were, as we have noted, achieved in voting terms with a surprising degree of unanimity. On the first substantive question — whether Western Sahara was, at the time of colonisation by Spain, *terra nullius,* the Court's vote was 16 to 0 in favour of a negative response. On the second substantive question, the Court, though denying ties of sovereignty to exist in either case, nevertheless voted 14 to 2 that other legal ties existed between Western Sahara and Morocco at the time of Spanish colonisation; and voted 15 to 1 that other legal ties existed between Western Sahara and the "Mauritanian entity" at the time of Spanish colonisation. Granted the fact of only one formal Dissenting Opinion, how then does one explain the presence, in addition

85) *Ibid.*, p. 66.
86) *Ibid.*, p. 67.
87) *Ibid.*
88) *Ibid.*, pp. 66–7.
89) *Ibid.*, p. 68.

to the official Opinion of Court signed by the President, of a plethora of individual judicial Declarations (three) and of individual Separate Opinions (six)?

The answer clearly lies in deeply-felt differences of opinion within the Court. These differences are certainly in a very large degree genuine intellectual differences, with the judges responding in measure to a World Community that is undergoing rapid transition and change at the present time; and they are differences of a sufficient magnitude that the ordinary skills of negotiation and compromise within a plural, multimember tribunal, have hardly been able to bridge them or cover them over, for they reflect differing attitudes to the desirable direction and degree of change in International Law itself in correspondence with the general societal change in the World Community. Yet some elements of the differences of opinion seem to be personal in character too, and are reflected perhaps in a somewhat tendentious, even pejorative note that occasionally enters into the language and styling of some of those Declarations and Separate Opinions.

Judge Gros, in his Declaration, had serious reservations as to the Court's handling of the preliminary, jurisdictional issue. From the beginning, in Judge Gros' view, it was apparent that the General Assembly was asking the Court to give an opinion on a precise legal question: was Morocco entitled to claim reintegration of the Western Sahara territory into the national territory of Morocco to which, according to Morocco, it belonged at the time of colonisation by Spain[90])? Judge Gros considered that there was no dispute between Morocco and Spain[91]) — no bilateral dispute which could be detached from the general discussion of the claim of the Government of Morocco to reintegration of the Territory[92]), the two Governments, Morocco and Spain, having explicitly chosen decolonisation in the context of the United Nations[93]). The legal question thus raised by Morocco before the General Assembly, with the support of Mauritania coming only in 1974, might be analysed as a multilateral legal controversy in a debate on the future status of the territory of Western Sahara[94]).

The principal consequence of the apparent confusion, as Judge Gros saw it, in the Opinion of the Court, between the alleged bilateral dispute *(Morocco* v. *Spain)* and a legal question falling within the Advisory competence of the Court, was an erroneous decision taken as to the compo-

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90) *Ibid.*, pp. 69—70.
91) *Ibid.*
92) *Ibid.*, p. 72.
93) *Ibid.*, p. 71.
94) *Ibid.*, pp. 69—70.

sition of the Court — *semble,* the appointment of the *ad hoc* Judge, Judge Boni; and further, the fact that the presentation of the Advisory Opinion amounted to a precise transposition of what was customary in contentious proceedings[95]). On the other hand, Judge Gros also criticised the Court majority for "allow[ing] one of its Members to sit although he had in the United Nations committed himself on one element in the discussion"[96]).

Treating the matter in the form in which it had originated — as an Advisory Opinion proceeding — Judge Gros indicated his doubts as to the propriety of the Court's replying at all to the first question referred to it by the General Assembly, (the *terra nullius* question), on the score that the — "question was not a legal one, that it was purely academic and served no useful purpose"[97]), and here he also accepted Judge Dillard's view that the question was a "loaded" one[98]).

On the second question, (as to the "legal ties"), Judge Gros insisted that not legal ties, but ethnic, religious or cultural ties were involved[99]). The Opinion of Court was — "an idyllic vision of what was a harsh reality"[100]). You could not speak of a legal tie of allegiance, since this was — "a concept of feudal law in an extremely hierarchical society"[101]).

As Judge Gros concluded:

> "The Court cannot attribute a legal nature to facts which do not intrinsically possess it: a court does not create the law, it establishes it. If there is no rule of law making it possible for it to assert the existence of the alleged legal ties, the Court oversteps its *rôle* as a judicial organ by describing them as legal, and its finding is not a legal finding . . . Economics, sociology and human geography are not law . . ."[102]).

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[95]) *Ibid.,* p. 72.

[96]) *Ibid.,* p. 74. The reference was apparently to Vice-President Ammoun, the ground of objection being that he had participated, years before, as a Lebanese national delegate to the U.N. General Assembly, in the debate on Resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples. An objection on the ground of judicial "interest", though obviously relevant in the case of contentious proceedings, might, *a priori,* seem to be odd or improper in the case of the Court's Advisory Opinion jurisdiction, but the precedent is well established by now. See the *Namibia* affair, where the disqualification of three judges, — the President (Sir M. Zafrulla Khan), and Judges Padilla Nervo and Morozov, — was discussed by the Court. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* I.C.J. Reports 1971, p. 27.

[97]) I.C.J. Reports 1975, at p. 74.

[98]) *Ibid.*

[99]) *Ibid.,* p. 75.

[100]) *Ibid.,* p. 76.

[101]) *Ibid.*

[102]) *Ibid.,* p. 77.

All this, in Judge Gros' view, confirmed the — "current trend in the Court to reply to problems which it raises itself rather than to that which is submitted to it" [103]).

Judge Petrén, who had been closely associated with Judge Gros in the Court's decisions in the *French Nuclear Tests* cases [104]), also joined him in the present case, in his Separate Opinion, in adopting much of the reasoning and argument in Judge Gros' Declaration. He had doubts as to the Court's decision to appoint an *ad hoc* judge, querying whether the "legal question actually pending between two or more States" — in the present context, between Morocco and Spain — might not actually have ceased to exist at the time when the Court made its decision on that point: Judge Petrén also considered that the most salient characteristic of the questions referred by the General Assembly to the Court was that they concerned the — "legal categorisation of situations which belong to a time now long past" [105]). For purposes of the stipulation in Art. 65 (1) of the Court Statute that the Court may give Advisory Opinions on "legal questions", could the Court have submitted to it — "questions concerning the legal assessment of situations which have ceased to exist" [106])? Answering his own question in the negative, Judge Petrén declared that the Court —

> "is not an historical research institute. There are numerous problems of the history of law to which no definitive answer has yet been given. Yet no one would think of submitting to the Court the question, for example, of the

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[103]) *Ibid.*

[104]) Judge Gros and Judge Petrén each dissented in the 8 to 6 decision of the Court, on 22 June 1973, to grant interim measures of protection in the *French Nuclear Tests* case, four of the six dissenting judges filing individual Dissenting Opinions (Judges Forster, Gros, Petrén, and Ignacio-Pinto): Nuclear Tests Case *(Australia* v. *France)* Request for the indication of Interim Measures of Protection, I.C.J. Reports 1973, p. 99. In the Court's final judgment of December 20, 1974, rendered by a majority of 9 to 6, four judges who were members of the majority (Judges Forster, Gros, Petrén, and Ignacio-Pinto) filed individual, specially concurring opinions which are sharply critical of the official Opinion of Court and which recur to the basic preliminary, jurisdictional objections raised in their individual dissents in the earlier, Interim Measures judgment: Nuclear Tests Case *(Australia* v. *France),* I.C.J. Reports 1974, p. 253. See the author's discussion, International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Cases, 3 Syracuse Journal of International Law and Commerce 9, at p. 26 *et seq.* (1975); and see generally Franck, Word Made Law: The Decision of the International Court of Justice in the Nuclear Test Cases, 69 A.J.I.L. 612 (1975); Sur, Les affaires des essais nucléaires devant la C.I.J., 79 Revue générale de droit international public 972 (1975).

[105]) I.C.J. Reports 1975, at p. 106.

[106]) *Ibid.,* p. 108.

authenticity of the will of the Emperor Trajan,or whether the invasion of Britain by William the Conqueror was justified"[107]).

In turning to the present case, Judge Petrén denied that any legal question was pending between Morocco and Spain; since Morocco did not dispute the present sovereignty of Spain over the territory, and both Morocco and Spain accepted, for its decolonisation, the application of the resolutions of the General Assembly[108]). While the decolonisation of a territory might raise the question of the "balance to be struck between the right of its population to self-determination and the territorial integrity of one or even of several States", in Judge Petrén's view — "questions of this kind are not yet considered ripe for submission to the Court"[109]).

Judge Dillard joined forces, this time, with Judges Gros and Petrén from whom he had differed on the actual vote though not, seemingly, the main thrust of the reasoning, in the *French Nuclear Tests* case Final Judgment. Judge Dillard queried, from the outset of his Separate Opinion, "both the existence and relevance of any legal question"[110]), the necessary base of any exercise of the Court's Advisory Opinion jurisdiction. As Judge Dillard suggested, — "it was immediately apparent that the two questions were exclusively confined to an historical period and . . . invited an enquiry which, while no doubt historically fascinating, was far removed from any contemporary problem whatever"; and here Judge Dillard dropped a footnote specifically referring to Judge Petrén's Separate Opinion[111]).

As Judge Dillard continued, —

"the notion that a legal question is simply one that invites an answer 'based on law' appears to be question-begging and it derives no added authority by virtue of being frequently repeated. Nor is it apparent that an exclusively historical question could be automatically converted into a legal one merely because of the use of a legal term such as *terra nullius* or because the question itself baptised the term 'ties' with a legal label by referring to them as 'legal ties' a device which also appeared to be question-begging. More important, it seemed difficult to discern any contemporary legal relevance to any answer the Court might give if it were confined to the status of a territory some 90 years ago the title to which was not in dispute then or now.

Finally it did not appear to me sufficient to say that the questions would be rendered legally relevant on the mere assumption that the answers would tend to enlighten the General Assembly in the exercise of its political functions. Absent from this assumption was the notion of contemporary legal relevance"[112]).

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107) *Ibid.*
108) *Ibid.*, p. 109.
109) *Ibid.*, p. 110.
110) *Ibid.*, p. 116.
111) *Ibid.*
112) *Ibid.*, p. 117 (foot-note omitted).

The balance of Judge Dillard's Separate Opinion is a sustained critique of the reasoning in the official Opinion of Court, and particularly that part of the reasoning relating to the existence or otherwise of "legal ties" between the territory of Western Sahara and Morocco and Mauritania. In Judge Dillard's view:

> ". . . A concept of law and hence of 'legal' ties is misconceived if patterned on the kind of sense of obligation which now prevails in post-Reformation western oriented societies. In these societies, ever since the Reformation, the sense of obligation to the sovereign has been sharply focussed on his secular authority which is not only paramount but permits a dissociation between obligations owed to the State and those owed to religious authority.
>
> Concepts of this kind are not applicable to a society, such as prevailed in the Sahara, in which a distinction between *modes* of authority are not sharply delineated and are not part of the consciousness of people. It is artificial, therefore, to say that a tie is not 'legal' merely because it fails to qualify as one in which a sense of obligation is owed vertically to the secular power of someone with authority"[113]).

5. Divisions within the Court: the substantive issue and the "new" International Law

In contrast to these three specially concurring opinions that offer elements, it may be suggested, of veiled dissents directed to the logical analysis and reasoning of the Court majority, are three other specially concurring opinions, coming this time from Third World judges. These latter three opinions, it may also be suggested, come rather close to being veiled dissents from the official Opinion of Court; but the grounds of criticism of the official Opinion of Court go, now, not to procedural, but to substantive law questions, setting in opposition classical International Law doctrine and the so-called "new" International Law.

The strongest and most sustained of these opinions is that of Vice-President Ammoun, who draws very strongly, for his own views, on the arguments advanced in the oral hearings before the Court by the legal representatives of the Republic of Zaire and of the Republic of Algeria who had intervened in the case.

The Senior President of the Supreme Court of Zaire, Bayona-Bastet Meya, Judge Ammoun noted, had, in his pleadings before the Court, gone on to —

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[113]) *Ibid.*, p. 126.

"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 *terra nullius* territories inhabited by populations whose civilisation, in the sense of the public law of Europe, is backward and whose political organisation is not conceived according to Western norms . . . This is the reply which may be given to the participants in the Berlin Conference of 1885 ..." [114]).

Judge Ammoun then adopted with approval the reasoning of Ambassador Mohammed Bedjaoui of Algeria who, in his pleadings before the Court, identified three distinct epochs in the evolution of the International Law as to acquisition of title to territory:

(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 civilised State was *nullius* [115]).

In short, Judge Ammoun concluded, —

"the concept of *terra nullius*, employed at all periods to the brink of the twentieth century, to justify conquest and colonisation, 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*" [116]).

In the context of the present case, Judge Ammoun then turned to the principle of self-determination and specifically to what he described as "the legitimate struggle for liberation from foreign domination", the legitimacy of which he saw as affirmed by the General Assembly "in at least four resolutions . . . which taken together already constitute a custom" [117]).

Nothing, in Judge Ammoun's view, more clearly showed the will for emancipation than that struggle for liberation — ". . . more decisive than a referendum, being absolutely sincere and authentic" [118]). On this basis,

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[114]) *Ibid.*, pp. 85–6.
[115]) *Ibid.*, p. 86.
[116]) *Ibid.*, pp. 86–7.
[117]) *Ibid.*, p. 99.
[118]) *Ibid.*, p. 100.

Judge Ammoun rejected the Spanish Government's plea for a referendum to determine the future status of Western Sahara, Judge Ammoun accepting here certain statements by the Spanish Foreign Ministry which indicated, in his view, that the Spanish campaign for a referendum was linked to the — "recognition in favour of Spain, . . . 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"[119]).

Judge Ammoun was joined, in his discussion of the spatially and temporally limited, "Western" or "classical" International Law character of the concept of *terra nullius,* by Judge Forster who, in his Separate Opinion, indicated his disagreement with the majority Opinion of Court so far as the Opinion of Court concluded that the materials and information presented to it did not establish any ties of territorial sovereignty between Western Sahara and the Kingdom of Morocco and the Mauritanian entity. The Opinion of Court, in Judge Forster's opinion, went too far in —

> "minimising the exceptional importance of the geographical, social and temporal contexts of the problem . . . It is Africa of former times which is in question, as to which it cannot arbitrarily be required that its institutions should be a carbon copy of European institutions, for on that basis almost the entire African continent would have to be declared *terra nullius*"[120]).

This was a theme recurred to by *ad hoc* Judge Boni who, in his Separate Opinion, also reproached the majority Opinion of Court for not having —

> "taken sufficient account of the local context. As regards Morocco, insufficient emphasis has been placed on the religious ties linking the Sultan [of Morocco] and certain tribes of the Sakiet El Hamra. For these tribes, the Sultan was Commander of the Faithful, that is to say, the Steward of God on earth for all matters, whether religious or not. He was thus regarded not only as religious leader but as director of their temporal affairs. The legal ties between them were thus not only religious — which no one denies — but also political, and had the character of territorial sovereignty[121]).
>
> The solution which I advocate, and which confers a character of territorial sovereignty on the ties that existed between Morocco and Western Sahara, leads to the same conclusion: obligatory consultation of the inhabitants of Western Sahara on their future, in pursuance of General Assembly Resolution 1514 (XV)"[122]).

[119]) *Ibid.,* p. 101.
[120]) *Ibid.,* p. 103.
[121]) *Ibid.,* p. 173.
[122]) *Ibid.,* pp. 173–4.

6. Divisions within the Court: mixed procedural and substantive conflicts

The remaining special Declarations and Separate Opinions appended to the Opinion of Court and also the lone Dissenting Opinion, do not present the same clear-cut joinders of issue with the official majority position as do, on the one hand, those opinions, in the positivistic, "classical" International Law stream that fault the majority for its handling of the procedural, adjectival law, jurisdictional issue; and, on the other hand, those opinions that would go well beyond the official majority position on the substantive issues in seeking an express rejection of the "classical" International Law doctrine as to territorial sovereignty and its modes of acquisition and an affirmative proclamation of a "new" International Law position in keeping with contemporary World Community expectations.

Thus, Judge Ignacio-Pinto, in a brief, one-page Declaration, rallied to Judge Petrén's position in characterising the substantive questions posed by the General Assembly to the Court as being —

> "loaded questions, leading in any case to the answer awaited in this particular instance, namely the recognition of rights of sovereignty of Morocco on the one hand and of Mauritania on the other over some part or other of Western Sahara" [123]).

Judge Nagendra Singh, for his part, devoted his short Declaration to issues, variously, of fact-finding — for example, the lack of evidence, at the time of Spanish colonisation, of the existence of one single State, comprising the territory of Western Sahara and either Morocco or Mauritania, which would have been dismembered by the coloniser and thus justify re-union on decolonisaton [124]). Judge Nagendra Singh also discussed the relations of the Court to the General Assembly, suggesting that even if the procedures for decolonisation lie within the exclusive province of the General Assembly, the Court does not trespass on the prerogatives of the General Assembly in pointing out the — "relationship between the existence of the legal ties and the decolonisation process" [125]). He finally turned to the principle of self-determination, with the comment that — "the consultation of the people of the territory awaiting decolonisation is an inescapable imperative whether the method followed on decolonisation is integration or association or independence" [126]).

[123]) *Ibid.*, p. 78.
[124]) *Ibid.*, pp. 79—80.
[125]) *Ibid.*, p. 80.
[126]) *Ibid.*, p. 81.

Judge Ruda, the lone Judge to file a formal Dissenting Opinion, expressly denied the existence, at the time of Spanish colonisation, of "legal ties" between the Kingdom of Morocco and the territory of Western Sahara. In his view, those legal ties of allegiance and authority described in the Opinion of Court were not legal ties, but "merely personal ties"[127]); and he was not convinced that the various letters and documents mentioned in the Opinion of Court or any other information submitted to the Court afforded — "clear indication of permanent, real and manifested acceptance either of allegiance or of the Sultan's political authority over tribes in Western Sahara"[128]). On the other hand, Judge Ruda indicated, he voted in favour of the existence of legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara because the ties here were, — "in my view, legal ties of a territorial character"[129]). Judge Ruda's Dissenting Opinion is a short (two-page) opinion and, as the lone formal Dissenting Opinion, it contrasts sharply with some of the key concurring opinions — both special Declarations and Separate Opinions — in respecting the principle of comity and deference, on the part of a judicial minority, to the official majority judicial position as expressed in the Opinion of Court.

Finally, Judge De Castro, as a permanent member of the Court but one also cast in the *rôle*, as the national of one of the interested parties, Spain, of balancing the *ad hoc* Judge, Judge Boni, filed a Separate Opinion, — in this case much the longest opinion — 46 pages, — of any opinion apart from the Opinion of Court. The range of Judge De Castro's Opinion is very wide: he notes, for example, "the existence of 'new aspects to the problem of the Sahara' — economic aspects (the Bu Craa deposit) and political aspects (Morocco's relations with Mauritania and Algeria)"[130]).

On the preliminary, jurisdictional question, Judge De Castro noted that the Court's Advisory Opinion jurisdiction is predicated upon the existence of a "legal question"[131]); and he quoted with approval Charles De Visscher's definition that a legal question is "any question capable of receiving an answer based on law", and that the Court would refrain from replying to a question which "depended upon considerations extraneous to

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[127]) *Ibid.*, p. 175.
[128]) *Ibid.*, pp. 175–6.
[129]) *Ibid.*, p. 176.
[130]) *Ibid.*, p. 129.
[131]) *Ibid.*, pp. 137–8.

the law"[132]). Judge De Castro concluded that the question of the existence of ties at the time of the colonisation by Spain could not be capable of receiving an answer based on law, since — "the answer would have to be based on the proof of historical facts", and this notwithstanding that — "the old Court was not afraid of studying historic rights, even going back to the year 900"[133]).

On the question of the ties existing at the time of the colonisation of the territory of Western Sahara by Spain and their legal efficacy, Judge De Castro had some interesting comments: did these ties —

> "have the validity of acquired rights, unaltered by the passage of time, or of contingent rights which could still be exercised, or were they subject to the rules of intertemporal law? The question is not a new one; it is a question of the validity of historic rights"[134]).

As Judge De Castro noted, the Court had already had to consider the validity of legal ties in accordance with intertemporal law, and he cited the *Minquiers and Ecrehos* case[135]) as authority for the proposition that the Court does not find it necessary to "deal with pointless historical controversies", and that an — "original title ceases to be valid if there are new facts to be considered on the basis of new law"[136]).

In the present context, Judge De Castro felt,

> "changes of facts and changes in the law to be applied cannot be ignored. Just before colonisation by Spain, the territory had a status which was governed by the law in force at that time. But that status had not crystallised and was not fixed *ad aeternum.* It was subject to changes in the times.
>
> First of all, there was colonisation. Colonisation is now condemned to die out; but the colonial fact was a new fact with sociological and legal implications"[137]).

Judge De Castro's conclusion was that the legal ties, such as they were, that Morocco or Mauritania might have had with the territory of Western Sahara at the time of colonisation by Spain were subject to the rules of intertemporal law; and this, in his view, meant that those ties "cannot stand in the way of the application of the principle of self-determination"[138]), a proposition that he had interpreted as connoting the —

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[132]) De Visscher, Théories et réalités en droit international public, p. 431 (1955); I.C.J. Reports 1975, p. 140.

[133]) I.C.J. Reports 1975, p. 140.

[134]) *Ibid.*, p. 168.

[135]) I.C.J. Reports 1953, p. 56.

[136]) I.C.J. Reports 1975, p. 168.

[137]) *Ibid.*, p. 169.

[138]) *Ibid.*, p. 171.

"principle that the peoples of non-self-governing territories have the right to decide upon their own destiny and to decide freely, and by democratic means, either to become independent or to become integrated with an independent State"[139]). In the special context of the Spanish Government's announced policy on decolonisation of the territory of the Western Sahara, at the time of the Court's hearings and the Court's decision, this implied the Spanish Government's holding of a referendum within the territory[140]).

7. Conclusions

(a) Internal Court organisation

The most immediately noticeable element in the Court's work in the *Western Sahara* Opinion is the lack of unity and of internal cohesiveness and cooperation on the part of the individual Judges, a condition that is not merely not covered over by the apparent near unanimity of the final judicial votes but that seems actually accentuated by the antinomy between the voting consensus and the opinion-writing dissonance. By Anglo-Saxon, Common Law Court standards, the Opinion of Court cannot be said to represent a reasonable balance or compromise between the majority judges — a lowest common denominator, at least, of agreement between them as to substantive conclusions and as to the reasoning in support thereof[141]).

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[139]) *Ibid.*, p. 170.

[140]) *Ibid.*, p. 170, foot-note 1.

[141]) Stylistically, the official Opinion of Court in *Western Sahara* bears all the external evidence of a composite opinion, with two distinct segments, — one concerning the preliminary, jurisdictional issue, and the other the substantive issues of territorial sovereignty and national self-determination — which presumably are the work of different judicial authors. The Resolution concerning the internal judicial practice of the Court, *op. cit.* (note 6) adopted on 5 July 1968, provides, as we have noted, for a drafting committee for any matter, chosen by secret ballot of the Court and by an absolute majority of votes, and composed of — "two judges . . . elected from among those Members of the Court whose oral statements and written notes have most closely and effectively reflected the opinion of the Court as a whole"; with the President of the Court to be *ex officio* a member of the drafting committee unless he is among the dissenters, and failing the President the Vice-President, and failing the Vice-President a third elected judge with the senior elected judge to preside in the drafting committee in this latter situation (Art. 6).

As adopted, the Resolution on Internal Judicial Practice of the Court would appear to envisage collective, collegial work on the part of the three-man majority drafting

It may well be a tribute to the powers of intellectual leadership and influence of the then President of the Court that he should have been able to marshall such a decisive judicial vote in favour of the Court's final conclusions[142]); but factors in the Court's internal organisation and practice as well as genuine philosophical differences or personality conflicts, seem to have contributed to the judicial votes' not being accompanied — more properly, perhaps, preceded — by an equivalent policy or doctrinal consensus.

It is almost impossible to extract what Common Lawyers call a *ratio decidendi* or common principle of decision from the Opinion of Court and the accompanying majority Declarations and Separate Opinions. Tested by Common Law judicial standards these Declarations and Separate Opinions seem to miss the point of a judicial special concurrence. For they read rather like a collection of judicial essays, with the individual judicial authors feeling free, on occasion, to make a personal *tour de force* or to take debating points against the official Opinion of Court, instead of applying the normal canons of judicial self-restraint of municipal tribunals and limiting themselves to a brief statement of what they accept in the official Opinion and where and for what legal reasons they would regard them-

committee; but there is nothing excluding the committee's acting as the Privy Council did and having a single strong judicial personality act as *rapporteur* and prepare the final majority Opinion of Court himself. This particular part of the Court's decision-making process is, it has been suggested, veiled in secrecy as to its actual practice. Lillich/White, The deliberative process of the International Court of Justice: a preliminary critique and some possible reforms, 70 A.J.I.L. 28, 35 (1976); though see Rosenne, The International Court of Justice, An Essay in Political and Legal Theory (1961), at pp. 416—20. Judge Gros, in a perceptive analysis of the Court's internal decision-making and opinion-writing practice, stresses the influence of the P.C.I.J., in the early, formative years of the Court, as controlling in establishing present day patterns:

"The great jurists of the years 1922—1940 were accustomed to research and to work conducted individually and without either meetings or frequent confrontations. Nothing shows this better than the refusal of the Court, right from its opening session, to institute *rapporteurs,* — a familiar practice in the highest jurisdictions of numerous countries". Gros, Observations sur le mode de délibération de la Cour Internationale de Justice, in: Studi in onore di Gaetano Morelli, Il processo internazionale, p. 377, at p. 380 (1975).

[142]) It is, in this regard, surely rather arch to essay the general comment as to the Court's opinion-writing, without citing any evidence in support thereof, — "Since 1968, however, the President's membership has been of the *ex officio* variety: presumably he does no actual drafting". Lillich/White, *op. cit.,* 70 A.J.I.L. 28, at 36 (1976). As to the Presidency generally, see Rosenne, The International Court of Justice, *op. cit.,* p. 152 *et seq.;* Rosenne, The World Court. What it is and how it works (1962), at p. 62 *et seq.*

selves as unable to accept that official Opinion[143]). Some of these special Declarations and Separate Opinions might possibly better have been deposed as Dissenting Opinions[144]), with the individual authors accepting, then, the concomitant obligation of precisely defining and limiting their intellectual legal disagreements with the official Opinion of Court. By way of comparison, Judge Ruda's lone formal Dissenting Opinion might, perhaps, be taken as a model of how to express – succinctly and

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[143]) The Resolution concerning the internal judicial practice, *op. cit.* (note 6) adopted on 5 July 1968, though not providing, in terms, for control over the content, form, or tone of Separate or Dissenting Opinions, seems, nevertheless, to envisage some form at least of internal Court scrutiny prior to publication, in stipulating that the texts of any such proposed opinions are to be delivered to the Court after the first reading of the draft Opinion of Court is concluded and within a time-limit fixed by the Court (Art. 7 (ii)); and that, in the course of the second reading of the Opinion of Court, judges who are delivering Separate or Dissenting Opinions are to inform the Court of changes they propose to introduce into the text of their opinions by reasons of the changes made in the draft Opinion of Court (Art. 7 (iv)).

Anand comments on "discordant notes of varied intensities, [which], it is sometimes asserted, create disharmony and bad taste . . . There have also been some complaints about the unseemly use of language and bitter tone of dissents, especially during the *régime* of the International Court, which are full of criticism of the Court's judgments instead of offering 'objective and judicial' exposition of the views of the writer, as was generally the case during the life of the Permanent Court". Anand, The *rôle* of Individual and Dissenting Opinions in International Adjudication, in: Studies in International Adjudication, p. 191, at pp. 192–3 (1969).

Several members of the Court have, in the past, gone on public record as to the obligation on the part of judges strictly to construe and limit the *rôle* of Dissenting Opinions, in order to prevent abuses – notably Judge Basdevant and Judge Krylov: Krylov suggested that it is the President's "delicate task" to implement this principle of judicial self-restraint on the part of dissenting judges. Rosenne, The International Court of Justice, *op. cit.* (note 141), at p. 417. Judge Gros is inclined to blame the Court's own rules as to internal judicial practice as having "created a reflex of waiting which does not contribute to the development of a truly collegial justice". Gros, Observations, *op. cit.* (note 141), p. 377, at p. 384. As to the Court's practice and procedure generally, see Petrén, Quelques réflexions sur la revision du règlement de la Cour Internationale de Justice, in: Mélanges offerts à Charles Rousseau, La communauté internationale, p. 187 (1974); Jiménez de Aréchaga, The Amendments to the Rules of Procedure of the International Court of Justice, 67 A.J.I.L. 1 (1973).

[144]) A criticism that Professor Leo Gross advances in regard to the Court's Advisory Opinion in *Admission of a State to the United Nations* (Charter, Article 4), I.C.J. Reports 1948, p. 15: Gross, The International Court of Justice and the United Nations, 2 Recueil des Cours 313, at 406 (1967). And see also Gross, Election of States to United Nations Membership, [1954] Proceedings, American Society of International Law 37. And see also Sur, *op. cit.* (note 104), p. 972, at pp. 1016–1018.

appositely, — individual judicial grounds of disagreement with an official majority Opinion of Court.

Criticisms of this character tend, of course, to reflect Common Law judicial standards and tests as they are generally recognised and accepted in the Common Law world. Looking to the Court as it now exists, however, several factors in its distinctive internal organisation and practice may fairly readily be identified as contributing factors in the weaknesses manifested in the *Western Sahara* Opinion. The President of the Court is elected for a term of three years[145]), and though he is legally eligible for re-election[146]), by convention and practice within the Court he never is, and the office rotates within the Court[147]). The convention as to rotation of the Presidency on the World Court, perhaps inevitable politically with a multinational tribunal, might, under ideal circumstances, encourage and assist collegiality and a sense of collective responsibility on the part of the Court as a whole; but it weakens the possibilities of long-term leadership and direction which, in the case of a multi-national international tribunal, would seem to be far more necessary than with a relatively more homogeneous and predictable national court. Again, the factors normally making for collegiality in a national tribunal which could compensate for any lack of intellectual authority and influence in the Chief Justiceship where that office either changes frequently through death and retirement or else where it may happen to have a weak incumbent — namely, continuity of service and experience on the part of a number of senior Justices — are hardly present with a tribunal like the World Court whose members are elected for a term of years, nine years, only[148]), and who, though eligible for re-election[149]), may not, for reasons of their normally fairly advanced age, choose to run again, or else may not, in fact, because of the operation of political factors in the system of elections to the Court[150]), be re-elected.

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[145]) Statute of the International Court of Justice, Art. 21 (1).

[146]) *Ibid.*

[147]) Only one President, J. G. Guerrero of El Salvador, has been re-elected to date and that fact may be attributed to unique circumstances related to the Second World War and the transition, after the war, from the P.C.I.J. to the I.C.J.: Judge Guerrero was the last President of the old Permanent Court (from 1936 to 1946), and the first President of the new Court (from 1946 to 1949), and his nine successors as President have all been limited to a single, three-year term. Documents on the International Court of Justice (Rosenne, ed.), pp. 329—334 (1974).

[148]) Statute of the International Court of Justice, Art. 13 (1).

[149]) *Ibid.*

[150]) The system of the double majority — in the General Assembly and the Security Council — required for purposes of election to the Court, in terms of the Court

Thus the authors of two of the more interesting opinions in the *Western Sahara* case — Judge Petrén, with his important contribution to an emergent, analytical positivist strain of interpretation on the Court, and Vice-President Ammoun, with his innovatory opening towards the "new" International Law, — are no longer members of the Court, Judge Petrén having been defeated in his candidacy for re-election at the regular, triennial elections to the Court in the Autumn of 1975, and Vice-President Ammoun not having presented his candidature at that time. By way of comparison, the Indian Supreme Court and the Canadian Supreme Courts, which have usually had quite short terms for their presiding officers through a fairly general tradition of promoting the most senior Associate Justice in length of service when the Chief Justiceship falls vacant, have been able effectively to counter-balance any incidental weaknesses in their presidency by an acceptance of collegial responsibility on the part of the senior Associate Justices who, once appointed, hold office until retirement on reaching a fixed age limit[151]). The West German Federal Constitutional Court which, perhaps more nearly than other national tribunals, serves as an analogue to the World Court in regard to judicial selection in that its judges are also elected for a term of years only, has been able to obtain substantial continuity in its membership through

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Statute, Arts. 4 (1), 10 (1) and 10 (3), seems to impose special hazards on the chances of candidates from the smaller or non-affiliated countries. See generally Rosenne, The International Court of Justice, *op. cit.* (note 141), pp. 136—142; Documents on the International Court of Justice, *op. cit.* (note 147), pp. 337—349.

At the same time, the increasing politicisation of the processes of election in the aftermath of the Court's one-vote majority decision in the *South West Africa* case in 1966 clearly implies closer scrutiny than heretofore of the political values or political preferences of the individual judicial candidates. As Dr. (now Judge) Elias comments: "Given the new impetus from 'the third world', there does not appear to be any likelihood of a return to the old order in which Europe dominated the Bench. This is not to say that Western Europe would in future be under-represented. Rather, it is that Western European candidates of the future would stand a far better chance of being elected if they had or were thought to have liberal or progressive views *vis-à-vis* the problems of 'the third world'". Elias, in: Judicial Settlement of International Disputes, *op. cit.* (note 2), p. 19 at p. 26. Elias ascribes, in particular, the failure of the Australian jurist, Sir Kenneth Bailey, to secure election to the Court in 1966 in part to the fact that he was considered to be "narrow and conservative", and in part to political back-lash against the Court's 1966 *South West Africa* decision and the crucial *rôle* played in that one-vote majority decision by the second, tie-breaking vote exercised by the Court's retiring President, Sir Percy Spender, who was of the same nationality as Bailey. *Ibid.*, at pp. 26—7.

[151]) See generally the author's Judicial Review, at p. 217 *et seq.* (4th ed. 1969).

the operation of the party political system in the appointment and re-appointment of judges through the system of indirect, Parliamentary elections enjoined by West German constitutional law for the Associate Justiceships and also the Presidency and Vice-Presidency of that Court [152]). The World Court is, as we have remarked, sufficiently distinctive in its internal organisation and practice, — neither strictly Common Law nor strictly Civil Law — to be labelled as *sui generis;* yet it would seem, by the same token, to have the major strengths and advantages of neither one system nor the other.

(b) Court jurisdiction. The Advisory Opinion jurisdiction

One of the two strong elements of disagreement, within the Court majority in the *Western Sahara* Opinion, related, as we have noted, to the Court's jurisdiction to grant an Advisory Opinion and to whether, in particular, there was a "legal question" present for purposes of Art. 96 of the U.N. Charter and Art. 65 of the Court Statute. The Court, for these purposes, characterised the Permanent Court's holding in the *Status of Eastern Carelia* [153]), as having "no parallel" and being "entirely different" — a distinction that the Court related to the facts, first, that Spain, unlike the Soviet Union in *Eastern Carelia,* was both a party to the Statute of the Court and also a Member, at the time, of the relevant World organisation [154]); and, second, that Spain, unlike the Soviet Union in *Eastern Carelia,* had actively participated in the Advisory Opinion proceedings before the Court and "furnished very extensive documentary evidence of the facts", so that there was no issue of "inadequacy of the evidence", as in *Eastern*

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[152]) See the author's Constitutionalism in Germany and the Federal Constitutional Court, at p. 41 *et seq.* (1962); Leibholz, Der Status des Bundesverfassungsgerichts, in: Das Bundesverfassungsgericht, at p. 61 *et seq.* (1963); Leibholz/Rinck, Grundgesetz für die Bundesrepublik Deutschland, at p. 686 *et seq.* (4th ed. 1971); Laufer, Verfassungsgerichtsbarkeit und politischer Prozess, at p. 206 *et seq.* (1968); Laufer, Typus und Status des Bundesverfassungsgerichts, in: 2 Die Moderne Demokratie und ihr Recht (Festschrift für Gerhard Leibholz zum 65. Geburtstag) (Bracher *et. al.* eds.), at p. 427 (1966); Kutscher, Die Kompetenzen des Bundesverfassungsgerichts 1951 bis 1969, in: Festschrift für Gebhard Müller zum 70. Geburtstag des Präsidenten des Bundesverfassungsgerichts (Ritterspach/Geiger, eds.), at p. 161 (1970).

[153]) *Status of Eastern Carelia,* Advisory Opinion of 23 July 1923, P.C.I.J. Series B, No. 5, p. 7.

[154]) I.C.J. Reports 1975, p. 24.

Carelia, operating, "for reasons of judicial propriety", to prevent the Court from giving an opinion[155]).

That being so, it might still have been better for the Court, if it could not, in Common Law terms, "overrule" *Eastern Carelia,* at least to have indicated more substantial reasons for "distinguishing" it in the present case – perhaps, a "political questions"-style limitation, that the World Court, no more than national courts, does not like to act in vain and must recognise the limitations of effectiveness[156]) where it seeks to operate adversely to a Great Power in the absence of that Great Power's full and genuine consent to jurisdiction on the part of the Court. Such a policy consideration, it may be suggested, operated as an inarticulate major premise to the Court majority's holding in the Final Judgment in the *French Nuclear Tests* case in 1974[157]), and it would seem to make good sense now also in the contemporary re-interpretation and application of the *Eastern Carelia* holding of 1923.

Looking, however, to the apparent *ratio* of *Eastern Carelia* and comparing it to the facts of the instant case, it seems difficult to avoid the conclusion that in the instant case an actual dispute *inter partes* was decided, or at least ruled upon tangentially, in the interstices of an Advisory Opinion proceeding. It was, of course, a dispute *inter partes* the participants in which, and also their degree of mutual opposition and common interest, may be said to have changed significantly during the pendency of the proceedings before the Court and certainly after the Court's actual holding [as to which, see *infra*]; but that would not change the character of the proceedings in *Western Sahara* as inherently adversary, though reaching the Court in the guise of an Advisory Opinion proceeding. It might, of course, be submitted that granted the limitations to the number of States adhering to

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[155]) I.C.J. Reports 1975, pp. 28–9.

[156]) Compare De Visscher, Les effectivités du droit international public, p. 151, at p. 160 (1967); De Visscher, *op. cit.* (note 132), at p. 410 *et seq.;* Verzijl, The Jurisprudence of the World Court, A case by case commentary, at pp. 50–2 (1967); Lauterpacht, The Development of International Law by the International Court, at p. 352 *et seq.*(1958); Gross, 2 Recueil des Cours 313, at 412–3 (1967); Hambro, The Authority of the Advisory Opinions of the International Court of Justice, 3 I.C.L.Q. 6, at 19–20 (1954); Lachs, Perspectives pour la fonction consultative de la Cour Internationale de Justice, in: Studi in onore di Gaetano Morelli, Il processo internazionale, p. 423, at p. 436 (1975).

[157]) Nuclear Tests Case *(Australia* v. *France)* (Judgment), I.C.J. Reports 1974, p. 253; and see International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Cases, 3 Syracuse J. Int'l L. & Com. 9, at 39 *et seq.* (1975).

the Court's compulsory jurisdiction and the very serious reservations that so many of those States would apply to their own acceptance of that jurisdiction, it is reasonable for a tribunal that is starved as to number and range of matters coming before it, to welcome the opportunity for filling the gaps in its calendar through liberal, expansive interpretation of its Advisory Opinion jurisdiction. The risk of over-ready recourse to that Advisory Opinion jurisdiction is, of course, subject to control in that that jurisdiction may only be invoked by the U.N. General Assembly or Security Council, or by other U.N. organs and specialised agencies when expressly so authorised by the General Assembly[158]). Insofar as the General Assembly is a body of coordinate authority to itself, the Court owes it a certain duty of deference under ordinary principles of intra-governmental comity. Such a judicial policy seems implicit in the Court's deriving, with approval, from its holdings in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*[159]), and from *Nambia*[160]) the proposition that — "only

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[158]) Charter of the United Nations, Art. 96. The earlier warning by Judge Manley Hudson, in the era of the old P.C.I.J., against carrying too far any policy of assimilating the Advisory to the contentious procedure of the Court, lest the Advisory Opinions come to be regarded as a "species of judgment" and the "advisory jurisdiction be regarded as an alternative to obligatory jurisdiction, and this might result in diminishing the frequency of requests for advisory opinions", is presumably counterbalanced, in the case of the present Court, by the stricter political control capable of being exercised over access to the Court's Advisory Opinion jurisdiction, by the Security Council and, especially, by the General Assembly. Hudson, The Permanent Court of International Justice 1920—1942, at p. 523 (1943); Gross, 2 Recueil des Cours 313, at 405 (1967). Judge Lachs notes that the Advisory Opinion procedure has continued to be assimilated to the contentious procedure of the Court: Lachs, *op. cit.* (note 156), pp. 423, 426; while Professor Jennings suggests that the procedure of the Advisory Opinion, with its machinery of notice to all interested parties (Statute of the International Court of Justice, Art. 64 (2)) — and its possibility of hearing arguments from governments generally as well as the United Nations, is ideally suited to cases "of general constitutional interest", and this may account for its increasing usage. Jennings, in: Judicial Settlement of International Disputes, *op. cit.* (note 2), p. 35, at p. 45. For comparison of the relative facility of intervention by States in contentious proceedings, (Court Statute, Arts. 62 and 63) and in Advisory Opinion proceedings, see Hambro, Intervention under Article 63 of the Statute of the International Court of Justice, in: Studi in onore di Gaetano Morelli, Il processo internazionale, p. 387 (1975).

[159]) I.C.J. Reports 1950, p. 72.

[160]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* I.C.J. Reports 1971, p. 27.

'compelling reasons' should lead it to refuse to give a requested Advisory Opinion"[161]); and from its express invocation from *Peace Treaties* of the broader, more facultative view of its Advisory Opinion jurisdiction:

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it: the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the organisation, and, in principle, should not be refused"[162]).

(c) Philosophic differences within the Court

More slowly, perhaps, than might have been anticipated after the Court's much-criticised decision in the *South-West Africa* cases in 1966 and the resultant increasing politicisation of the processes of election of Members of

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[161]) I.C.J. Reports 1975, p. 12, at p. 21.

[162]) *Peace Treaties*, I.C.J. Reports 1950, p. 71; cited with approval, I.C.J. Reports 1975, p. 12, at p. 24. As Gross sums up the "distinguishing", in *Peace Treaties* (1950), of the P.C.I.J. holding in *Eastern Carelia* (1923):

"Seeing itself, as the Court stated categorically in the *Peace Treaties* case, in the *rôle* of organ of the United Nations, albeit a judicial organ, the Court was in principle willing to participate in the activities of the Organisation. It was the Court which made the categorical statement that its Opinions had no binding force, that they were not given to the State but to the requesting organ, and that no State could prevent the giving of an Advisory Opinion which, not the Court, but the United Nations 'considers to be desirable in order to obtain enlightenment as to the course of action it should take'. The Court maintained that the case before it, the *Peace Treaties* case, was 'profoundly different' from the *Eastern Carelia* case. It is suggested that it was rather the perception of its *rôle* which was 'profoundly different' from that of the Permanent Court". Gross, 2 Recueil des Cours, 313, at 415–6 (1967); and see also Gross, Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice, 17 International Organisation 1, at 26–7 (1963).

Judge Lachs has gone on record to the effect that the Court ought to facilitate requests for Advisory Opinions, in order to "breathe new life into Articles 92 and 96 of the Charter": Lachs, *op. cit.* (note 156),p. 423, at pp. 436–7. And see generally De Visscher, Aspects récents du droit procédural de la Cour Internationale de Justice, p. 195 *et seq.* (1966); Chacko, The possible expansion of the Advisory Jurisdiction of the International Court of Justice, in: Essays on International Law in Honour of Krishna Rao (Nawaz, ed.), p. 214 (1975).

the Court as the new Third World majority became aware of its voting strength in the General Assembly, philosophic differences are appearing within the Court that mirror, in measure, the gap between "classical" International Law doctrine and the so-called "new" International Law. These philosophic differences were manifested, in *Western Sahara,* in the conflict as to the legal status of the territory of Western Sahara at the time of Spanish colonisation on the stipulated date of 1884, and as to the spatial-temporal rules to be applied to determine that legal status. What was involved, in terms of legal doctrine, was a contemporary and quite comprehensive re-examination of the doctrinal notion of Intertemporal Law. For those Members of the Court, in *Western Sahara,* who might fairly to be said to represent the more "classical" International Law approach, the application of Intertemporal Law seemed to call for judging the legal significance today of actions and attitudes in the territory of Western Sahara in 1884 in terms of International Law doctrine and its special categories as to territorial sovereignty and acquisition of title thereto, in the condition in which that doctrine actually existed as at 1884. Intertemporal Law, on this view, required for purposes of present-day analysis and classification, a jelling of International Law doctrine in point of time, 1884; and, insofar as International Law doctrine was in fact, in 1884, essentially derived from Western State practice over the 250 years of the development of "modern" International Law founded on societies on the rise of commerce, a jelling of International Law in point of space also — the predominantly Western-based classical International Law.

On the other hand, those Members of the Court reflecting more directly and immediately the trends away from classical International Law doctrine towards the "new" International Law seemed to be arguing, essentially, that in interpreting the legal significance today of historical events in the territory of Western Sahara in 1884, the relevant legal criteria were not simply those that might have been applied to the dispute if it had actually arisen and been decided in 1884, but the classical International Law categories as to territorial sovereignty as informed by contemporary awareness of their special space-time origins and limitations. For, in effect, the Zaire and Algerian arguments, as adopted expressly by Vice-President Ammoun and also in essence by Judge Forster and *ad hoc* Judge Boni, involved the proposition that where classical International Law doctrine, as at 1884, — based as it was on strictly Western-type society and strictly Western political relationships, — would, if applied, deny the existence of ties of legal sovereignty between the territory of Western Sahara on the one hand and Morocco and Mauritania, a more flexible and imag-

inative interpretation of the classical International Law doctrine so as to take account also of non-Western patterns of society and social organisation would yield a quite different answer. Such a result might be beyond the logical possibilities inherent in Intertemporal Law as it has, so far, tended, — somewhat conservatively perhaps, — to be defined and applied in International Law doctrine[163]); but it would not appear to be beyond the intellectual capacities of either of the two main classical legal strains from which International Law doctrine derives — the Common Law, under the rubric of progressive, generic interpretation; and the Civil Law, in terms of Gény's notion, as applied to the *Code Napoléon,* of *la libre recherche scientifique*[164]) and of teleological or purposive interpretation generally. International Law today thus presents not merely an intertemporal but also an inter-cultural aspect[165]), and its specialised techniques and reasoning should be as capable of responding, flexibly, to the one as to the other.

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[163]) The Institut de Droit International has defined the "general intertemporal problem" as being the "delimitation of the temporal sphere of application of norms", and has gone on to stipulate: —

"1. Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it". Institut de Droit International, The Intertemporal Problem in Public International Law. (Resolution adopted at Wiesbaden, August 11, 1975). And see, Le problème dit du droit intertemporel dans l'ordre international (Provisional Report and Definitive Report, Eleventh Commission) (Sørensen, *rapporteur),* 55 Annuaire de l'Institut de Droit International 1 (1973).

[164]) Gény, Méthode d'interprétation et sources en droit privé positif, Essai critique, p. 74 *et seq.* (1899).

[165]) This notion seems implicit in Judge Lachs' observations in response to the Institut de Droit International's Provisional Report: "A truly appropriate method would consist in taking into consideration at once the conflict of the norms and the validity and the interpretation of the one norm in time: otherwise stated, the intertemporal application of law. This last element appears to me particularly important at an epoch where life evolves so quickly and where certain rules of international law become out-dated in the space of a generation, or must be rethought on new and entirely different bases". 55 Annuaire de l'Institut de Droit International 1, at 69 and 106 (1973). And see also Doehring, Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln, Jahrbuch der Max-Planck-Gesellschaft (1964), p. 70, at p. 75 *et seq.* and pp. 88—9; Krause-Ablass, Intertemporales Völkerrecht, Der zeitliche Anwendungsbereich von Völkerrechtsnormen (1970); Fitzmaurice, The Future of Public International Law and of the International Legal System in the circumstances of today, Institut de Droit International, Livre du Centenaire 1873—1973; Evolutions et

(d) The Court and international problem-solving

The *Western Sahara* affair, at the time it reached the Court, involved a dispute between Spain on the one hand and Morocco and Algeria on the other, with Zaire and Algeria intervening, so to speak, as "friends of court" and presenting arguments denying an effective Spanish acquisition of sovereignty at the time of Spanish colonisation in 1884 [166]). The Court's majority ruling, in the Advisory Opinion, that "legal ties", even if not ties of formal sovereignty, existed between the territory of Western Sahara on the one hand and the Kingdom of Morocco and also the Mauritanian entity, undoubtedly encouraged Morocco in the political pursuit of its objective of unification or integration of a decolonised Western Sahara with Morocco. The Court's Advisory Opinion ruling was rendered on October 16, 1975. On the same day, King Hassan of Morocco anounced his "green march", — stated to be a peaceful movement of 350,000 volunteer civilians, ten percent of whom were to be women, — to recover the territory [167]). While Spain, and also Algeria, threatened force to keep Morocco out of the Western Sahara territory [168]), and U.N. Secretary-General, Kurt Waldheim, proposed mediation between the parties — now defined as being Spain, Morocco, Mauritania, and Algeria — and a temporary United Nations administration of the territory pending a referendum to determine the wishes of the population which would be held within six months, King Hassan, on November 9, 1975, suddenly called off the "green march" and ordered the Moroccan "volunteers" to return home [169]). It was then reported that on November 14, 1975, Spain, Morocco, and Mauritania had made a tripartite agreement for a Spanish withdrawal from the Western Sahara territory, to take place on February 28, 1976, leaving the territory to a provisional administration formed by Morocco and Mauritania. The

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perspectives du Droit International, p. 196, at p. 255 *et seq.* (1973); and see generally the Court's Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* I.C.J. Reports 1971, p. 16.

[166]) I.C.J. Reports 1975, p. 12, at pp. 16—17.

[167]) La crise du Sahara occidental rebondit, Le Monde (Paris), 18 October 1975.

[168]) Le Conflit du Sahara occidental, Les positions des partis, Le Monde, 4 November 1975; The Wall Street Journal (New York), 3 November 1975.

[169]) La fin de la «Marche Verte»: Madrid et Rabat parlent de succès: M. Boumédienne reçoit M. Ould Daddah, Le Monde, 11 November 1975; Sahara occidental, Hassan II: la «marche verte» a atteint ses objectifs, Le Monde, 11 November 1975; U.N. *rôle* proposed for Spanish Sahara, The New York Times, 9 November 1975.

agreement apparently involved an understanding that Spain would be reimbursed for its investments in the Saharan phosphates and that Spain and Morocco would continue jointly to exploit the phosphate deposits and also that Spanish fishing vessels would continue to fish in Saharan waters[170]). Morocco and Mauritania had earlier apparently reached an accord to partition the territory between them, with Morocco taking the phosphates-rich Northern half[171]). There was, however, no agreement with Algeria which, at this time, was backing a local self-determination movement, Polisario, claiming to represent the 70,000 indigenous inhabitants[172]); and Algeria therefore announced that it would treat the tripartite declaration on the future of the territory as null and void[173]). Moroccan troops proceeded to occupy the territory on the withdrawal of Spanish troops, and the Algerian-backed Polisario Front thereupon proclaimed, on February 27, 1976, the formation of a Democratic Saharan Arab Republic, and commenced guerrilla operations against the Moroccan forces[174]). Morocco and Mauritania responded, on March 7, 1976, by breaking off diplomatic relations with Algeria[175]). The situation has not, at the time of writing, been resolved definitively, but open hostilities between the three Maghreb countries have at least been avoided to date[176]), even though the Algerian-backed Western Sahara national liberation group, Polisario, now maintains continuing guerrilla activities against

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[170]) La décolonisation du Sahara occidental, Aux termes de l'accord conclu entre Madrid, Rabat, Nouakchott. La présence espagnole prendra fin le 28 février 1976, Le Monde, 15 November 1975; Alger: un fait accompli diplomatique, Le Monde, 15 November 1975.

[171]) La crise du Sahara: Le dessous des cartes, I. Arrière-pensées et intrigues, Le Monde, 27 November 1975; and see also Le Maroc et la Mauritanie délimitent leur frontière au Sahara occidental, Le Monde, 17 April 1976.

[172]) La crise du Sahara: Le dessous des cartes, II. Une grande partie de poker, Le Monde, 28 November 1975.

[173]) Sahara occidental: M. Boumédienne obtient l'appui du Colonel Kadhafi dans son différend avec le Maroc, Le Monde, 31 December 1975; Les risques de l'aventure, Le Monde, 31 December 1975.

[174]) La création de la république saharouie, La riposte du Polisario, Le Monde, 1 March 1976; Sahara occidental: L'ordre marocain règne à El-Aïoun, Le Monde, 27 February 1976.

[175]) Rabat et Nouakchott rompent avec Alger, Le Monde, 9 March 1976.

[176]) La crise du Sahara occidental, La tension entre Alger et Rabat est progressivement retombée, Le Monde, 10 April 1976; Aux Nations Unies, L'affaire du Sahara occidental ne sera examinée qu'à la prochaine session, Le Monde, 14–15 November 1976.

the Moroccan and Mauritanian military occupation forces in the Western Sahara territory[177]).

The World Court ruling undoubtedly facilitated the Spanish decision to withdraw from the Western Sahara territory as quickly and gracefully as possible under the circumstances; for the Spanish politic of sponsoring a referendum among the local inhabitants, which would presumably have rendered a decision in favour of an independent and autonomous, and no doubt Spanish-leaning Saharan State, foundered once and for all when it received no affirmative backing from the Court ruling. If the Spanish aims, after all, were economic ones directed to maintenance of some at least of their phosphates-development interests, and only secondarily political[178]), these were achieved by the subsequent, non-belligerent, tripartite accord between Spain and Morocco and Mauritania.

Only Algeria was left out. The Algerian Government, even though it chose to intervene and present argument before the Court in the Advisory Opinion hearing, may well have felt disposed to quarrel, after the event, with an ultimately Court-derived solution to the Western Sahara territorial conflict. For that Court-derived solution, through its operation within the interstices of the Advisory Opinion procedures and its avoidance, therefore, of the precise and full identification of all the parties and of the range and limits of their respective interests enjoined by contentious proceedings, may be argued as having substantially overlooked one of the main protagonists and, perhaps also, as having done less than justice to its special claims and interests. In this sense, some of the objections of the specially concurring Judges, going to the limitations of the Advisory Opinion jurisdiction as a vehicle for bringing disputes before the Court, may seem warranted. As Mr. Justice Frankfurter once observed, — "Only fragments of a social problem are seen through the narrow windows of a litigation"[179]). Those main parties who were more or less informally identified as such by the Court majority — namely Morocco and Mauritania — were clearly confirmed in a feeling of self-righteousness as a result of a Court ruling that may have been overly restrictive in its conception of the total problem and the total range of parties, without full regard, for example, for

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[177]) Sahara occidental, Le Front Polisario annonce le déclenchement d'une vaste offensive militaire, Le Monde, 26 May, 1976.

[178]) Phosphate: Taking a Leaf from Oil's Book, The New York Times, Sunday, 9 November 1975 (Section F, p. 3). And see also The Big Dispute over the Sahara, The Wall Street Journal, 21 October 1975.

[179]) Per Frankfurter J., dissenting, *Sherrer* v. *Sherrer,* 334 U.S. 343, 365—6 (1948).

the views of the local, indigenous, Western Sahara, population whose views were hardly adequately represented by the Spanish proposal for a referendum. The political colourability of the Spanish referendum proposal was, after all, soon to be demonstrated by the ease and swiftness with which Spain abandoned it in return for the *quid pro quo* of economic concessions from the successor Moroccan and Mauritanian governments. By the same token, the Court Opinion essentially passes over the claims of that other, future party, Algeria, which had intervened to plead so eloquently and effectively the case against any original Spanish acquisition of territorial sovereignty through the late-19th century act of colonisation of the Western Sahara territory. A somewhat more comprehensive, inclusive, approach by the Court, not limiting itself to the narrow boundaries of the questions as originally formulated by the General Assembly but defining the ambit of the interested parties broadly so as to embrace — in addition to Morocco, Mauritania and Spain — both Algeria and also the local, indigenous Western Sahara population, would have seemed to be within the full spirit of the Court majority's newer, more facultative approach to interpretation of the Court's Advisory Opinion jurisdiction; and might also, as it turned out, have been a more fruitful judicial approach to international legal problem-solving in the instant case [180]).

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[180]) The new Resolution concerning the internal judicial practice of the Court, *op. cit.* (note 6), which was adopted by the Court on 12 April 1976, in revision of the earlier Resolution adopted on 5 July 1968 and in force at the time of the rendering of the *Western Sahara* Advisory Opinion, seems designed, in part at least, to alleviate the type of judicial dissonance evidenced in the Western Sahara judicial opinion-writing. The thrust of the revised Resolution appears twofold: to improve procedures for canvassing of individual judicial positions prior to the actual decision-making stage and so facilitate the achieving of a Court consensus; and to reduce the chances of purely unneccessary judicial disagreements being manifested in the opinion-writing stage by establishing limiting criteria of relevance for Separate or Dissenting Opinions. The first principle seems reflected, in particular, in the revised Resolution's new wording in Art. 1 (i) and 1 (iii); Art. 3 (ii); Art. 4 (ii) (b); and Art. 5 (i). The second principle seems reflected, in particular, in the new and much more precise wording of Art. 7 (iv), which stipulates that, once those judges who wish to deliver Separate or Dissenting Opinions have submitted their first draft opinions to the Court, they may, thereafter, — "make changes in or additions to their opinions only to the extent that changes have been made in the draft decision" [of the Court].