International Law and the Western Sahara Conflict

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“If the power of Morocco ends up subduing the Sahrawi people, that State, admirable for other things, will have obtained the saddest victory, a victory without honor, without shine, built on the lives and dreams of a people who wanted to live in peace on their land with their neighbors, all together, to make the continent a more habitable place” (José Saramago)

“I dream of an Africa which is in peace with itself” (Nelson Mandela)
A mi padre, veinticinco años más tarde te sigo echando de menos

A mi madre, aunque estás detrás de la cortina del Alzheimer sé que sigues ahí

A Marce, mi querida e imprescindible compañera de fatigas
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THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE OF OCTOBER 16, 1975

As was pointed out above, GA Resolution 3292 (XXIX) requested the ICJ to issue an advisory opinion which would establish whether the territory was terra nullius at the time when Spain began its colonisation (1884) and, if it was not-, what type of legal ties existed between the territory and the Kingdom of Morocco and the Mauritanian Entity. However, before analysing the substantive issue, the Court was obliged to pronounce on formal questions, which were, of course, of maximum importance in conditioning its position as regards the core of the matter to a great extent: these were the questions of the ad hoc judges and the competence of the Court itself.

1. The formal questions

1.1. The question of the ad hoc judges

The Court began its work listening to "the parties concerned and involved" in the conflict in order to determine the possible inclusion of ad hoc judges in its composition and concluded, through an Order of May 22, 1975, that an ad hoc judge would be designated by Morocco, although the one proposed by

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212 As pointed out by Tomás Ortiz de la Torre, and even if is obvious, it should be mentioned that, as a advisory opinion, it is not correct to use the term “parties”, as this condition is reserved for those who intervene in a litigious process before a Court. It should be interpreted as “appearing States”. This circumstance stresses even more the contention appearance of the process before the Court, question that we will analyse below. Cfr. TOMÁS ORTIZ DE LA TORRE, J. (1975): 566.

212 The judge ad hoc put forward by Morocco was Alphons Boni, President of the Supreme Court of the Ivory Coast. The acceptance of the Moroccan right to design a judge ad hoc was backed by 10 votes in favour and 5 votes against. The decision to deny the right of designing an ad hoc judge to Mauritania was approved by 8 votes in favour and 7 against (Western Sahara, Order of 22 Mayo 1975, I.C.J., p. 8).
Mauritania was rejected as it was considered that the advisory opinion requested related to a legal controversy pending at the time between two States, Spain and Morocco, excluding Mauritania.

The decision of the Court was based on the consideration that “there seems to be a legal controversy” between Spain and Morocco. This decision would be of a provisional nature and would not prejudge the intentions of the parties in the case submitted to the advisory opinion. However, it is clear that the Court was here adopting a very clear option, affecting the totality of the conflict, when it stated that this was a legal controversy between two states, as had been the intention of Morocco for a long time, ignoring the policy clearly established by the resolutions of the General Assembly, which analyse the conflict in the context of decolonization. As pointed out by Judge Gros, from the documentation provided by the Secretary General of the UN, it is not possible to deduce, any “trace of any specific legal question between Morocco and Spain, which however the present Advisory Opinion has described as a 'legal dispute… regarding the Territory'”. In his opinion, the General Assembly did put forward a legal question, but this does not confront Spain and Morocco, however, affecting solely the latter, and can be summed up in the following question: “is Morocco entitled to claim reintegration of the Territory into the national territory of the Kingdom of Morocco, to which it belonged, according to Morocco, at the time of colonization by Spain?”

Likewise, the judge Petén stated that this type of decisions “is definitive and can be used during the whole process”, because “to accept such designation on the supposition that there is a legal difference, leaving in suspense other decisions as to the existence of that difference, leads to serious risks”, as “in this position is finally negative (...) it would imply that no ad hoc judge at all should have been designed” (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 107). This judge states that by the approach of using the correct questions to the three concerned States, the Court “could have obtained the necessary information to verify or not if there were legal differences between the States on the question of Western Sahara, so the answer should not have been differed to this question until the end of the process on the core of the matter”. Likewise, cfr. VALLÉE, Ch. (1976): 48.

Cortina pointed in the same sense before the GA: “Spain has no dispute or controversy with any country in particular, as all resolutions that defend the self-determination as a proper way of decolonizing a territory reach all member States of this Organisation”, underlining that “different from the Sahara question (...), the Gibraltar matter has always been considered by the pertinent resolutions of this Organisation as a conflict between States -Spain and United Kingdom- that must solve the question of sovereignty and Spanish territorial integrity implicit in the decolonizing process of the Rock” (ORGA: A/PV.2253, pages 410-411).

Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 70, par. 1. As stated in this sense by Judge Petén, statements of Spanish and Moroccan representation from the beginning of
This would be the only legal question that the Court should have pronounced on, since the judge considers that the rest of the questions analysed by the opinion “are unrelated to the object of the request”\(^{217}\).

In addition, if we maintain that there is no legal dispute between Morocco and Spain, for the same reason we must reject that this situation exists between Spain and Mauritania; if the Court decided to grant Morocco the right to have an \textit{ad hoc} judge in the proceedings, it does not seem reasonable to deny this possibility to Mauritania\(^{218}\) with the argument that there was no legal dispute between Mauritania and Spain when, on one hand, the opinion could have concluded the existence of historical rights of Mauritania over the territory of Western Sahara, and, on the other, throughout the proceedings, Morocco and Mauritania are treated at the same level\(^{219}\).

In conclusion, in this first phase of its work the Court used very weak arguments, which, at the time, gave rise to reasonable doubts regarding the future of the proceedings. It should not be forgotten that the decision of the Court was based on such weak grounds as the “appearance” of a legal dispute between Morocco and Spain, and the absence of such appearance between Mauritania and Spain. It is certain that, despite the fact that the Court denied it, this decision on a preliminary question prejudged the core of the matter\(^{220}\). The Court had to expressly and definitively pronounce on the existence of a legal controversy before granting or denying the possibility of the appointment of \textit{ad hoc} judges, especially since it did not return to this question in the opinion, avoiding any pronouncements in this regard.

the process before the Court “made it clear that there is no legal question in this matter between these States referring Western Sahara. Morocco does not deny the actual Spanish sovereignty in the territory; both Morocco and Spain accept the application of the General Assembly resolution on decolonization. In other words, the Court is not before a legal claim formulated by Morocco against Spain and contested by the mentioned (...). The fact that States that take part in the General Assembly debates express differences about debated questions cannot be considered as constitutive of a legal difference between them” (\textit{Western Sahara, Advisory Opinion}, I.C.J., Reports 1975, p. 109).

\(^{217}\) Gros agrees, by saying that it is not enough that two States maintain different thesis, or even opposed ones as to an event or situation, to suppose litigation between them (\textit{cfr. ibidem}).

\(^{218}\) Judge Morozov expressed a different opinion, justifying his vote against the matter, understanding that the arguments that supported the acceptance of an \textit{ad hoc} judge for Morocco were valid for the designation of a judge \textit{ad hoc} on the Mauritanian side (\textit{Western Sahara, Advisory Opinion}, I.C.J., Reports 1975, p. 10).


1.2. The question of competence

Once the decision concerning the ad hoc judges was adopted, the Court addressed the question of their competence, but in our opinion failed to give this point the attention it deserved. We share the position taken by the Spanish representative in this phase of the proceedings, who defended the question put to the Court by the GA: "does not constitute a real and existing legal question, but instead a simple question of an academic nature"\textsuperscript{221}, meaning therefore the

\textsuperscript{221} The Spanish representation sustained that the appropriate exercise of the Court should lead to examine not only the Territory statute in the past and the eventual rights that other States could have exerted before, but also and before pronouncement, to the rights and duties existent nowadays that have been established in the course of the decolonization process carried out by the United Nations (highlighted by the author) (I.C.J., Pleadings, Western Sahara, Vol. I, p. 222, par. 387). In our opinion, Spain raised the question quite rightly, as in the petition of the Advisory Opinion there is no legal question to solve. In effect, a legal question must be resolved by the application of legal techniques (ROSENNE, S., \textit{The Law and Practice of the International Court}, 2th ed., Martinus Nijhoff Publishers, Dordrecht/ Boston/ Lancaster, 1985, p. 702), and in the case that we are dealing with, the used techniques are mainly of an historical character. Furthermore, as pointed by Hinojo, the fact that the question is of a legal nature does not necessarily mean that the Court should pronounce a ruling, though to do so, the aforementioned condition must be present. This author celebrates the attitude of the Court: “firm and brave” to give its opinion exerting its jurisdictional function each time it has been asked to pronounce itself, answering to the challenges posed by political organs and committing to its duty in contemporary International law and international society (HINOJO ROJAS, M. (1997): 85 and 91). We don’t agree with this statement, because the fact that the Court accepted to pronounce its advisory opinion (promoted by Morocco with the only objective of postponing and even blocking the celebration of the referendum that Spanish authorities were preparing) was one of the main reasons for which the process entered a dead end. There is no doubt that, if the advisory opinion had been rejected, the referendum would have resolved the conflict definitely.

Judge De Castro adopted in his dissenting opinion a less radical approach, considering that at least "There are reasons for doubting the competence of the Court. The Court really does not seem to be the appropriate advisory opinion, questions of fact or questions of which the historical aspect is predominant. However the Court’s spirit of collaboration in relation to the other organs of the United Nations, together with the very special nature of a case, may be justification for the Court not applying Article 65 of its Statute strictly” (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 142). The judge continues pointing that "Even on the hypothesis of the Court concluding that it had no competence to reply to a quaestio facti, such as that of the existence of legal ties at the time of colonization by Spain, it would not have followed that the Court had no competence to reply to the request for an advisory opinion. And it did not seem to me that the right approach was to adopt a restrictive or negative interpretation that would lead to the conclusion that the request for an advisory opinion was without object. The Court should rather do its best to assist the General Assembly in the task of decolonization" (ibid., p. 166).
Court must refuse to comply with the request made by the General Assembly, invoking Article 65.1 of its Statutes222 since this involves a “displacement of the true problem towards questions of territorial sovereignty (which), necessarily, require a cross examination of the facts, which is impossible to

Nevertheless, some of the opinions are not unanimously shared by doctrine. In this sense, Ruiloba states that it cannot be pleaded that that petition of ruling to the ICJ were inadmissible due to its political nature, because what was being debated was the reciprocal relations between the self-determination right and the territory integrity right, and the previous question of the validity of the titles claimed by both parties. These two questions are with no doubt of a legal nature. In this author’s opinion, the need of free expression of the will of peoples, which is the essential element of the right of self-determination, must always be the priority, and this, independent of the nature of the links that could have existed between peoples and the neighbouring authorities. Ruiloba seems to be near to these approaches when clarifying the previous statements by adding that it is difficult to maintain that the existence of an eventual historical title of territorial sovereignty may put aside or annul the right of self-determination (RUILOBA SANTANA, E. (1974): 341 et seq.).

222 Article 65.1 of the Statue of the ICJ states: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations" (emphasized by author). The judge Petrén points also that this article leaves to the Court the freedom to refuse to deliver a advisory opinion “if it is not considered inopportune”, as the judge himself maintains regarding the Western Sahara matter (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 113). Similar positions are defended by judge De Castro, that, however, reminds that up to the present time the Court has not used such optional power, refusing to deliver a advisory opinion (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 137). Again in this sense, cfr. BLAYDES, L.E. Jr., "International Law. International Court of Justice does not find ´legal ties´ of such a nature to affect self-determination in the decolonization process of Western Sahara. Advisory opinion on Western Sahara, (1975) I.C.J., T.I.L.J., 11, (1976): 361.

Even if judge Petrén insists on the freedom of the Court on this question, the truth is that the Court established that “it cannot deliver a advisory opinion on a non-legal question. If a matter is not legal, the Court has no optional power on the matter: it must refuse to deliver ruling that may have been requested” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgement, I.C.J., Reports 1992, p. 156). Without any doubt, the freedom that the judge is referring to is the one that belongs to the Court in the case that, even being a legal matter, and it is competent on, it may refuse to deliver ruling, according to the circumstances that occur in the case (Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 72).

Judge Dillard stated that the Court should have declared itself non-competent: “First it was immediately apparent that the two questions were exclusively confined to an historical period and second they raised no issue whatever as to the legitimacy of Spain’s original occupation of the territory or its present authority over it. It appeared, therefore, that the two questions invited an enquiry which, while no doubt historically fascinating, was far removed from any contemporary problem whatever” (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 116).
carry out within the advisory jurisdiction” of the Court. As pointed out by Daillier, the Court must contribute to the proper functioning of the Organization but, although Article 65 gives a discretionary character to its advisory competence, only ‘decisive reasons’ can justify the rejection of a request of this nature; in our opinion and as time would unfortunately show, this was one of the situations where the opinion would negatively contribute to the correct functioning of the UN as regards decolonization. The Court should not have pronounced on the nature of the ties that might have existed at the time of the Spanish colonisation unless it had previously considered whether the finding of this would have some type of repercussion on the decolonization process in the territory. On this point, the second factor which the Court

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223 I.C.J., Pleadings, Western Sahara, Vol. I, p. 223, par. 389. In this same regard, judge Ignacio-Pinto declared to by only partially in agreement with the Court conclusions, finding that, though it should have declared itself competent regarding the form, it should not have done the same regarding the core of the matter, because even the composition of the questions, pursue a “hidden” objective: “the recognition of sovereignty rights in favour of Morocco on the one hand, and of Mauritania, on the other hand, over this or that part of Western Sahara”. This judge, as would do so judge Petén, refuses from paragraph 162 all that does not refer to the relations of sovereignty over the territory by Morocco and Mauritania, assuming, however, the rest of the considerations within the advisory opinion (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 78, 104 et seq.). As even the ICJ established in 1962 “according to the article 65 of the Statute, the Court can only deliver a advisory opinion if the matter is of a legal nature. If the question is not legal, the Court lacks of optional characteristics to do so; refusing the request of delivery” (Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 155).

Similarly López Martin, points out that, in view of the literal content of the questions forwarded by the GA, its answer contains the solution of a territorial problem of attribution of sovereignty over Western Sahara, as to establish that sovereign relations existed, as pleaded both States (Morocco and Mauritania), on the basis of the continuous and peaceful exercise of authority of the State in favour of one or the other, it would have meant the recognition as sovereign of the mentioned territory, this is, the attribution of territorial sovereignty. In this case, the consent of Spain would have been necessary (cfr. LOPEZ MARTIN, A.G., El ejercicio continuo y pacífico de funciones de Estado como modo de adquisición del título territorial en la jurisprudencia internacional: el problema de su prueba, Universidad Complutense de Madrid, Servicio de Publicaciones Madrid (1995): 274 et seq.). Similarly, cfr. BARBIER, M. (1976): 82.


225 The Spanish representation insisted, with a similar position to the one held before the Court, that the previous and repeated acceptance, of all “concerned and involved” parts, thus, Morocco, Mauritania, Algeria and even Spain, on the Saharan people’s self-determination right. For this reason “resolutions of the General Assembly about Western Sahara, due to the fact that those resolutions were accepted by the administering Power and the
must take into account when using the discretionary power attributed to it by the Charter must not be forgotten, but this was ignored in this case: the Court must provide a useful response\(^{226}\), a usefulness which we cannot quite imagine in this case.

Furthermore, it must be remembered that Morocco has previously requested of Spain that the same questions put forward by Resolution 3292 (XXIX) be submitted by both States, by common agreement, to the contentious jurisdiction of the Court\(^{227}\), and that the silence of the Spanish authorities regarding this request led to Morocco taking the case to the General Assembly, the results of which are already known.

The decision concerning the determination of the legal or purely academic nature of the question submitted by the General Assembly to the ICJ was not insignificant as it was to mark the course of the debates: the doubts concerning this question would have repercussions on the proceedings themselves because, as we pointed out above, in spite of the advisory nature of the opinion, neighbouring States, “concerned parties” of the decolonization, has created an objective situation related to the actual statute in Western Sahara. From this situation comes out the attribution of rights of the population of this territory and the establishment of duties of the administering Power. This situation also entitles the “concerned parties” to be consulted about the modes to observe the referendum under the auspices of United Nations. (...) Therefore, the determination of the Court on the actual situation of Western Sahara implies a preliminary character and a certain conditioning in relation to the answers to the questions formulated by the General Assembly (...)” (stressed characters by author) (I.C.J., Pleadings, Western Sahara, Vol. I, p. 221, par. 382 et seq.)


\(^{227}\) Petition of September 17, 1974, in the following terms: "You claim Sahara was terra nullius. That it is a disinherit ed land or good, with no established power of administration; Morocco claims the contrary. We ask for arbitration of the International Court of Justice of The Hague (...)" (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 14, par. 26). This statement is also collected on the individual opinion of judge De Castro (ibid., p. 129). Furthermore, the Visiting Mission Report of October 1975 can be consulted on this question (ORGA: A/10023/Add.5, par. 100, y A/9771, annex).

Judge De Castro’s opinion is that, even if Spain would have accepted to forward both question in litigation before the Court, the possibility would not have been feasible, as “Spain did not have at that moment, nor has it nowadays, the quality to be party in this matter with Morocco o any other State concerning the actual or past sovereign titles referred to a territory with the status of Non-Self-Governing Territory, and of which Spain remains the administering Power. Spain did not have what is called in procedure the passive legitimacy” (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 145). We agree only partially with these approaches, because, though Spain did not aspire to be sovereign of the territory, according to its administering Power condition of the territory, Spain not only had legitimacy to defend the interests of the population, but also was compelled to do so.
it “has not managed to offload its contentious premises”, in particular as regards the composition of the Court and its conclusions228.

The Spanish delegation maintained that, if the Court began to analyse the questions submitted by the General Assembly through advisory proceedings, when Spain had previously rejected contentious proceedings, it would be converting advisory jurisdiction into "a means to get round the consent of the States in contentious jurisdiction"229 as "this approach could result in the introduction of obligatory jurisdiction through a majority vote within a political organ"230, thus ignoring the philosophy of the Statute of the Court231. After analysing the position of the Spanish representative in the course of the debates in the General Assembly and in the phases of the process carried out before it, the Court concluded that it could not be deduced from this analysis that Spain had given its consent that the questions put forward by 3292 (XXIX) be directed to the Court. Thus, Spain continued to submit objections to these, and

"the fact that it abstained and did not vote against the resolution cannot be interpreted as implying its consent to the adjudication of those questions by the Court. Moreover, its

230 Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 14, par. 27
231 Even if Judge Petrén did not completely agree with the approaches of the Spanish representation on this point, he pointed out that the quasi exclusive use of the Court of documentation presented by Spain, Morocco, Mauritania and Algeria (which corresponds more to litigation procedures than to advisory ones, as in consultative procedures it is the proper Court that provides the necessary documents, whenever States do not provide so), “has provided the process with a much more litigious aspect than a consultative one”, so the participation of these States “had conferred (…) a wholly unusual character tending to obscure the difference in principle between contentious and advisory proceedings” (ibid., p. 112). Likewise, judge De Castro describes the procedure as “hybrid” and “quasi-litigious”, due to the fact that “the way in which those parties proceeded was not that of amici curiae. Throughout the proceedings, the attitude of the interested parties was that of parties in contentious proceeding” (ibid., pages 136, 137 and 142.). In the same sense, cfr. SHAW, M., "The Western Sahara case", B.Y.I.L., 49 (1978): 124 et seq.; and VALLEE, Ch. (1976): 48. Even if ZICCARDI considers that the procedure had a quasi-litigious character, he considers that the Court acted always in conformity with the purpose and provisions that regulate the consultative function, referring to the various precedents in which the Court had exercised the consultative function in relation with international controversy (cfr. ZICCARDI CAPALDO, G., "Il parere consultivo della Corte Internazionale di giustizia sul Sahara Occidentale: Un occasione per un riesame della natura e degli effetti della funzione consultiva", Comunicazioni e Studi, 15 (1978): 535-544, especially 544-545).
participation in the Court’s proceedings cannot be understood as implying that it has consented to the adjudication of the questions posed in Resolution 3292 (XXIX), for it has persistently maintained its objections throughout”\textsuperscript{232}.

The fact that, in the debates held in the General Assembly, the Spanish delegation even declared that it was prepared to adhere with the claim, "on condition that another question intended to achieve a satisfactory balance between the historical and legal explanation of the problem and the current situation, considered in the light of the United Nations Charter and the relevant resolutions of the General Assembly concerning the decolonization of the territory was added to the questions put forward", led the Court to consider that “Spain did not oppose the reference of the Western Sahara question as such to the Court’s advisory jurisdiction: it objected rather to the restriction of that reference to the historical aspects of that question”\textsuperscript{233}. So, in the Court’s opinion, Spain has not really opposed the questions raised before the Court, but the terms by which these questions were finally posed.

However, as was expected, the Court rejected the Spanish pretensions, mainly for two reasons, both of which related to the characteristics of the advisory opinions: on one hand, because its effects are not binding on the States, unlike those of contentious proceedings, and, on the other hand, because as the Court had established in the case of the interpretation of the peace treaties concluded with Bulgaria, Hungary and Romania, first phase,

"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 organization, and, in principle, should not be refused"\textsuperscript{234}.

However, it understands that, in certain circumstances that in its opinion do not affect this case, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. This circumstance would arise "when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". The Court understands that the consent of a State concerned is

\textsuperscript{232} Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 15, par. 29.
\textsuperscript{233} Ibid., p. 16, par. 30.
\textsuperscript{234} Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 71 (emphasized by author).
important, not from the point of view of its competence, but “for the appreciation of the propriety of giving an opinion”\(^{235}\). In the case in question, there is a legal controversy, but one “which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations”. When the Spanish Government stated that possesses no “Non-Self-Governing Territories, but provinces”, Morocco expressly stated its reservations to this affirmation as regards, among others, the territory of "Spanish Sahara". This legal dispute remained unchanged within the Organization in the period from 1966-1974, during which Morocco accepted the right to self-determination of the population of "Spanish Sahara". Mauritania was in the same situation as from the time that it became a member of the UN (1960) as it then declared that "Spanish Sahara" was part of its territory.

The Court insisted on the object of the Advisory Opinion requested, which coincides with the request of the General Assembly to enlighten the United Nations in its actions\(^{236}\), as,

"The legitimate interest of the General Assembly in obtaining an opinion from the Court in respect of its own future action cannot be affected or prejudiced by the fact that Morocco made a proposal, not accepted by pain, to submit for adjudication by the Court a dispute raising issues related to those contained in the request. It is difficult to see on what basis the sending of the Note would make Spain’s consent necessary for the reference of the questions to the Court, if that consent would not otherwise be needed"\(^{237}\).

In our opinion, and not only in this case but in any work of the Court, advisory proceedings may and must be a valid component to overcome the excessively horizontal nature of the contemporary international community\(^{238}\). If this

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\(^{235}\) Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 17, par. 32.

\(^{236}\) Likewise pronouncement of judge Nagendra Singh, when pointing out that among the functions of the Court are those of determining the effects of relations that would have existed between Morocco, Mauritania and the Western Sahara population at the moment of the Spanish colonization, “this is a vital aspect which has to be stated fully and in clear and unambiguous terms to enlighten the General Assembly” (Ibid., p. 79).

\(^{237}\) Ibid., p. 19, par. 41.

analysis were guaranteed by a more progressive interpretation of its legal function and more committed opinions than those currently produced by the Court, this would mark progress, an evolution towards overcoming the relativity of contemporary International law and an expression of the collaborator role which the Court must play as another important part of the structure of the United Nations, in which, it must not be forgotten, it is one of the principal organs.

As concerns the second reason, the Court considered that "the reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial functions", which necessarily must take into account "existing rules of International law which are directly connected with the terms of the request and indispensable for the proper interpretation and understanding of its Opinion". The Court finds that it is competent to entertain the request by which the General Assembly has referred to it questions "embodying such concepts of law as terra nullius and legal ties, regardless of the fact that the Assembly has not requested the determination of existing rights and obligations".

This pronouncement of the Court did not have the unanimous backing of its members. In the opinion of Judge Petrén, an opinion we fully subscribe to,

“The question of the extent to which, an under what conditions, past legal ties may influence the decolonization of a territory

239 In this respect, it must be reminded the deceiving advisory opinion of the International Court of Justice of June 8, 1996 about the Legality of the use of nuclear weapons by State in an armed conflict. On this occasion, as stated by Carrillo Salcedo, the Court had been invited to make pronouncement on a legal problem of high importance, essential for international relations of the fifties on the existence of the UNO. As highlighted by this author, the ambiguous nature, and even the contradictory explanations of this advisory opinion are important and have their explanation in outstanding and notorious political factors (cfr. CARRILLO SALCEDO, J.A., prólogo a la obra de HINOJO ROJAS, M., A propósito de la jurisdicción consultiva de la Corte Internacional de Justicia, Cuadernos de Derecho Internacional, nº 8, Córdoba, 1997. On the other hand, it is alarming to confirm the progressive tendency to limit the use of consultative procedures in the last times, as since the Court pronounced the ruling on the Western Sahara question they have opted for a consultative option in only eleven times (1975-2014). Hinojo corroborates that the ICJ has underused the resource of consultative jurisdiction (ibid., p. 142).


242 Ibid., p. 12, par. 20.
seems to me to fall within an as yet inadequately explored area of contemporary International law. That is why I find that the Court should not have approached those questions without first examining both their theoretical and their practical aspects"243.

Furthermore, as pointed out by Judge Dillard,

“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 baptized the term ties with a legal label by referring to them as legal ties a device which also appeared to be question-begging”244.

For the same reasons, we disagree with the approach taken by the Court when it states that

"The issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not in any way compromised by the answers that the Court may give to the questions put to it"245.

What the Court means by this statement is very difficult to understand. How is the opinion of the Court going to influence the right of the people of Western Sahara to self-determination? What would have been the consequences if the opinion had it established ties of sovereignty between Morocco and/or the Mauritanian Entity over Western Sahara? Would it have proclaimed the legality of the annexation of a territory which, in this way, “would return it to

243 Ibid., p. 112 (emphasized by author). Maintaining such opinion, the judge states that the wide range of geographic and other circumstances that must be taken into account in the decolonization process “have not allowed yet the constitution of a sufficiently elaborated set of rules and practices to cope with all the situations that may give problems”, what, in other words, means that “the decolonization right does not constitute a finished body of doctrine and practice” (Ibidem, p. 110).

244 Ibid., p. 109.

245 Ibid., p. 19, par. 42 (emphasized by author).
the mother country”, thus stealing the possibility of the population to freely express its will? As stated in the opinion, if the legal position of Spain is not to be changed as a consequence of the advisory opinion, what sense does the fact that the opinion might evaluate the legal or territorial nature of the ties that might have existed in 1884 when Spain commenced the colonisation have? In what way could the opinion of the General Assembly influence "the policy to be followed in order to accelerate the process of self-determination”, when this was well defined in the resolutions on decolonization of the territory? These questions were unanswered and, since the opinion did not find links of sovereignty over the territory (it tacitly persevered the policy established by the General Assembly as regards decolonization?), more questions were not put forward as regards this matter. In our opinion, this is the most neglected aspect of the opinion of the Court and, in which the opinions given by the judges in this matter, which we shall see below, are most deceptive.

Furthermore, the Court had already pronounced on the value of the legal ties in accordance with inter-temporal law meaning that a reference to this subject would not have been in any way complicated. In the case of Minquiers et des Écréhous, the analysis of useless historical controversies was considered to be unnecessary, and it was concluded that the original entitlement loses its value if new events occur and these must be considered in the light of new law:

“a legal fact must be appreciated in the light of contemporary law. (...) When the legal system under which the entitlement was validly created disappears, this right cannot be maintained

246 The same question is raised by the Algerian representative, M. Bedjaoui, before the Fourth Commission in the following terms: "(...) the aforementioned asks about the value and authority of the historical titles regarding a territory in the case they should exist. If the nations had to support his claims on the territories of other peoples according to historical titles derived from more or less lasting conquers, all peaceful live on earth would be impossible. If this were the case, why not reconstruct the Persian Empire from actual Iran, or the Phoenician domains from Lebanon of our days or the Napoleon Empire from contemporary France or the Alexander Magnum from Modern Greece or the vast territory conquered by the Romans from the Italy we now know or even add Andalusia to an Arab country, for example Morocco? The decolonization does not consist of mere substitution of the territory competence of the administering power by another competence that historically has been there before without the consent of the population in question. (...) After a long evolution, the contemporary world has emerged as a principle that peoples must decide on the destiny of their territory, and not the other way, as the dignity of the people is in game, and this cannot be treated as a mere accessory question of the portion of land. The logical consequence is that historical rights can only prevail when supported by the acquiescence of the people of the territory in question” (ORGA: A/457/32/SR.13, par. 25 et seq., November 2, 1977) (emphasized by author).
under the new legal system it complies with the conditions set out in the new system”247.

In the case of Western Sahara, the changes in the circumstances of the territory are evident: if the colonisation was carried out in accordance with the law at the time, since the seventies the maintenance of colonialism was considered to be contrary to the United Nations Charter, therefore the territory was included among the Non-Self-Governing Territories, about which the administering powers have the duty to provide information as referred to in Article 73e) of the Charter248, thus establishing Spain’s obligation to put an end to colonial domination. As a culmination to this process, at the time the Court was requested to issue an advisory opinion, the right of the population of Western Sahara to self-determination had already been established by several resolutions249.

As stated by Judge De Castro,

"whatever the existing legal ties with the territory may have been at the time of colonization by Spain, legally those ties remain subject to intertemporal law and that, as a consequence, they cannot stand in the way of the application of the principle of self-determination”250.

The 1975 Visiting Mission seemed to ask this same question when it asked the Algerian President if, in his opinion, in the event that the Court pronounced in favour of the existence of ties of sovereignty of Morocco or Mauritania over Western Sahara territory, “should the principle of self-determination be obligatorily applied”. In even blunter terms, the President of the mission asked the President of Algeria the following questions,

“Would it be necessary to consult the population on the transfer of powers?” or, “Could this transfer be made simply through

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248 Spain started to transmit to the Secretary General of the United Nations the information referring article 73 e) of the Charter on Mayo 18, 1961 (ORGA: A/4785, supl. No. 15).
nations between Spain and the country designated by the Court?"^{251}

Undoubtedly, the President of the Mission was “speaking aloud”, when he expressed his doubts on the potential consequences of a decision of the Court in favour of the pretensions of annexation of the States neighbouring on Western Sahara. The answer given by the Algerian President could not have been more sensible and more in accord with international legality, “it is not logical that the United Nations should contravene its own decisions on decolonization. The fear that some seem to have regarding consulting the population is incomprehensible”. In his opinion, it is not possible to ignore the will of the people, “no matter how small this is”^{252} which, in our opinion, would make a pronouncement of the Court on this question unnecessary^{253}.

2. The core questions

2.1. Was Western Sahara terra nullius at the time of the Spanish colonization?

After resolving the preliminary question regarding its competence, the Court began to analyse the two core questions presented by Resolution 3292 (XXIX). As regards the first question, which was aimed at determining whether the territory was terra nullius or not^{254} at the time it was colonized by

\[^{251} \text{ORGA: A}/10023/{\text{Add.5, Appendix II, par. 51.}}\]
\[^{252} \text{Ibid., par. 52 and 54.} \]
\[^{253} \text{This approach is also defended by the Permanent People's Court, in its ruling on the Western Sahara, maintaining that if the right of self-determination should enter in conflict with legal ties, or even, in the case these did not exist, with a sovereign relation former to the colonization, it would be convenient to verify at the moment of the decolonization if the reintegration of the territory in an existing State would satisfy the free and true will of the majority of the inhabitants of this territory (Jouve, E. (1983): 69).} \]
\[^{254} \text{Regarding the first questions put forward by the GA to the ICJ, Moreno maintains that such an approach nowadays has no sense, as, states Moreno, we lack of criteria to judge whether a territory is 'terra nullius' or not, because the evolution of International law, especially the existence within the Law of the principle of equal rights of peoples has made disappear the concept of 'terra nullius': peoples that are inhabitant of a territory are always a valid owner of it and, unless it is demonstrated that it belongs to a certain State, peoples are the only ones to decide their destiny according to the right of self-determination. The problem now is not to judge whether it is a “terra nullius” or not, but to determine who is its legitimate owner. In a case of decolonization this will condition the principle according to which the decolonization must take place: self-determination of peoples or territorial integrity of States (Moreno López, M.A., "Sahara Español: una descolonización controvertida", R.P.J., 139, Mayo-Junio (1975): 90). Furthermore, Vallée states that it would} \]
Spain\textsuperscript{255}, the conclusion reached by the Court was negative, and was based on the law in force at the time of the colonisation. According to this law, \textit{terra nullius} was all the territory which could be occupied as it did not have an owner; in other words, because it was not inhabited by socially and politically organized populations.

The decision was mainly supported by two arguments. On one hand, because "at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them"; and on the other hand, because in colonizing Western Sahara, “Spain did not proceed on the basis that it was establishing its sovereignty over \textit{terrae nullius}”. In its Royal Order of 26 December 1884, far from treating the case as one of occupation of \textit{terra nullius}, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements that had been entered into with the chiefs of the local tribes\textsuperscript{256}. Likewise, in negotiating with France concerning the limits of Spanish territory to the north of the Rio de Oro, that is, in the Sakiet El Hamra area, Spain did not rely upon any claim to the acquisition of sovereignty over a \textit{terra nullius}\textsuperscript{257}.

The decision of the Court concerning this first question put forward by the General Assembly was, therefore, quite clear when it pointed out that, at the time of the Spanish colonisation, the territory was not \textit{terra nullius}, and it is also significant that the decision was unanimously adopted by its members although some of these stated that their vote in favour had been forced as it was impossible to abstain\textsuperscript{258}. In our opinion, the Court should not have

\textsuperscript{255} About this concept of "\textit{terra nullius}" in International law, \textit{cfr.} BEDJAOUI, M., \textit{Terra nullius, “droits” historiques et autodétermination}, Oral expositions before ICJ on the Western Sahara matter, on May 14, and 14, 15,16 and 29 July 1975, ed. United Nations, The Hague (1975);

\textsuperscript{256} The Order referred expressly to "the documents which the independent tribes of this part of the coast" had "signed with the representative of the Sociedad Española de Africanistas", and announced that the King had confirmed "the deeds of adherence" to Spain (\textit{Western Sahara, Advisory Opinion, I.C.J., Reports 1975}, p. 39, par. 81)

\textsuperscript{257} \textit{Ibidem}.

\textsuperscript{258} \textit{I.C.J., Pleadings, Western Sahara}, Vol. I, p. 134, par. 163. Likewise, judge Gros stated that, even if he had no doubt of the nature of the territory, that in no case was \textit{terra nullius}, “the question was not a legal one (…) it was purely academic and served no useful purpose”, and therefore has a “loaded nature”, because the concept of \textit{terra nullius} was never relied on by any of the States interested in the status of the Territory at the time of colonization; no treaty or diplomatic document has been produced relying on this concept in connection with
pronounced on this question as we do not see to what extent the response to this question enlightened the General Assembly in its decolonizing policy, especially when the condition of *terra nullius* of the territory had not been questioned by any of the States involved in the conflict.\(^{259}\) If the Court had only pronounced on the second question posed by the General Assembly, the response to the first question would have been given in the event that it was stated that there were ties of the sovereignty of Morocco and/or Mauritania over the territory, because obviously the territory would not be *terra nullius* and in the event that such ties were denied, the response to the first question would be without purpose.

2.2. **The question of the "legal ties" and the "ties of territorial sovereignty"**

2.2.1. **The Advisory Opinion**

On analysing the second question posed by the General Assembly, as a prior question, the Court considered that it should clarify the sense in which it interpreted the expression "legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity", used in Resolution 3292 (XXIX), understanding this as referring to such "to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara".\(^{260}\)

Western Sahara, and States at the time spoke only of zones of influence (...) It is not for a court to enquire into what would have happened in 1884 if States had relied on this concept, but into what did happen" (ibid., par. 9). Same approach defended by judge Dillard (*Western Sahara, Advisory Opinion, I.C.J., Reports 1975*, p. 124) and judge Petré: the notion of *terra nullius*, used by doctrine and by case law to define the legality of certain ways of acquiring territories, is not applicable in the case of Western Sahara, as in no case the legitimacy of the acquisition of the territory by Spain is questioned. Spain on the other hand, never claimed before the Court its sovereignty over it. In his opinion, “the question of whether the territory was *terra nullius* at the time of colonization is thus without object in the context of the present case”. In view of the foregoing, the judge find it pointless and consequently inappropriate for the Court to answer the first of the two questions put” (ibid., pages 104, 113 et seq.). Also on this matter: GILBERT, K., "Aboriginal sovereign position: summary and definitions", Extract from Gilbert, K., Aboriginal Sovereignty: Justice, the Law and Land (1987), *Social Alternatives*, vol.13, no.1, April (1994): 13-15, that makes a comparative study of the cases of Western Sahara and the Maori population of Australia, to conclude that in none of the cases can we talk about "*terra nullius*".


Once this point was clarified, it went on to analyse the core of the second question, by first referring to the relations between the territory and Morocco and, then to the relations between the territory and the Mauritanian entity.

A) The ties between Western Sahara and Morocco

The Court first established the premises to support its argumentation in this question, pointing out that it would give priority to evidence directly related to the effective exercise of authority in the territory at the time of the Spanish colonisation and during the period prior to this colonisation, rather than “indirect inferences drawn from events in past history.” The Court, despite admitting that the Sherifien State had a particular nature as “its special character consisted 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 (...) rather on the notion of territory”, it denies relevance to this question as “common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler”. In the opinion of the Court, these ties do not necessarily suppose the authentic exercise of state authority.

The Court made a separate study of two different areas of action of Morocco: the domestic and the international. As concerns the first of these, it understands that the evidence submitted by Morocco, which, in the opinion of the authorities of this State must justify “its internal deployment of authority in the territory”,

"the material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory".

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261 Ibid., par. 93. Ruling mentions specifically that this criterion had been established by its own case law, in the case The Minquiers and Ecrehos case, Juzgement of November 17th, 1953: I.C.J. Reports, p. 57.


263 Ibid., par. 107. The same reasoning would be repeated in the final paragraphs of the advisory opinion (ibid, par. 162). The then President of Algeria, Boumediene, pointed out to this respect that “the spiritual authority of religious leaders did not coincide, geographically, with administrative divisions” (ORGA: A/10023/Add.5, appendix II, par. 47)
This moderation or prudence of the Court would later serve as an excuse for Morocco to justify the Green March, alleging that the ties of allegiance referred to in the opinion were a form peculiar to the Arab world of effectively exercising power over a territory, an interpretation which is openly distant from what the Court actually stated\textsuperscript{264}.

As concerns the international acts which took place between 1767 and 1911, and which, according to Morocco, justify the recognition by other States of its sovereignty over all or part of the territory, the conclusion reached by the Court did not differ much from what we have just mentioned about the internal area. Fundamentally, the Moroccan representatives alleged the following international acts, from whose analysis would derive recognition in favour of Moroccan sovereignty over the territory\textsuperscript{265}:

a) The Hispano-Moroccan Treaty of Marrakech (1767)\textsuperscript{266}, and treaties made with the United States of America (1836), Great Britain (1856) and Spain (1861) referring to the rescue of shipwrecked persons in the coasts adjacent to those of Noun or in its proximity\textsuperscript{267}. After analysing the specific content of each of these treaties and the controversy regarding interpretation arising in the first of these due to the different content of the texts drafted in Spanish and Arabic, the Court concluded that it cannot be considered that these international acts entail the international recognition of territorial sovereignty of the Sultan over Western Sahara, but they constitute "the display of the Sultan’s authority or influence in Western Sahara only in terms of ties of allegiance or of personal influence in respect of some of the nomadic tribes of the territory"\textsuperscript{268}.

\textsuperscript{264} Amongst those who think this statement of the Court means recognition of the right of Morocco on the territory, approach that we do not obviously agree with, cfr. ISOART, P., "Réflexions sur les liens juridiques unissant le Royaume du Maroc et le Sahara Occidental", Revue Juridique Politique et Economique du Maroc (1978): 11-47. Dupuy thinks this attitude is due to a traditional eurocentred vision of the Court. (DUPUY, R.J., “L’Avis Consultatif de la Cour Internationale de Justice”, in Hassan II présente la Marche Verte (dir. by Bardonnet, Basri, Dupuy, J.R., Laroui and vVdel, Paris (1990): 119 et seq.)

\textsuperscript{265} Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 41, par. 108.

\textsuperscript{266} This treaty was concluded between the Sultán Sidi Mohamed Ben Abdellah Ben Ismail and the King of Spain, Carlos III.


\textsuperscript{268} Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 45, par. 118. In this way, for example, article 18 of the Treaty of Marrakech of 1767, states the following: "S.M. Imperial se aparta de deliberar sobre el establecimiento que S.M. Católica quiere fundar al sur del Río Noun, pues no puede hacerse responsable de los accidentes y desgracias que sucedieran a causa de no llegar allí sus dominios". In this way, it was acknowledging that it was not exercising control over the territory situated to the south of the Noun river.
b) Anglo-Moroccan Treaty of 1895, whereby Great Britain would have recognized Moroccan sovereignty over the territories located south of Cape Bojador. As regards this treaty, the ICJ stated that “what those provisions yielded to the Sultan was acceptance by Great Britain not of his existing sovereignty but of his interest in that area”\[269\].

c) Hispano-Moroccan diplomatic correspondence concerning the execution of the provisions of Article 8 of the Treaty of Tetuan of 1860, and of a subsequent agreement made with Spain in 1900, in which Spain had recognized Moroccan sovereignty south of Cape Bojador. The ICJ concluded that Morocco did not sufficiently prove the existence of these protocols, which was also denied by Spain and Mauritania, meaning that they were in fact not taken into account\[270\].

d) An exchange of Franco-German letters in 1911, where it was agreed that "Morocco includes all the territory in the North of Africa between Algeria, French West Africa and the Spanish colony of Rio de Oro". In the opinion of the Court, this correspondence was intended to delimit the zones of political interest of France as regards Germany; therefore, they cannot be considered to be evidence of recognition of the limits of Morocco\[271\].

In conclusion, and as regards Moroccan pretensions, the Court understands that

"Examination of the various elements adduced by Morocco in the present proceedings does not, therefore, appear to the Court to establish the international recognition by other States of Moroccan territorial sovereignty in Western Sahara at the time of the Spanish colonization. Some elements, however, more especially the material relating to the recovery of shipwrecked sailors, do provide indications of international recognition at the time of colonization of authority or influence of the Sultan, displayed through Tekna caids of the Noun, over some nomads in Western Sahara"\[272\].

B) The ties between Western Sahara and Mauritania

Since the State of Mauritania did not yet exist at the time the colonisation of the territory was carried out, the Court chose the denomination “Mauritanian

\[269\] Ibid, p. 46, par. 120.
\[270\] Ibid., p. 47, par. 123.
\[271\] Ibid., p. 48, par. 127.
\[272\] Ibid., p. 48, par. 128.
entity”, an expression used for the first time in 1974 in the course of the debates of the General Assembly which would conclude with the approval of Resolution 3292 (XXIX), showing the lack of a distinct collective personality at the time of the colonisation of the territory with respect to the emirates and tribes which composed it. In this regard, and, although it recognises that the nomadic character of a large part of the population of the territory logically resulted in the establishment of determined ties of a legal nature among the tribes of Western Sahara and those who lived in the territories which today form part of the Islamic Republic of Mauritania, it rejects "at the time of the colonisation by Spain there existed between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of 'simple inclusion' in the same legal entity"273.

This second question was resolved by the Court through an express referral to paragraph 162 of the Advisory Opinion, in the following terms,

“...The materials and information presented to the Court show the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the Tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. However, the Court’s conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the kingdom of Morocco or the Mauritanian entity. Thus, the Court has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory (cfr. paragraphs 54-59 above)".

As can be appreciated from the literal meaning of the paragraph cited, the Court reached three conclusions:

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1) The existence of legal ties of allegiance between the Sultan of Morocco and certain tribes that inhabited Western Sahara.

2) The non-existence of ties of territorial sovereignty over Western Sahara by Morocco and Mauritania.

3) The non-existence of ties that might modify the application of Resolution 1514 (XV) of the General Assembly.

2.2.2. The declarations and opinions of the judges

The criticism and dissidence of the members of the Court against the conclusions contained in this paragraph are multiple and of different types. Thus, some of these wanted to show their disagreement with the reference made in the Opinion to the question of the existence of legal ties, considering that the Court should have specified "precisely the implications of those ties in terms of decolonization which is the very object and the main theme of the exercise pending before the General Assembly". Despite this, they considered that the statement that there were no sovereignty ties over the territory was "a correct, clear and conclusive reply to the real questions put to the Court".

In opposition to this majority position, a limited number of judges stated that the legal ties referred to by the opinion are also ties of sovereignty.

A) Opinions of the judges who deny the existence of “legal ties”, or, if these exist, they have no relevance

The most radical opinion against the pronouncement of the Court is that of the Argentinian Judge Ruda, who maintained the only dissenting opinion made by the members, stating that the ties existing between the Sultan of Morocco and certain populations of Western Sahara, “legal ties of allegiance and authority” in the words of the Court, do not have the legal character attributed to them because they are exclusively “personal ties”. In his opinion, if these types of legal ties of allegiance and authority had actually existed, they would have created a territorial right, since “the normal legal inference of such a finding would have been that the Sultan of Morocco was the sovereign of the territories where these tribes live; but this is a proposition which the Court has

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275 Ibid., p. 127. The judge Nagendra Singh understands, however, that even if relations existed between Sahara and Morocco, the natures of these relations were of a “transitory and non-legal or political significance” (Ibid., p. 147).
276 Ibid., p. 173 (Separate opinion of judge Boni).
not accepted”. Thus, he concluded that there have not been any types of legal ties between Morocco and Western Sahara. However, this judge stated that such ties did exist between the Mauritanian entity and Western Sahara, ties which, in his opinion, had a territorial character. The basis of his argumentation is focused on the traditional freedom of the nomadic populations to cross frontiers, which would provide the Mauritanian entity with characteristics of political unity legally capable in itself to be the holder of territorial rights, political unity which the tribes of Western Sahara would have been part of and in a way no different from the others in the territory denominated “Mauritanian entity”.

From a less radical position, Judge Gros criticizes the complexity of the process chosen by the Court in order to respond to the second of the questions put forward by the General Assembly, a response which he considers to be “enigmatic”, as

"A positive finding of what are said to be legal ties of allegiance between certain nomadic tribes of the territory and the Emperor of Morocco at the time of the colonisation, and also other ties which are said to be legal, this time between the Mauritanian entity and the Territory, is combined with a negative decision as to the existence of any tie of sovereignty over the territory on the part of the Emperor of Morocco or the Mauritanian entity, the conclusion being that no legal tie exists which could influence the principle of self-determination through the free and genuine expression of the will of the people of the Territory (with a fresh cross-reference to paras. 54 to 59 of the Opinion)".

Going even further, Gros points out that, if he did not vote against paragraph 162, this was because it had not been divided into two parts, thus preventing him from expressing his opinion on the question. Thus, although he shares the position of the Court as regards the second part of the paragraph ("no legal tie exists which could influence the principle of self-determination"), he does not share the position as concerns the first part as the intrinsic contradiction which, in his opinion, involves the identification of "legal ties" with "ties of territorial sovereignty" as the latter are not of a legal nature, but instead of ethnic, religious or cultural nature. In the opinion of Judge De Castro, the expression “legal ties” cannot have any other meaning in the context of the

277 Ibid., p. 176 (Dissenting opinion of judge Ruda).
278 Ibid., p. 75, par. 10 (emphasized by author) (Declaration of Judge Gros).
Western Saharan conflict than that of “State ties relating to the territory and capable of having the value of a legal title to lay claim to the territory, that is to say, a right of sovereignty over the territory”279.

In the opinion of Judge Gros, it is not right to attempt to assimilate institutions of a “separate world" to those institutions of Europe and from another epoch:

"It is the duty of a Court to establish facts, that is to say, to make findings as to their existence (...) a Court may neither suppose the existence of facts nor deduce them from hypotheses unsupported by evidence. How can one speak of a legal tie of allegiance, a concept of feudal law in an extremely hierarchical society, in which allegiance was an obligation which was assumed formally and publicly, which was known to all (...)"280.

In his opinion, the Court exceeds the powers conferred on it by Article 65 of its Statute when it attributes a legal character to facts that do not have this character:

"a court does not create the law, it establishes it; (...) the ties which it describes as legal would only be so if, after having established their existence, the Court could (...) produce an effect on the decolonization of the Territory”281.

279 Judge De Castro points out that, even if the legal ties can be of diverse nature (taking origin from neighbourhood, a treaty, a war, can be territorial, personal, of sovereignty, of vassalage; they can also be international, of public or private law, of canonical law or Muslim law, etc.), the truth is that in the Saharan conflict, and in the light of the literal content of the questions forwarded to the GA, no other meaning is acceptable than that of sovereignty relations (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 135). On the other hand, he also underlined his disagreement with the advisory opinion, understanding that “There is no legal foundation for regarding as ties with the force of ob-ligare (vinculatio) the personal and sporadic ties of the Sultan with certain unclearly defined tribes” (ibid., p. 164). Of course, the first question on the nature of terra nullius of the territory is deeply related to the second, as the answer to this is a direct consequence of the answer given to the first: was the territory terra nullius at the moment of Spanish colonization? In the case it were not, who was the sovereign of the territory?: Morocco? The Mauritanian entity? The question is to determine if the existing relations in the territory regarding the neighbour States are of territorial sovereignty. It is patently obvious that relations have existed, as these are frequent and inevitable between any kinds of neighbouring human communities, even more if populations are of a nomad nature. The question of the GA cannot have, in our opinion, another sense.

280 Ibid., p. 77, par. 11.
281 Ibid., par. 12).
He thus repeats, although within a more limited scope, the arguments stated by Spain when he affirms the non-competence of the Court in this case. In fact, Spain considered that the Court should not examine a question of a purely historical nature, a "simple question of academic interest" which in no case could condition the exercise of the right of the people of Western Sahara to self-determination, confirmed "in the light of the current rights and obligations established by the decolonization process substantiated by the United Nations", while Judge Gros considers that "it is not an abstract or academic question" 282 and although it is possible that the Court might appreciate the existence of the facts, this does not grant it the power to attribute a legal character to such facts which they do not in reality possess. In his opinion, it is the application of this theory to the provisions of the opinion that makes it abusive 283.

The other members of the Court expressed their doubts as to the content of the first of the points included in the paragraph we are analysing as they considered that the affirmation that there are ties of a legal nature does not rest on sufficient evidence 284, and, despite this, in our opinion, such an affirmation is not really important because of the content of the following two paragraphs and the "limited interest" which can be attributed to the legal condition of ties which existed in 1884, "in the contemporary setting of the decolonization process" 285. In our opinion, the only ties which can be classified as legal in the context of the Western Sahara conflict, that is to say, in the law on decolonization, would be those capable of affecting the process of self-determination 286. For the purposes of the General Assembly, the other ties could be of a historical but not of a legal nature, and would be unimportant in the context of the exercise of the right to self-determination.

282 Ibid., par. 6.
283 Ibidem. Defending this thesis, in a very expressive way, judge Petrén states that “The Court is the principal judicial organ of the United Nations; it is not an historical research institute” (ibid., p. 108). Judge Dillard maintains similar approaches (ibid., p. 116 et seq.)
284 Ibid., p. 119. Judge De Castro, that maintains the same approach, attracts the attention on a key moment of the procedure before the Court: if in its written statements Morocco and Mauritania maintained individual claims on the whole of the territory, in the oral statements, surprisingly, they modified their initial approaches, limiting them from then on to the North and South, respectively, and what is more serious, without referring in any way to the reasons of such change in their attitude nor to the value of the documents presented to that point to justify the claim on the whole of the territory (ibid., p. 132).
285 Ibid., p. 126.
286 In this regard, cfr. VALLÉE, Ch. (1976): 52.
B) Opinions of the judges who maintain the existence of “legal ties” and their identification with “sovereignty ties”

Counter to these approaches, and following the literal meaning of paragraph 162, after celebrating that the Court had assumed a progressive conception of *terra nullius*, according to which today it is no longer possible to any inhabited territory as *terra nullius*, nor to justify conquest and colonisation based on this concept, Judge Ammoun made a detailed analysis of the treaties and documents where sovereignty over the territory was questioned, and concluded that, although he shared the opinion of the Court that there were ties of a legal nature between the populations of Western Sahara and Morocco and Mauritania, he did not share the value attributed to these. In his opinion, the legal ties which unite the territory Western Sahara to Morocco and to the Mauritanian entity referred to in paragraph 162 are of a political nature, and refer not to the population which inhabits the territory but to the territory itself. This judge criticizes the fact that the advisory opinion sometimes refers to territory, and sometimes to the population, as if these were separate questions. As pointed out by López de la Torre, Judge Ammoun, a Lebanese lawyer with knowledge of Koranic Law, made an interpretation based on this law, according to which the willingness to render allegiance to the Sultan would be identified with obedience to the State he reigned over and, since the willingness to render allegiance was proclaimed by a sufficient majority of the tribes which inhabited the territory, there would be a real tie between the populations of the territory and Morocco, which was only partially recognized although it was never ignored in the definitive text of the opinion.

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288 Judge Forster maintains practically the same point of view than that of judge Ammoun, considering that the legal ties to which the advisory opinion “indicate the existence of State power and the exercise of political administration analogous to a tie of sovereignty exercised in the Sahara, a territory to which access was difficult, and over tribes some of which were nomadic and others settled” (*ibid.*, p. 95). Likewise stresses the “euro centrist” nature of the ruling (*cfr.* NDIAYE, B., *"Avis de la C.I.J. sur le Sahara Occidental 16 octobre 1975*", *Revue Sénégalaise de Droit*, 10 (1976): 50 et seq.).
Judge Boni fully shared these approaches, considering that the error of the ICJ had consisted in failing,

“to take sufficient account of the local context (...) As regards Morocco, insufficient emphasis has been placed on the religious ties linking the Sultan and certain tribes of the Sakiet El Hamra (...): the legal ties between them were thus not only religious, - which no one denies- but also political, and had the character of territorial sovereignty”\(^{290}\).

3. **Critical analysis of the advisory opinion of the ICJ**

The evaluation of the advisory opinion in international doctrine has not been especially positive. From a generic point of view, as pointed out by Carrillo, it is regrettable that the Court allowed the possibilities offered by the request for an opinion to escape, since “it could have been an excellent occasion, which had not been fully taken advantage of, for the ICJ to specify certain unclear aspects of the Law on decolonization”\(^{291}\), when, at least in theory, this was the objective intended by the request from the General Assembly. From a more specific point of view and, although we have mentioned this issue above, it should be asked to what extent the General Assembly would have been able to oppose its own policy, established through an interminable series of resolutions, in response to an opinion of the ICJ which it had requested. In fact, if, after twenty years of action by the General Assembly in defence of the rights of the population of Western Sahara, the opinion had contradicted the doctrine of the General Assembly, the Assembly would have found itself in a very difficult position, especially taking into account the fact that, although the advisory opinions of the Court are not of a compulsory nature, if the decisions of the Court establish the existence and the content of the international rule


with authority, it seems only logical that the requesting organ must adapt its conduct to the legal decision unless it wants to disrespect this rule 292.

Neither is the reference made by the Court to this question very reassuring when it states that

"In any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide", since "for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people"293.

Carrillo criticizes this attitude of the Court because, although he states that it is true that the opinion is clear as regards the procedures and guarantees required to ensure the free and genuine expression of the will of the people of Western Sahara, it is not so clear with regard to the consultations between the States concerned. He is right when he asks about the meaning of this ambiguous expression, what prevails: the principle of free determination or the territorial claims of the States concerned?294.

As has been mentioned above, the Court addressed this question in the final paragraph of the opinion, in which, as a conclusion concerning the second question posed by Resolution 3292 (XXIX), it affirmed the existence of "ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara (...); legal ties between the Mauritanian entity (...) and the territory of Western Sahara", but the non-existence of "any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity", therefore, in no case can

293 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 37, par. 73 y 72.

Some authors have branded the advisory opinion of the Court as ambiguous in this sense, which we cannot deny, but the use of such ambiguity is very different. Some use it to support similar approaches of those used by King Hassan II to call population to the "Green March" (Cfr. GOYTISOLO, J. (1979): 45; LEWIS, W. H. (1985): 214; LÓPEZ GARCIA, B., "Los comunistas marroquíes ante la cuestión del Sahara. Entrevista con Ali Yata, Secretario General del P.P.S. (P.C.N.)", Materiales, nº 8 (1978): 147-160). Others have denied such ambiguity to corroborate the non-existence of any kind of right of Morocco or Mauritania over the territory of Western Sahara; to this end, for example, cfr. BLAY, K. N., "Changing African perspectives..." (1985): 156. Also in this sense the Court of Peoples pronounced itself, Avis sur le Sahara Occidental, par. 4 of the ruling (in JOUVE, E. (1983)).
these ties affect "the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory". The "solomonic judgment" to the two questions put forward by the General Assembly was reflected in the impossibility to achieve the unanimity of its members regarding the legal ties existing at the time of the colonisation between Morocco and the territory (adopted by fourteen votes in favour and two against) and as regards the Mauritanian entity (fifteen votes in favour and one against). The first doubt which arises concerning paragraph 162 under debate is whether the decision would have been the same in the event that Morocco or Mauritania, or both, had proved the existence of ties of sovereignty over the populations of Western Sahara at the time it was colonized. The declaration by the Court that, at the time of the colonisation, there were legal ties between the Sultan of Morocco and some Western Saharan tribes and between Western Saharan territory and the Mauritanian entity, but despite this in neither of the cases "were there ties of territorial sovereignty", a declaration that, as we pointed out above, would serve as an argument for Hassan II to call for the "Green March", gave rise to some of its members expressing their personal points of view concerning "the enigmatic reply" which the Court gave to the question.

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295 The importance of these statements of the Court has been underlined, by, among others, Carrillo Salcedo, as the International Court of Justice has reaffirmed the right of self-determination of peoples, and has done so in a categorical way that can be hardly denied from here on that the mentioned right belongs to contemporary positive International Law (CARRILLO SALCEDO, J.A., "Libre determinación..." (1976): 33).


298 Doubts on the real existence of legal ties between Morocco and Mauritania or between both over Western Sahara have been underlined by different doctrine writings on the matter. In this sense, cfr. SHAW, M. (1978): 140.

299 The permanent representation of Morocco before the United Nations stated on November 1975 that the International Court of Justice “had formally recognized the historical relations of loyalty” (ORG A: S/11863 -Secretary General Report -). Also, the King Hassan II insisted on the fact that the International Court of The Hague had passed advisory opinion estimating that the Sahara had always had a loyalty relation to Morocco (LAURENT, E., Hassan II. La memoria de un Rey, Ed. B, Grupo ZETA, Barcelona (1994): 189). The monarch affirmed that the Court had pronounced in favour of Moroccan rights over the territory because, for the Islamic Law, the vassalage relations constitute authority (vid. The text of these statements in WILSON, C., ZOUBIR, Y., "Western Sahara: a foreign policy success waiting to happen", Transafrica Forum, nº 6 (3/4) Spring/Summer (1989): 32).

In our opinion, if some passages of the opinion can be criticized, the ambiguous attitude adopted by some members of the Court in their respective individual declarations and opinions are no less important, and some of these are very close to truly dissenting opinions. As we have seen, some criticized that the opinion had not specified more exactly the effects of these "legal ties" on the decolonization of the territory, while others even pointed out the incorrect nature of a pronouncement on the existence of ties beyond those which are strictly legal, but the proposals of the judges were in fact not a perfect model of compromise either because they did not even mention the effects which a pronouncement stating the existence of ties of sovereignty might have on the process for the decolonization of Western Sahara.

In any case, it is evident that the conclusions of the Court are incompatible with the tenor of the interpretations made by Morocco or Mauritania. The Court can be criticized for its lack of forcefulness in some of the passages of the opinion, but it is not true that the opinion declared that all the parties were right, as those who pretended the legality of the Moroccan occupation of the territory maintained. Chapez stated that it was feared that, "in these cases with no victor, there is only one loser: the International Court of Justice", while Vallée considered that it was evident and regrettable that, due to certain "mistaken and unusual" aspects, the opinion had reinforced the particular opinion of each of the parties that right was on their side. Although it is

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301 As pointed by Sur, the vote of some magistrates in favour of the decision can be explained by tactical reasons than by legal rigor, as this decision represents to their eyes a lesser evil (SUR, S., “Les affaires des essais nucléaires”, R.G.D.I.P., n° 4 (1975): 1016). This is precisely the reason for which Vellas attributes to the ruling a “transactional character”, though it has not contented any of the parties, which, was an impossible task in this case (VELLAS, P., “La diplomatie marocaine dans l’affaire du Sahara”, Politique Étrangère, 1 (1978): 54).

302 Judges Ammoun, Forster and Boni.

303 Judges De Castro, Dillard, Gros, Ignacio-Pinto, Petrén and Ruda. The opinion of the doctrine on this matter is not unanimous. So, for example, Chappez thinks that maybe the Court could have silenced the existence of these types of relations (CHAPPEZ, J. (1976): 1176).


306 In this same sense Le Borgne points out, very graphically, that “even if (the advisory opinion) was very wise, it allowed at least Morocco and Mauritania to support their claims, it allowed the POLISARIO Front to justify their fight, and it allowed the UNO, following the Court recommendations, to forward the self-determination principle” (LE BORGNE, C., "Sahara Occidental: miracle ou mirage?", L’Afrique et l’Asie modernes, n°159, Hiver
certain that the lack of proportionality between the enormous amounts of documentation analysed by the Court, the subtle arguments maintained by the parties and the time used in the debates as regards the limited effect of the Opinion, the literal nature of the second part of the aforementioned paragraph 162 does not admit such approaches. Specifically, as pointed out by Flory, the main reason why the opinion expressly referred to the right of self-determination in its final and principal paragraph to highlight that the ties of a legal nature which existed at the time of the Spanish colonisation did not affect the exercise of this right, lay in the uncertainty created by the mountain of documentation, arguments and counter-arguments used by the parties before the Court. 307

The lack of definition of the Court as regards the possibility that the ties of sovereignty existing in the past might result in the inapplicability of the right to self-determination at the present time is unfortunate. 308 When it denies the existence of “rights of sovereignty”, although it affirms the existence of “legal rights”, it seems to suggest that the existence of the first would have justified a pronouncement other than the applicability of the right to self-determination, 309 which, from our point of view, is unacceptable. 310

(1988-1989): 25). Likewise, Shaw considers that the Court’s recognition of the existence of legal character relations “provides a legal pretext” to Morocco and Mauritania to defend the success of their aims, claiming the non-capacity of the Court to determine the real reach of the relations established in the past, because the Arabic culture was unknown to the quasi total of their members (cfr. SHAW, M. (1978): 140). In the same sense, cfr. DESSENS, P. (1976): 43.

From pro-Moroccan points of view, Vellas points out that the ruling implies “a big satisfaction for Morocco”, as it declares, on the one hand that the territory was not terra nullius, and on the other hand, it admits the existence of legal ties, existence of rights, including certain rights related to the land (cfr. VELLAS, P. (1978): 421). In a very strict way the French diplomat Fougerouse describes Morocco as “the big winner” of the Court’s ruling, after which “Moroccans just have to “go back home” to reunite with their countrymen” (FOUGEROUSE, M., Le Maroc: vocations et réalités, Fondation Singer-Polignac, Paris (1987): 86 et seq.).

310 As Remiro points out in a very appropriate way, “an historical sovereignty title of a third party, supposing it existed, would not prevail over the right of self-determination of the genuine colonial population” (REMIRO BROTONS, A., Derecho Internacional (1997): 121).
Otherwise, the consultation put to the population, the main component of the right to self-determination, could be subject to the verification of situations remote in time which should never be able to affect the current rights of the population. Moreover, it is not by chance that the resolution of the General Assembly pointed out a proviso that the reply to the questions put forward did not prejudge the applicability of the right to self-determination.

Carrillo Salcedo is correct when he states that the decision of the Court as regards the necessary application of the right to self-determination in the Western Sahara case is coherent with the thesis sustained by the Court itself in its opinion of June 21, 1971 and with the progressive development of International law entailed by Resolution 2625 (XXV) in this matter. In fact, he states that “except for the colonial enclaves, the international legal status of all Non-Self-Governing Territories must be respected just as by the administering Powers as by third party States, even in the situation that there had been alleged legal ties between the Non-Self-Governing Territory and a third party State before the appearance of the colonial power. (…) The historical entitlements, except for the cases of colonial enclaves, cannot hinder the application of the principle of self-determination.”

The doctrine which has involved the analysis of the advisory opinions of the Court has coincided in pointing out the fact that, despite the non-binding value of these, in practice, there is a tendency to attribute to these “a value which is close to, but not identical to rulings,” and they have an “indubitable

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311 As clearly established by the Court “The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances” (Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 33, par. 59), so the exception to the general rule of the need to consult the population in the exercise of the right of self-determination does not affect, obviously, the case of Western Sahara.

312 RIEDEL, E. H. (1976): 439. Resolution 3292 (XXIX) "asks the International Court of Justice, without prejudice of the application of the principles contained in Resolution 1514 (XV) of the General Assembly, to deliver a advisory opinion (…)" (emphasized by author).


The opinion which we analyse was in reality legally useless; it did not contribute to the solution to the conflict nor did it cast light on the future action of the General Assembly, which is obvious in the light of the null effects of the opinion on the solution to the conflict, and, more seriously: the uselessness of the opinion was foreseeable. As opportunely stated by Cassese, “the political interests involved prevent the International Court of Justice from providing the desired effects”, and this placed its credibility in question. In addition it is feared that the advisory channel might continue to have little effect on international society. The opinion of the Court concerning the legality of the construction of the wall in the occupied Palestinian territories is a powerful confirmation of this fear as, if for once, the ICJ does not give an inch to those who illegally occupy a territory, as does Morocco in Western Sahara, there are no indications that Israel will comply with the content of the opinion, not even as regards its most achievable points. Despite all of this, there is no doubt that, if, instead of an opinion, the ICJ had given a Sentence, the Western Saharan conflict would have ceased to be a conflict some decades ago as, despite all the criticisms against the Court, the fundamental remained extremely clear: the solution to the conflict necessarily involves the exercise of the right to self-determination through the free and genuine expression of the will of the populations of the territory.

according to which certain rulings have compulsory force that can be or should be claimed to the Court.

317 To this respect, the Court itself has stated the importance if its contribution to the proper working of the UNO, even if it pointed out that the risk of compromising or discrediting the legal role of the Court would have been a decision taking reason not to give course to the petition (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J., Reports 1982, p. 347), circumstance that should have been taken into account in the petition of the GA about Western Sahara.
CHAPTER VII

THE PEACE PLAN (II). THE PROBLEM OF CONSULTING THE POPULATION


The first text of reference when examining the Peace Plan must be the Report of the Visiting Mission of the United Nations, which, in compliance with Resolution 3292 (XXIX), travelled throughout the territory in 1975. At the time, this document correctly forecast the most important difficulties involved in the organization of the when it stated that,

“It is evident from the above that, if the Territory were to become independent, the criteria for determining nationality would be very important. Likewise, problems would arise in determining eligibility to participate in a referendum”.

In this regard, it pointed out that, in the opinion of the administering Power and of the population of the territory, those who belonged to a family group in the territory and whose identification would not be excessively complicated should have the right to participate in a referendum since,

“All the members of such groups are known to each other and that the authenticity of a claim to belong to a family group can be verified by the sheiks and notables of that group in consultation with their members”\textsuperscript{552}.

The report\textsuperscript{553} also pointed out that, as a previous question to any approach to consulting the population, that,

"If it is to be truly an expression of the opinion of the majority, any consultation of any nature whatsoever organized in the territory must be based on the participation of all the Western Saharan indigenous to the Territory. Therefore, it is important to

\textsuperscript{552} ORGA: A/10023/Add.5, par. 157 and 158.

\textsuperscript{553} ORGA: A/10023/Rev. 1, Volume III, Chapter XIII, annex
determine those who are and those who are not indigenous to the Territory”.

In addition, it stated that, if the solution to the conflict were to be lasting and permit peace in the region, any settlement of the situation "must carried out with the agreement and the participation of all the parties involved and concerned". To this end, the decolonization "must take into account the wishes and aspirations of all the Western Saharan population in the territory, including those who now live abroad as political exiles or refugees". Despite the fact that the participation of the parties involved and concerned as regards achieving the agreement was considered to be necessary, as pointed out by the Cuban representative of the Visiting Mission, Marta Jiménez Martínez “the exercise of this right cannot be limited, much less subordinated to the interests of other nations”.

In order to achieve these objectives, the so-called “Parties involved and interested” gave a number of previous conditions for the referendum so that it might be carried out in a climate of freedom:

- The withdrawal of the armed forces and the Spanish administration;
- The return of the political exiles and the refugees, and
- A Transitional Period, during which the United Nations would be present and would assume responsibility for the administration and the maintenance of peace and order in the territory.

As regards the modalities of the referendum, the report we refer to is not very clear as it only pointed out that these,

"Should be drafted by a new Visiting Mission designated by the Secretary General of the United Nations in close cooperation with the administering Power and the other parties involved and concerned ".

The positions of the parties involved in the conflict were as follows:

- Spain was in favour of carrying out a referendum in the terms of Resolution 1541 (XV): independence, association or integration, although the General Assembly should decide the text of the question;
- Morocco defended a “procedure for the transfer of administration” as was the case for the enclave of Ifni and, although it opposed the holding of a referendum, in the event that one were to be held, it would accept only one question, “Do you want to remain under the authority of Spain or to re-join Morocco?";
- The POLISARIO Front proposed to ask the voters, “Whether they wished to be free or to remain under Spanish rule”.

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• Algeria explained to the Mission that, regardless of the question which would finally be asked in a referendum, the main question consisted of verifying whether the population wanted to be freed from the yoke of colonization and that, on a second occasion, once the territory had free political institutions, the question of association or integration in another State could be asked.

• Finally, although Mauritania opposed the holding of a referendum on self-determination, since, the “situation had been tailored by the Spanish authorities so that a referendum could have only one result, that sought by the administering Power”, so it proposed that, if there was a referendum, this would be based on universal adult suffrage or, “as in the case of West Irian, on the vote of their representatives”. The question put to the population would have to be proposed by the organ in charge of making the census, “taking into account the objective facts of the situation and the need to respect the national unity and territorial integrity of States”.

In the light of these positions, it was not difficult to deduce where the problems would arise in a theoretical referendum: Morocco would refuse to accept the possibility of asking the Western Saharan electorate about the “third option”, namely, the independence of the territory, and Mauritania proposed the method used in Western Irian as an example for the resolution of the conflict, and, as we pointed out above, this constituted the conflict in which the impartiality of the United Nations was most called into question throughout the whole decolonization process.

2. The Pérez de Cuéllar phase

2.1. The Settlement Plan

Once the Visiting Mission had carried out its task in the territory, a long period of hopelessness began and the questions related to the census passed into the background, as the war prevented any debate on this question. It was not until November 1987 that a period of peace began in the territory and the question was again taken up seriously. At this time, a mission composed of representatives of the UN and of the OAU\textsuperscript{554} visited the territory in order to

\textsuperscript{554} Paragraph 6 of Resolution 42/78 of the GA, approved on December 4, 1987, takes note of the joint decision of the current Chairman of the Assembly of Heads of State and Government of the Organization of African Unity and the Secretary-General of the United Nations to send a technical mission to Western Sahara in order to collect the relevant technical information to assist them in discharging the mandate entrusted to them under General Assembly resolutions 40/50 and 41/16 and by the present resolution; Also, in the
carry out a technical evaluation of the conditions for holding the referendum. After holding successive meetings with King Hassan II\textsuperscript{555} and with the representatives of the POLISARIO Front, the Secretary General of the UN, who was also visiting the territory, in his report of October 5, 1988\textsuperscript{556} welcomed the fact that, on August 30, 1988, both parties to the conflict had agreed to the "proposals for a peaceful settlement" presented by the President of the OAU and the Secretary General of the UN. In the opinion of the Secretary General, these proposals, aimed at restoring peace in the region "provide a framework for the conclusion of a ceasefire and the establishment of conditions necessary for the organization of a credible referendum that will make it possible for the people of Western Sahara to exercise its inalienable right to self-determination without military or administrative constraints". As stated in the previous Chapter, the proposals established that their application be directed by a Special Representative of the Secretary General, assisted by civil, military and security units in order to comply with his organization and control functions, whose appointment was authorized by Resolution 621 (1988) of the Security Council.

On June 30, 1989, the Secretary General constituted the Technical Commission, whose main mission would be to specify, together with the parties, the conditions and the resources that would make it possible to implement the peace proposals agreed to on 30 August the previous year\textsuperscript{557}. advisory opinion of the ICJ of October 16, 1975, it was referred to in a general way, noting that the decolonization process in Western Sahara envisaged by the General Assembly will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will, not mentioning any possible option (independence, association, integration in another State, or any other) between which the population should be able to choose (\textit{CIJ, Recueil} 1975, p. 36, par. 70).

\textsuperscript{555} King Hassan II, as noticed before, had already accepted the following commitment "the Secretary General has been assured of Morocco's full cooperation and support in his efforts. And has indicated that his country was fully prepared to see the United Nations entrusted with the responsibility for the organization and conduct of a referendum in the Territory through which the inhabitants could express their right to self-determination" (\textit{RGA: A/42/601}, par. 26, October 1, 1987).

\textsuperscript{556} \textit{Cfr. ORGA: A/43/680}, October 5, 1988 (Annual report of the SG on the application of the implementation of the declaration of the granting of independence to colonial countries and peoples).

\textsuperscript{557} This Commission is integrated by the SG himself, that will assume the function of President, the Special Representative, Gros Espiell, the Personal Representative of the current Chairman of OAU, the Under-Secretary-General for Special Political Questions, Regional Co-operation, Decolonization and Trusteeship, the Under-Secretary-General for Special Political Affairs, the Legal Counsel and the Military Adviser to the Secretary-General (\textit{ORGA: A/44/634}, par. 11).
As was stated above, the report submitted to the Security Council by the Secretary General on June 18, 1990\textsuperscript{558} includes the proposals for a peaceful settlement accepted by both parties in the conflict, and would provide the bases for holding the referendum, which had to be, "organized and supervised by the United Nations, in cooperation with the OAU, will be carried out during a Transitional Period", with the following characteristics\textsuperscript{559}:

- 18 is the minimum age established for the right to vote of "all the Western Saharans who are registered in the census of 1974 made by the Spanish authorities", while the Special Representative of the Secretary General.

\textsuperscript{558} ORSC: S/21360.

\textsuperscript{559} While the Saharan question was submitted to study by the OAU, a series of Decisions of the Organisation established certain criteria regarding how to carry out the self-determination referendum. Though, due to existing tensions at the time between the Parties in conflict, these criteria were not in fact implemented. They are nevertheless of undoubted importance, for having concreted, even at a very early stage, the criteria that would later on form the Settlement Plan. So, already in 1981, some criteria had been accepted by "all parties of the conflict". In the first ordinary period of the Implementation Committee for Western Sahara of the OAU (Nairobi, 24-26 August, 1981), and in application of the AHG/Res.103 (XVIII), the aforementioned Committee decided to "organize and conduct a general and free referendum in the Western Sahara, establish and maintain the cease-fire (...) in the territory in which the main features would be: 1) All Saharans listed in the census conducted in 1974 by the Spanish authorities who have attained the age of 18 or above, shall be eligible to vote; 2) In determining the Saharan refugee population in the neighbouring countries, reference should be made by the records of the UNHCR; 3) In establishing the population of the Western Sahara, account shall be taken of the internationally recognized rate of population growth"; 4) The people of the Western Sahara shall be given the following choice: independence or Integration with Morocco (AHG/IMP.C/WS/DEC.1 (I), that figures as annex to document of the UNO, ORGA: S/14692, or also ORESC: E/CN.4/1982/14, p. 13, and E/CN.4/1982/17, Annex 1).

The criteria established by the Decision of this Implementation Committee of the OAU where also complemented, if not "retouched", during the second ordinary period of sessions of the mentioned Committee ((Nairobi, 8-9 February 1982), in which it was pointed that the requirements to have the right to vote would be established during the basic agreement and would conclude in an Order that would be promulgated by the Commission, who would be in charge during the referendum of a register of eligible voters. Also, it establishes as the first requirement of the celebration of the referendum a "register of the eligible voters, for which must be taken into account the figures of the census of 1974". Furthermore, it insisted on the fact that the options for the referendum would be two: independence or integration with Morocco (AHG/IMP.C/WS/DEC.2 (II), Rev.2, that figures as annex to document of the UNO, ORGA: A/37/570/Rev.1 and E/CN.4/1982/17, Annex 2).

As it can be appreciated the development of the project is still at early stage of what will become the Settlement Plan, being especially important the participation of the United Nations in its making from the very start. To this respect, \textit{cfr. ORGA: A/37/570/Rev.1, Report of the SG to the UNO}
assisted by the High Commissioner of the United Nations for Refugees (UNHCR) is responsible for the Western Saharan refugees outside the territory. As was later pointed out by the representative of the POLISARIO Front before the Fourth Commission\textsuperscript{560}, respect for these criteria as a basis for determining the updating of the census should entail a maximum increase of 3-6\% of the electorate registered in the 1974 census. However, this first criterion would later be "reinterpreted", in such a way that this percentage was only symbolic;

- An Identification Commission was created with the principal function of examining and updating the 1974 census, which involved calculating the real growth of the Western Saharan population in the period between the aforementioned census and the date of organization of the referendum (taking into account the births and deaths and the displacements of the Western Saharan population), a function which had to be finalized prior to the commencement of the referendum campaign.

In order to resolve the questions more strictly related to the characteristics of the population, this Identification Commission would be made up of "an expert in demography, familiarised with the problems and the structure of Western Saharan society, assisted by a group of three to five specialists in the demographic study of countries where nomads predominate". In order to achieve an improved guarantee of success in the work of the Identification Commission, the participation of the chiefs and tribal leaders in the territory was guaranteed, as these "can make comments and provide their contribution", considered by the Secretary General as "essential for the peaceful and swift resolution of the question", as well as the participation of the representatives of the two parties in the conflict and those of the OAU at the meetings of the Commission with the tribal leaders, as observers;

- There were only two options included in the referendum on self-determination for the accredited Western Saharan: independence or integration with Morocco. The limitation of the possibilities included in Resolution 1541 (XV)\textsuperscript{561} and 2625 (XXV)\textsuperscript{562} of the General Assembly to

\textsuperscript{560} October 7, 1996.

\textsuperscript{561} "A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: a) Emergence as a sovereign independent State; b) Free association with an independent State; or c) Integration with an independent State" -Principle VI Resolution 1541 (XV).

\textsuperscript{562} "The establishment of a sovereign and independent State, the free association or integration with an independent State of the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination of that people" -Principle of equal rights and self-determination of peoples. Resolution
Chapter VII

these two options clearly shows the difficulties encountered by the representatives of the two parties involved in the conflict when attempting to reach a base agreement to enable the process of self-determination in the territory;

- The ballot will be secret, and special arrangements will be made for people who cannot read or write;
- Although the absence of references to the withdrawal of the Moroccan Administration during the referendum is particularly notable, the following factors are established as previous conditions:
  a) before the commencement of the electoral campaign, the Special Representative can request the suspension of any law or measure which might be a risk to a free and fair referendum;
  b) all the political prisoners must be released so that they can participate in the referendum;
  c) once they have been included in the census, Western Saharan refugees can return to the territory freely and participate in the referendum;
  d) the Western Saharans who are resident outside the territory can freely decide whether they wish to return or not and will be assisted by the Special Representative of the Secretary General and by the UNHCR;

In 1973, when the Spanish Government was studying different possibilities regarding the future of the territory, Fernández de la Mora proposed to grant it with the statute of a Free State associated to Spain, by which the consultation to the people would be made under the auspices of the UNO (FERNÁNDEZ DE LA MORA, G., Río Arriba. Memorias, ed. Planeta, Barcelona (1995): 164).

In respect to this, answering the questions of the SG, the Moroccan government had pointed already in May 1986 that not only Moroccan Administration would not leave the territory, but also if it were to take place, it would be materially impossible to carry out the referendum. So the Moroccan administration "to whom electoral consultation is no novelty", offers all its cooperation and goodwill to accept any suggestions with the aim of "adapting certain rules in force to the particular demands of the referendum". The text of the Moroccan answer can be consulted in GRIMAUD, N. (1988): 99 and s.

This approach was openly in contrast with the SADR claims. The Information minister had pointed a month before (April 11, 1986) the necessary conditions for the celebration of the referendum: 1) complete withdrawal of Moroccan; 2) complete withdrawal of Moroccan Administration and presence in any form, including the colony population; 3) return of all Saharan refugees; 4) liberation of all Saharan prisoners and detainees; 5) peace-keeping force of the UNO and the OAU in the territory; and 6) set up of an internal international administration, constituted by the OAU and UNO to administer the territory during the transitional period to prepare, organize and lead the celebration of the referendum (Text in Sahara Libre, num. 285, April 1986).
e) absolute freedom of speech, assembly, movement and press will be established;

- Once it is verified that all these prerequisites have been complied with, the Special Representative will establish the date of commencement of the referendum campaign, and will be responsible for the maintenance of law and order in the territory during the Transitional Period;
- As regards the holding of the referendum itself, the representatives of the two parties in the conflict, as well as those of the OAU, will be invited to observe how it is carried out, and may submit any possible complaints for the consideration of the Special Representative, whose decision cannot be appealed against. In addition, the parties are committed to cooperate fully with the Special Representative, as well as to accept and obey the result of the referendum.

In January 1989\textsuperscript{565} technical conversations began at the United Nations Headquarters as regards preparations for updating the census that had been made by the Spanish authorities in the territory in 1974, which should serve “as agreed by the two parties, to draw up of a voters’ list for the proposed referendum”. This previous agreement of the parties constituted the starting point of the search for agreements intended to achieve the holding of the referendum in the territory. However, an event of special importance was to take place in the context of these pre-agreements, strengthening even more the progress of the negotiations: in February 1989, in Marrakech, direct contact between the two parties in conflict was established for the first time, between King Hassan II and a high level delegation of the POLISARIO Front.

In May 1990 the preparations to establish the Identification Commission stipulated in the Agreement Proposals were being finalized so that the identification process could be carried out in conditions of security. Since it was going to be necessary for the heads and tribal leaders to meet, a month later the Secretary General gathered thirty-eight tribal leaders and elders of the territory and explained the mandate and the methods of work of the Identification Commission to them. Thus, they had the opportunity to formulate the suggestions they considered to be advisable for the Commission both in relation to the best way to identify the persons with a right to vote in the referendum and the possible methods so that the leaders and elders could help the Commission to carry out its task\textsuperscript{566}.

\textsuperscript{565} ORGA: A/44/634, October 12, 1989 (Report of the SG).

2.2.  The Implementation Plan

Furthermore, the Secretary General proposed an Implementation Plan for the referendum on Self-Determination\textsuperscript{567}. On July 12, 1989, the Technical Commission, constituted on June 30, 1989 in order to carry out a study of the resources required to implement the settlement proposals we have just analysed, delivered this study to the two parties, together with a timetable plan for its implementation. This Plan, which includes the content of the agreement of August 30, 1988, had the following most innovative aspects:

a) For the first time a period for holding the referendum was established: which would be "24 weeks after the ceasefire came into force", and its results "must be publicly announced within a period of 72 hours", although the possibility to alter these periods was left to the Special Representative, depending on the circumstances;

b) The need for the creation of "an integrated group of United nations civilian, military and civil police personnel which he will head and direct" was established, and this would receive the name Misión de las Naciones Unidas para el Referéndum del Sahara Occidental (MINURSO)[United Nations Mission for the Western Sahara Referendum]. Its presence in the territory would last, with the proviso mentioned in the previous paragraph, "for up to 35 weeks from the coming into effect of the ceasefire". The main function of the MINURSO\textsuperscript{568} would consist of resolving all the questions concerning the referendum, its organization and execution, and it could take the measures needed to guarantee freedom of movement and the security of the population, as well as the impartiality of the referendum;

c) A Transitional Period was also established and this would begin with the ceasefire and would terminate when the results of the referendum were publicly announced;

d) Finally, the Secretary General pointed out the impossibility of calculating the cost which the MINURSO might entail for the UN, therefore, he decided to send a technical mission to the territory and to the neighbouring countries in order to make an in-depth study of the administrative aspects of the Plan which would make it possible to make an approximate evaluation of this cost (as we have seen above, the creation of the MINURSO was decided by Resolution 690 (1991) of the Security Council of April 29).

\textsuperscript{567} Cfr. ORSC, S/21360.

The content of some of the aspects of the Implementation Plan was subsequently extended through the report that the Secretary General submitted to the Security Council on April 19, 1991, in compliance with Resolution 658 (1990)\(^{569}\), which also developed other aspects already stipulated in the report. This specified the estimation of the global cost of the MINURSO (approximately 200 million dollars), developed some questions related to the referendum census and modified other aspects, stressing the following points:

a) Some of the functions to be implemented by the Identification Commission had to be carried out "outside and inside the Territory before the ceasefire comes into effect " thus contradicting the previous report, which limited these to the Transitional Period;

b) As regards the updating of the 1974 census, the functions to be carried out by the Commission were extended, when it pointed out that this must "a) remove from the lists the names of persons who have since died and b) consider applications from persons who claim the right to participate in the referendum on the grounds that they are Western Saharans and were omitted from the 1974 census", and the tribal leaders of Western Sahara would be asked to contribute to this work;

c) Moreover, two stages in the process that would lead to the drafting of the definitive census of voters were established:

• In the first phase the 1974 census list would be updated. In order to achieve this, the Secretary General previously sent both parties a copy of the census list drawn up by Spain, accompanied by a request for information on the location of persons who were in or outside the territory at the time the census was made, and had not been included in it. Once the corrections are made to the list, it must be published in the territory and “in places outside where numbers of Western Saharans are known to be living", and at the same time instructions had to be published before a determined date concerning the submittal of applications in writing by "those Western Saharans wanting to be included in the list who were omitted from the 1974 census". As a culmination to this first phase, the Commission had to meet in New York or Geneva together with the tribal leaders in the presence of observers from the OAU and from the parties in order to examine the applications under the supervision of the Special Representative. The resulting lists of this phase of the process had to be published in the territory and in the places referred to above on a determined date, when the Commission had to be “installed in the mission zone”.

\(^{569}\) ORSC: S/22464, April 29, 1991.
In the second phase, which was planned to last for a maximum of eleven weeks, the Commission had to address two tasks: identify the persons on the lists, hand over their registration cards and establish the procedure for appeals against the decisions taken by the Commission concerning the drafting of these lists. In this second phase, the Commission also had to take the measures required to identify and register "at the designated locations, all Frente POLISARIO troops who are eligible to vote", as well as "any Western Saharans who are similarly eligible and may be serving in the Moroccan forces". Once this second phase finalized, the Special Representative had to submit the lists drafted to the Secretary General to be examined in consultation with the Acting President of the OAU, then, the definitive list of voters would be published. The process, including the carrying out of the referendum, was planned to last for 36 weeks starting from the date on which the establishment of the MINURSO was approved. The report reaffirmed that the options the voter could choose from amounted to two: integration with Morocco or independence, and that the ballot would be secret and carried out "only in the Territory". Moreover, it was established that the result of the referendum would be determined by a simple majority of the votes validly cast. As regards the question of the refugees, the Office of the United Nations High Commission for Refugees was assigned to implement the repatriation programme. Finally, as was stated above, through Resolution 690 (1991), the establishment of the MINURSO was approved.

2.3. The Report of December 19, 1991. The modification of the identification criteria and the types of evidence admissible

As recorded in what would be the last report of Pérez de Cuéllar as Secretary General of the UNO, as a previous question to the implementation of the Settlement Plan of the Secretary General, on September 6, 1991 the ceasefire proposed in the Plan and expressly agreed to by Morocco and the POLISARIO Front came into force. From that same date, the headquarters of the MINURSO was established in the capital, El Aaiún, with three regional

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570 The main functions of UNHCR are: 1) to ascertain and record the repatriation wishes of each Western Saharan as he or she is registered as a voter by the Identification Commission. 2) to issue the necessary documentation to the members of his or her immediate family and 3) to establish and manage, in cooperation with MINURSO which will provide security, the reception centres that will be established in the Territory for the returning of Western Saharans" (ORSC: S/22464, par. 35).
571 Cfr. ORGA: S/23299.
centres in the northern central and southern sectors of the territory, together with a "liaison office" in Tinduf, assisted by the Government of Algeria. Although it was sporadically breached by both parties, the establishment of the ceasefire made it possible to start up the parts of the Plan regarding the identification of voters.

Furthermore, the report of the Secretary General stressed the failure to comply with the periods established in the Settlement Plan, but despite this he considered that progress had been made in the process since, although an agreement on its publication had not been reached, at least the first of the phases planned in the previous report for the updating of the census had been completed, and there was a revised list of the 1974 census.

In an annex to his report, the Secretary General took time to analyse the principal difficulties involved in the identification process, and highlighted the following:

• The first is in relation to the peculiarities of the Western Saharan population, insofar as it is a nomadic society and tribal structure. The difficulties deriving from these characteristics of the population had already been underlined by the Visiting Mission to Western Sahara, when it mentioned that,

"Because of their nomadic way of life, the peoples of the Territory move easily across the borders to the neighbouring countries, where they are received by members of their tribes or even of their families. This ebb and flow of people across the borders of the Territory makes it difficult to take a complete census of the inhabitants of Spanish Sahara and also poses the complex problem of the identification of the Saharans of the Territory and makes it even more difficult to take a satisfactory census of refugees";

• The second is related to a question that the Visiting Mission had also pointed out. This was the added difficulty when determining who is and who is not an inhabitant of the territory deriving from the affinity, "between the Saharans of the Territory and those in neighbouring countries, and their nomadic tradition";

574 "Instructions relating to the tasks of the identification Commission", written in accordance with article 3 of General Ruling of the organization of the referendum (November 8, 1991), and figures as annex to document ORGA: S/23299.
575 ORGA: 30th period of sessions, supplement num. 23: A/10023/Rev.1, par. 11.
A third question concerned the *conflicts occurring previously* in the territory, which gave rise to a large number of Western Saharans seeking refuge in neighbouring countries on several occasions, and the *emigration due to natural reasons* (drought, the search for employment, etc.)

Finally the problem deriving from the *Green March* must not be forgotten since, when it ended, part of the participants settled in the territory and became new settlers. The Secretary General may have alluded to this question in his report, and such a neutral approach points to a shift in his outlook, aligning himself to the Moroccan position. The brief report states that "a number of persons who claim to belong to Western Sahara have been moved into the Territory". The use of the impersonal grammatical structure to refer to a situation which constitutes a violation not only of the content of the Settlement Plan but also of the obligations of Morocco as the occupying Power in the territory in conformity with the IV Geneva Convention, is more than a mere slip by Pérez de Cuéllar, and is the first step taken by a Secretary General to align himself with approaches of the occupying Power.

Despite this, the Secretary General states that "only those persons who have been duly identified by the UN will eventually be eligible to vote in the referendum", an assessment which, although obvious, is surprising coming from the person who holds the ultimate representation of the UN, and he casts doubt on his conviction that the conflict will be resolved, especially when he later points out that,

"it is clear that only members of tribes whose connection with the Territory within the limits of recognized international

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576 Cfr. ORSC: S/23299, par. 10.
577 Segura stated that approximately 50,000 Moroccans constituted the social base for the new occupation (*vid.* SEGURA PALOMARES, J., *El Sahara, razón de una sinrazón*, Ed. Acerbo, Madrid (1976): 194). Also, the third report that the SG presented to the SC in accordance to Resolution 379 (1975), in which he referred to the Madrid Agreements, pointed that "After the withdrawal of the participants in the ‘Green March’ from the Territory of Western Sahara, Spain resumed negotiations with Morocco and Mauritania and on 14 November the three parties agreed upon a ‘declaration of principles’ relating to the future of the Western Sahara" (ORSC: S/11880, par. 7), setting in this way that the totality of the participants left the territory already for November 19, 1975. Nevertheless, declarations of the Moroccan representative before the GA, M. Laraki, seem to confirm the contrary, as he states "Sahara lives in a peaceful atmosphere and of great activity of reconstruction and organization" (ORGA: 31st period of sessions of GA, 21st session, October 7, 1976, highlighted by author), which seems difficult to understand after the withdrawal of the territory of great part of the Saharan population, if it is not done by Moroccan colonists.
borders is clearly established should participate in the referendum".

The main problem of drafting the census derives precisely from the lack of respect to this last sentence. As we will see later, the pretensions of Morocco to include in the census members of tribes presumably linked with the territory but who reside outside “the limits of its recognised international borders” would take the process to the verge of collapse.

As a basis for a possible solution to the first two questions, the report of the Secretary General again referred to the Visiting Mission, to the effect that the census of the referendum should be based on the demonstrated composition of the social and family groups (fractions and sub-fractions of tribes) within the territory. In relation to these last two points, another question practically stopped the identification process, or rather almost killed it off. This was the intention of the Alawite monarch to include 170,000 new voters in the census, "Western Saharan" who had fled from the territory in 1958 as a consequence of the war and subsequent military operations; this was in open contradiction with the data used by the organs of the United Nations and expressly mentioned by the Moroccan representatives before these organs, and with the data provided by the POLISARIO Front and by Algeria as well as contrary to the report of the Secretary General which excluded from the census tribe members who do not live within the limits of the internationally recognised borders. In addition, the Western Saharan representation before the Committee of Twenty-Four appeared on October 15, 1990 before this Committee and stated that together with a military contingent of more than

579 The claim came from the Moroccan King by a letter sent on September 15, 1991 to the SG of the UNO. From the beginning of the seventies, when Morocco accepted for the first time that the solution to the conflict should be a self-determination referendum (where only two options would be eligible: remain under the Spanish status quo or integrate to Morocco), the government of this country mentioned the possibility that nearly 150,000 “Saharan refugees in Morocco under the Spanish repression” would be able to participate in the referendum. Cfr. DESSENS, P. (1976): 33.
580 Morocco had stated to the Visiting Mission of the UNO that they had an official calculation of Saharan refugees in the southern part of Morocco of between 30,000 and 35,000 (ORGA: Supplement num. 23 (A/10023/Rev.1), Report of the Visiting Mission, par. 124). Furthermore, the Decolonization Committee had collected similar statements from the Moroccan government that situated the number of Saharan refugees between 30,000 and 40,000 (Decision November 7, 1975, apart. 9). The POLISARIO Front stated to the Visiting Mission that the number of political refugees and exiled persons was of 50,000, while Algeria calculated that the Saharan refugees in its territory was over 7,000 (ORGA: Supplement num. 23 (A/10023/Rev.1), Report of the Visiting Mission, par. 156, note ff).
100,000 soldiers, there were 50,000 civil servants in Western Sahara, and "a Moroccan civil colony whose number exceeds 150,000"\textsuperscript{581}.

Furthermore, besides this serious situation, there was what has been called "the Second Green March", which consisted of the movement of a large contingent of Moroccan citizens to the territory, and the Moroccan Government intended to include these in the census of the referendum\textsuperscript{582}. Although this was the most important colonization of the territory as regards numbers, before this occurred, Morocco had already carried out an intense colonization policy in the territory\textsuperscript{583}.

With regard to another factor, in a section called "Instructions for the examination of the applications to participate in the referendum"\textsuperscript{584}, the Secretary General specified the profile of the inhabitants with a right to vote in the referendum, based on "recognized sources such as custom, international

\textsuperscript{581} ORGA: A/AC.109/PV.1376.

\textsuperscript{582} As stressed by Remiro Brotons, the systematic inflow of immigration leads the colonised territory to a situation where free election is infringed by colonists, even if the new population does not figure in the census of the referendum (\textit{vid. REMIRO BROTONS, "Derecho Internacional" (1997): 119}).

\textsuperscript{583} In this way, for example, the growth of the population of El Aaiún had been important. From 30,000 inhabitants in 1975, to 90,000 in 1984 (Centre d'Etudes et de Recherches Démographiques, Situation démographique régionale au Maroc: Analyses comparatives, Ministère du Plan. Rabat, 1988, pp. 248-257), and to 130,000 in 1992 (BERRADA GOUZI, N., GODEAU, R., “Laayoun, plus fort que le désert”, in the collective work "Que font les Marocains au Sahara?", \textit{Jeune Afrique}, num. 34, supplement num. 1722, January (1994): 73). As Kroner says, the spectacular increase of inhabitants of occupied territories of Western Sahara can only be explained by the massive inflow of Moroccan settlers (\textit{cfr. KRONER, D.H., "The maroccanization of the Western Sahara", \textit{Swiss Review of World Affaires}, 34 (9), Decembre (1984): 10). Likewise, Seddon numbers in 38,000 the Moroccans moved to the territory during the "Second Green March" (\textit{cfr. SEDDON, D., "Briefing: Western Sahara Tog-of-War", \textit{Review of African Political Economy}, n° 52 (1991): 110-113). On this same matter, \textit{cfr. JOFFE, G. (1995): 111. Also, the moving population from Morocco, moved by military transport to Western Sahara territory has been repeatedly denounced before the United Nations. Among these, \textit{cfr. CHOPRA, J., “Statement regarding the issue of the Western Sahara before the Fourth Committee of the United Nations General Assembly, October 19 1992"}, \textit{Internet: http://heiwww.unige.ch/arso/Chopra-92.htm}; Otherwise, in the case that the POLISARIO Front should win the referendum, there is no doubt of the problem that the new State would have to face: approximately a hundred thousand Moroccans could claim their staying in the Territory. As underlines Bookmiller, the Saharan thesis victory at the referendum would be the beginning and not the end of a long political process (\textit{cfr. BOOKMILLER, R.J., "The Western Sahara: future prospects", \textit{American-Arab affairs}, n.37, Summer (1991): 75 and s.).

\textsuperscript{584} ORSC: S/23299.
practice, generally recognized norms as well as laws in force in the region". After clarifying that "the determining factor is the membership of a family group (sub-fraction of a tribe) existing within the territory which can be attested to by the sheiks and notables of the family group", the Western Saharans in the following circumstances could be registered in the census:

1) The persons whose names are on the original 1974 Spanish census list, as well as on the revised list.

2) The persons who lived in the territory as members of a Western Saharan tribe when the census was made in 1974 and who could not be registered by virtue of individualised applications which had to be studied by the Identification Commission, which must apply criteria of justice and fairness. The applications of these persons must be accompanied by testimonies or documents that provide the grounds for their request.

3) The members of the immediate family (father, mother and children) of these first two groups, on account of kinship. In both cases, the relationship will be established in response to individual applications, that is to say, it will be necessary for each one of the persons concerned to make an individual claim to have his right recognized.

4) The children of Western Saharan parents born in the territory and were not there at the time of the census made by the Spanish authorities. Although these persons are not denied their a priori right to participate in the self-determination referendum, they are required to demonstrate strong ties with the territory. Moreover, in order to ensure that, the scope of this possibility was not excessively wide and was limited to the possibility of a single generation.

5) Finally, and generically, the Report points out that, when these guidelines of the United Nations were established, the interest of the parties and the customs of Western Saharan society were taken into consideration. Thus, generically, it was established that, "it is considered that a member of a Saharan tribe belonging to the Territory is eligible to participate in the referendum if he or she has resided in the Territory for a period of six consecutive years before 1 December 1974", although a twelve year period of intermittent residence previous to this date was established in order not to harm the Western Saharans who had to enter and leave the territory frequently due to their circumstances. The establishment of these periods was not arbitrary as six consecutive years was the average period of

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residence required by law in the countries in the region in order to acquire nationality.

Thus, the Secretary General extended the possibilities of acquiring the condition of voter in the referendum, without the approval of one of the parties, and openly contradicted the agreements stipulated in the Peace Plan. According to the report, there were five groups of persons with the right to participate in the referendum, while in the Settlement Plan, accepted by both parties, only the first group mentioned was referred to in the following terms, "eligibility to vote will depend either on the presence of a person's name in the 1974 census list, or on a person's ability to convince the Identification Commission that he or she is a Western Saharan who was omitted from the 1974 census." Even considering some of the criteria concerning the family ties as correct, and which had been admitted by the norms of the Yemáa Commission analysed above, this extension seems to be excessive, especially, if the statement in the Settlement Plan is taken into account which refers to Western Saharan society as, "a society that is nomadic and to a large extent illiterate and where such criteria as place of birth or residence are of limited relevance." The attitude of the Secretary General which modified the criteria which would give the right to participate in the referendum was denounced by the POLISARIO Front and, in the end, this would become the main reason for stopping the process, which was only unblocked after Kofi Annan became the UN Secretary General. Morocco considered these criteria to be correct as they were clearly advantageous considering its intentions, which were, if possible, even more ambitious.

The conclusions of the Report of the Secretary General also contained a component that was of decisive importance for drafting the lists, which, considering its significance, would constitute one of the main obstacles to the process, and would contribute to accentuating the differences between the parties. This involved the evidence admissible by the Identification Commission.

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586 ORSC: S/22464, par. 62, a).
588 ORGA: S/22464, par. 62, a).
589 In these conditions, the Saharan representative denied even to receive Marrack Goulding, Under-Secretary General of the UNO, that in 1992 travelled to Western Sahara in a good offices mission (vid. DAMIS, J. (1992): 39).
590 Damis states that Morocco wanted to extend these criteria to two generations back in time that would lead us to approximately to the year 1900. Also, the application of this new criterion would enable to participate in the referendum between 25,000 and 35,000 Saharans that had abandoned the territory during the last years of the fifties. And the new criteria would extend in 7,000 approximately the possible voters in favour of the POLISARIO Front (Ibidem).
while carrying out its work. According to the report of the Secretary General, these could be of two types: written documents -"the official documents, well known by the Western Saharan and used by them"-, and oral testimony -"given the fact that in Western Saharan society (…) this is an important component of all social activity".

As regards the written evidence, the report stated that all types of official documents would be accepted, and this was openly rejected by the POLISARIO Front as, in its opinion, only written documents issued by the colonial Power should be admitted, never those issued by Morocco. Morocco doubted the impartiality of the Spanish authorities and considered that those issued by its Administration should also be admitted.

Neither was an agreement reached on the admissibility of oral testimony. Thus, while Morocco defended its admissibility in all cases, the POLISARIO Front established the following limitations:

• The oral evidence for registering applicants for the census through the 5th criteria will not be admitted;
• The oral evidence will be purely complementary to the written evidence, therefore, this alone will not be considered to be sufficient evidence;
• This will only be taken into account in order to prove that an applicant belongs to a tribe, or to physically identify a person;
• Only the Sheikhs will be able to testify that they were included in the list drawn up by Spain.

Since belonging to a family group is a key component when including an applicant in the census, another controversial question, present throughout all the report, consisted in determining when it should be understood that this family group or sub-fraction of a tribe is settled in the territory. The differences between the Western Saharan and the Moroccan approaches to this point are evident since, as opposed to the broader interpretation of Morocco, according to which the fact that a single representative of a tribe was recorded in the 1974 Spanish census would give the totality of the members of this tribe to participate in the referendum, the representation of the POLISARIO Front maintained that only the family group whose majority of members were registered in the 1974 could be accepted as settled.

Despite the difficulties mentioned above (the nomadic nature of society, affinity, etc.), in 1974 the Spanish authorities had managed to achieve a census of the population, according to which the total number of Western Saharan who lived in the territory amounted to 73,497. The Visiting mission had been informed that "all the members of such groups are known to each other and that the authenticity of a claim to belong to a family group can be verified by the sheiks and notables of that group in consultation with their members".
Therefore, between 1970 and 1976, the Spanish authorities had issued 32,516 identity cards, which served as a basis for the census, issued due to the norms established by a Permanent Commission of Tribal Leaders (a Commission of the Yemāā) which used the criteria of belonging to a family group (ahel) in the territory. Moreover, at the final communiqué of the meeting of the tribal leaders organized by the United Nations in June 1990, referred to above, "the flaws and imprecision" of the 1974 census were stressed, as numerous Western Saharans had not been interviewed, and these had been included in the census of the territory, but were out of the territory when the 1974 census was carried out, and, if this had been taken into account, it would logically have increased the number of persons in the census. However, when mention was made of the imprecision of the 1974 census, this also involved an express reference to the refugees outside the territory who were not included in the census due to their situation. The Report of the Secretary General stated that the Identification Commission had to appeal, particularly, to the Western Saharan notables and tribal leaders faced with the rectification of the defects affecting the 1974 census which, as we pointed out above, would have to be the basis of the new

591 According to the approved rules by the Yemāā on November 1974 governing the issue of identity documents to Saharans, which were promulgated by the Governor-General on 18 December 1974 and could eventually form the basis for such law (ORGA: Supplement num. 23 (A/10023/Rev.1), Report of Visiting Mission, par. 160-163), "the following persons shall be deemed Saharans: 1) All persons born of Saharan fathers; 2) Persons born of Saharan mothers and fathers of foreign nationality, provided that the laws of the country of the father's nationality do not require that the children have the same nationality as the father; 3) Persons born in the Territory of parents of foreign nationality provided that the latter were also born in the Territory and were resident there at the time of birth; 4) Persons born in the Territory of unknown parentage, except that, should the latter's nationality become known, the foregoing provisions should apply". Also, the rule provides that persons may opt for Saharan nationality if they were born in the Territory or born outside the Territory of Saharan parentage. Where marriage is involved, the wife of a Saharan automatically acquires the nationality of her husband; the converse also applies, the children automatically having the nationality of the father. So, it was possible to choose the Saharan. Finally, these rules provide that a non-Saharan may be granted Saharan nationality, on the recommendation of the appropriate commission of the Yemāā, provided the applicant has resided in the Territory for not less than five consecutive years immediately prior to the application, or exceptionally, for three years if the applicant has made significant contribution to the Territory for example, by virtue of having introduced an important industry or by being the director of a major agricultural, industrial or trading enterprise. This last possibility aroused criticism by the POLISARIO Front before the Visiting Mission, as it could be used to grant Saharan nationality to non-local persons that occupied at that moment important posts in Spanish Administration.
census\textsuperscript{592}, thus, attributing an important role to the collaboration of the Western Saharans in the process for the identification of voters.

With regard to the \textit{identification procedure}, until the present time, this was carried out in twelve identification units, distributed as follows: four in the territories occupied by Morocco (El Aaiún, Villa Cisneros, Smara and Bojador), four in the Western Saharan "provinces" in the refugee camps located in Algerian territory (El Aaiún, Villa Cisneros, Smara and Auserd\textsuperscript{593}), two in Mauritania (Nuabidú and Zuerat) and another two mobile units. As regards their composition, there was a civil servant of the UN, two \textit{Sheikhs} appointed by the parties (Morocco and the POLISARIO Front), two observers appointed by Morocco and the POLISARIO Front, and a third designated by the OAU.

The procedure is as follows: the possible voters, distributed geographically among the identification units, had to appear before their corresponding units. In the event that there was an agreement between the two \textit{Sheikhs} regarding the Western Saharan identity of the applicant, he would be registered in the census and would be given a census card, which would enable him to participate in the referendum. In the event that there was no agreement, it would be necessary to resort to written evidence if there is any. If there were no agreement as regards this evidence, the UN civil servant would decide. The provisional lists of those registered may be appealed against, and these appeals will be resolved by an international jurist.

This final report of Pérez de Cuéllar was undoubtedly a setback for the process as it modified the criteria and the evidence agreed to from the beginning as regards the drafting of the census and these criteria had always been defended by the Secretary General but he had decided to abandon them on leaving his post. The POLISARIO Front flatly opposed this change of criteria decided by the Secretary General, "since it viewed the 1974 census as a key provision of the Settlement Plan, to which the two parties had agreed and which could not be changed without their consent"\textsuperscript{594}.

One sign of the conflict concerning the content was the unusual controversy in the Security Council; through its Resolution 725 (1991),

\textsuperscript{592} The importance of the cooperation and assistance of tribal chiefs and other notables of the Territory refers to the following aspects: 1) to assist the Commission in refining its operational procedures; 2) to assist in the review of the written applications from people who were not counted during the 1974 census; and 3) to assist in identifying and registering voters, and in connection with the process of appeals (\textit{cfr. ORSC}: S/23299, par. 16-18).

\textsuperscript{593} The Saharans organized the refugee camps of Tinduf in several geographical organisations, which they named after the main locations of Western Sahara.

\textsuperscript{594} \textit{ORSC}: S/25170, par. 16.
approved by unanimity, the Security Council approved “the efforts of the Secretary General”, but not the report that it merely “welcomed”. Approving the report of the Secretary General is quite different from “welcoming” it; the latter expression only entailing diplomatic courtesy. In addition, the impartiality of the Secretary General was called into question when, after this resolution was approved, some of the media published news referring to his participation in an important Moroccan company linked to Hassan II.

3. The Butros Gali phase

The first report drafted by Butros Gali as Secretary General of the United Nations highlighted the deep discrepancies between the Moroccan and the Western Saharan representatives as regards the census. The POLISARIO Front insisted that in the Settlement Plan the two parties in the conflict had agreed that the 1974 census would be the exclusive basis for the determination of the right to participate in the referendum, meaning therefore that the persons registered in this census should constitute the majority of the persons with the right to participate in the referendum, and those born in Western Sahara and omitted from the 1974 census would be the exception to the rule. The POLISARIO Front also insisted on the criteria already explained to the Secretary General concerning the conditions of admissibility of oral evidence. However, Morocco considered that the 1974 census was only a reference to be taken into account.

596 There are several press releases that refer to this question. In this regard, for example, cfr. the following: "Pérez de Cuéllar signs up for the main Moroccan holding" (El País, February 1, 1993, p. 14); "Pérez de Cuéllar affirms having rejected the post of head of a firm as it was going to be bought by a Moroccan group" (El País, February 4, 1993); The SG pointed that "it is true they made an offer, but I asked for time to think... They considered my lack of answer as an acceptance of the post, and made it public" (ABC, February 7, 1993); "Pérez de Cuéllar has been appointed Vice-president of a subsidiary company of the Moroccan Consortium ONA, related to Hassan II" (El Mundo, February 2, 1993).
597 Cfr. ORSC: S/24464, August 20, 1992. The prior reports of the new SG (ORGA: S/23662, of February 28, 1992, and S/24040, of May 29, of the same year) give faith of the same aspects that are related in this one, with the exception that for the first time the SG attributes in part the delay in the celebration of the referendum to "the fact that the United Nations has never before organized a referendum of this kind", wich “explains in large measure the delay that has occurred” (S/23662, par. 32).
598 These criteria were collected by the SG in his Report of December 19, 1991 (ORSC: S/23299).
The report of the Secretary General of January 26, 1993 clearly indicated the intention of the new Secretary General to put an end to the peace process. He untruthfully insisted on stating that the reports of his predecessor\textsuperscript{599} "are based on proposals to which the parties had freely agreed in August 1988"\textsuperscript{600}, given that, as mentioned above, Pérez de Cuéllar had included identification criteria which was not planned in these proposals, and he attributed the failure of the negotiations to the lack of willingness of the parties. In this situation, the Secretary General put forward three options regarding the future of the process, mentioned above: to continue with the negotiations, to apply the Plan even without the collaboration of the parties, or to propose a new way to resolve the conflict apart from the Plan.

3.1. The "agreement on the interpretation which must be given to criteria 4 and 5" (January 26, 1993)

The report of the Secretary General informed the Security Council of the scant progress in the process and notified it that, as a result of the negotiations between its Special Representative and the parties on the interpretation of the "Instructions for the examination of the applications for participation in the referendum"\textsuperscript{601}, an agreement had been reached on the interpretation which must be given to criteria 4 and 5 of these "Instructions"\textsuperscript{602}, as these were the criteria "which present the POLISARIO Front with the greatest problems in terms of applicability, compatibility and legality with regard to the relevant provisions of the Settlement Plan". Once it was established that discussing the interpretation of these criteria did not entail their acceptance, the representatives of the POLISARIO Front were prepared to accept these criteria with a single non negotiable condition: the exclusive use as evidence of authentic documents issued by the Spanish Administration. Morocco rejected a reopening of the debate on this question.

As was expected, the extent of the agreements reached in these circumstances was rather mediocre. In our opinion, they did not even reach


\textsuperscript{600} ORSC: S/25170, par. 28.


\textsuperscript{602} The agreements figure as Annex to the document ORSC: S/25170, under the title "an interpretation by the parties of the criteria for eligibility to vote and other instructions relating to the tasks of the Identification Commission".
this level. This is shown by the significant drafting of the agreements. In the case of "Criteria 4", the two parties agreed that "if this is applied", the evidence that the father was born in the territory would be a *sine qua non* condition for the person to have the right to vote. Moreover, this is the only agreement reached regarding this criterion as the POLISARIO Front considered that this was unacceptable as it reduced the stipulations in the Settlement Plan\(^{603}\), but despite this, it was prepared to examine "any compromise proposals on this issue"\(^{604}\).

With regard to "Criteria 5", the POLISARIO Front held that, in accordance with this criteria, if a person had been abroad at the time of the 1974 census, he would have to prove that he had been resident in the territory for six consecutive years or twelve non-consecutive years between 1958 and 1974 (if he was in Morocco), between 1960 and 1974 (if he was in Mauritania), and between 1962 and 1974 (if he was in Algeria) in order to be registered in the census. As is logical, these dates are not arbitrary, but correspond to the dates when these three neighbouring States became independent. Morocco referred to the nomadic nature of Western Saharan society and to the movements of the population due to the colonization as it considered that the period to be taken into account should begin in 1884, the year in which Spain entered the territory. It is clear that there was no agreement on the question, and the Secretary General simply restricted himself to collecting the contradictory positions of both parties, so it is not appropriate to speak of an agreement.

As regards the evidence, the report of the Secretary General repeated the differences between the parties, with no more comments. Finally, on the question of belonging to a tribe, the parties did agree that belonging to a tribe did not, in itself, grant the right to participate in the referendum, meaning that "the individual must in all cases meet one of the criteria for eligibility in order to vote in the referendum". However, despite this, the positions of the parties remained immovable as regards when a sub-fraction should be considered "to be established in the Territory".

After successive failed attempts to close the gap between the parties, and as consequence of the efforts of the Special Representative of the Secretary General, the parties held direct conversations in El Aaiún (17-19 of July 1993), in which agreements were reached on a new revised timetable and on a new form for registration with two versions, one in Arabic and French and the other in Arabic and Spanish\(^{605}\). As a result of these agreements, on November

\(^{603}\) Par. 24 and 61 of document ORSC: S/21360.

\(^{604}\) ORSC: S/25170, par. 6.

3, 1993, the commencement of the identification and registration process was officially announced. However, the re-launch of the process was only apparent. Although the POLISARIO Front modified its position as regards the type of evidence admissible, and accepted oral testimony in support of individual applications to participate in the referendum, it requested the inclusion of amendments to the transaction proposal of the Secretary General, which were immediately rejected by Morocco.

3.2. "The Compromise put forward to the two parties by the Secretary General" (July 28, 1993)\textsuperscript{606}

The most controversial question continued to be the determination of what should be understood by "settled sub-fraction of the territory"; so the SG presented the Parties a concrete compromise on the matter. The proposal of the SG could not be accepted by the POLISARIO Front and neither by Morocco due to reasons that will be analysed later on. The most important aspects of the proposal are that it:

- Reaffirms the previous five criteria of the SG Report;
- Establishes that a sub-fraction belonging to the territory is a sub-fraction included in 1974 census;
- Regarding supporting evidence it affirms that:
  
  “Exceptionally, where an applicant does not possess the above documents or has incomplete or inadequate documents, the Identification Commission may determine eligibility to vote taking into account testimony by tribal chiefs (Sheikhs)

- Regarding chiefs (Sheikhs) it points that
  
  “Only sheikhs of the Saharan subfractions included in the 1974 census will be eligible to testify before the identification Commission in support of individual applications to participate in the referendum”

This proposal could not be accepted by the POLISARIO Front, because the fact that if a single person belonging to a tribe, including those not settled in the territory, should figure in the census of 1974 it would give the right to participate in a referendum to all the members of that tribe, which, obviously, would distort the census, and therefore the Peace Plan. In their opinion, the

formula proposed by the SG lacked of any kind of basis: neither historical nor related to the 1974 census.

Morocco was also dubious with the proposal, with the surprising argumentation that the decision to consider as settled in the territory "all Saharan subfractions whose members had been included in the census of 1974" could arbitrarily exclude subfractions of which no member was present in the Territory during the 1974 census, but which were none the less an integral part of a Saharan Tribe of the Territory. To accept this position would throw be to directly discard the Settlement Plan, since the Spanish census would become the base criteria for create a further identification criteria.

Given this situation, the SG considered that neither of the conflicting interpretations of the two parties would be easily applicable, “the first being too imprecise and too broad and the second being mathematically impossible to formulate accurately”, especially considering that “the notion of ‘people of Western Sahara’ cannot be defined clearly and precisely”. Regarding the Sheikhs who could participate in the identification of the members of the different sub-fractions, the SG underlined "that two lists of Sheikhs are in existence: one from 1973, the other of those who at the time of realization of the census claimed to have this status, meaning that it was very difficult to reach an agreement on this question”.

Even if the SG was aware that "the identification process and registration of potential voters cannot proceed beyond a certain point unless the particular problem of linkage with the Territory is settled", in his report of July 12, 1994 he reported to the SC the situation of the work of the Identification Commission and underlined that the Identification Commission focused its efforts on achieving the agreement and cooperation of both parties in order to proceed with the identification of potential voters. The agreement refers to the two Saharan tribal subfractions with which the operation should start, the pertinent Sheikhs who would help the Commission to identify the applicants and the Parties representatives in charge of the observation of the process. In virtue of this process, the SG recommended that the Transition Period should start on October 1, 1994, and that the referendum should take place on February 14, 1994.

3.3. **Stalling of the process after "the flood of application forms at the last moment" (October 15, 1994). Decisions of the Secretary General (November 24, 1995) and his later disavowal by the Security Council -Resolution 1033 (1995)-**

Although on August 28 1994 the identification and registration operation was finally launched in El Aaiún and in the Tinduf camps (precisely in the “Wilaya” in "El Aaiún") and even after the initial understandable optimism at the start, the process had to be suspended for a few days. This was at the request of the POLISARIO Front, when the political and procedural difficulties inherent in the process were joined by those of nature, which seemed to ally itself with the misfortune Sahrawi people, punishing them with unprecedented heavy rainfall and consequent flash flooding in the Tinduf area, which caused widespread damage and disruption. The suspension for a few days of the process would not merit mention here if this unfortunate circumstance had not been used by Morocco to set up an operation that would ruin the whole process. The SG refers to it with a certain "surprise" pointing that "in the second half of October, there was a flood of completed application forms” but this mere “surprise” cannot cover the situation, given the significant extent of the violation of the Peace Plan. This is especially so if it is taken into account that, if the heavy rainfalls had not occurred, this "avalanche" of application forms would have arrived after the deadline, set in a letter to the parties from the Deputy Special Representative to set 15 October 1994 as the deadline for the receipt of the applications.

In a letter addressed to the President of the Security Council by the POLISARIO Front on November 10, 1994, the Saharan representatives fiercely criticized the Moroccan manoeuvre but also the Secretary General's attitude towards it, since faced with the flood of applications, the SG only pointed that "this inevitably means further lengthy delays in the identification process". 180,000 from the 232,000 demands received by the Identification Commission (data officiated by the MINURSO) were sent by the Moroccan government, of which 150,000 were sent on the day of the "last minute avalanche of applications" referred to in the report. Including the new applications in the voter's census would mean, compared to the 1974 census, an increase of 296%, when the initial previsions were of an approximate increase of 3-6%. Furthermore, the great majority of the new applications

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611 Par. 1 of letter of November 10, 1994.
belonged to tribal sub-fractions that only represented 14% of the 1974 census (approximately 10,000 persons)\textsuperscript{612}. The POLISARIO Front expressed their surprise and indignation to what they considered a "grave omission", as the SG’s report referred neither to the mentioned data, nor to the origin of the mentioned "flooding of applications"\textsuperscript{613}. This event without doubt marks the turning point of the identification process and another step in the drift of the attitude of the Secretary General towards Moroccan interests, since less than four months later he changed the course of the process, from setting the date for the referendum (February 14, 1995) to later considering that "it is clear that it will take many months to make sufficient progress in the identification process to be able to determine a date for the referendum"\textsuperscript{614}.

\textsuperscript{612} Data from the newspaper \textit{El País}, May 11, 1996.
\textsuperscript{613} In a memorandum of the POLISARIO Front, of June of 1995 (unpublished), the Saharan representation presents concrete data on the identification process expressing their doubts on the credibility of the process and, deducing in practice the impossibility of the commencement of the “transitional period”, that should take place after the final preparation of the voter list. In this way, it is stated that among the common features of the members of the big contingent of applicants of residence in the South of Morocco and in the occupied territories that claim to be included in the referendum census, the lack of identity documents is outstanding: documents issued by Spanish authorities or by Moroccan ones. But the memorandum draws attention about a paradigmatic case, the "most flagrant and symbolic" that took place in the Centre of Identification of the occupied location of Smara, where more than 3,000 applicants claimed in their inscriptions the following data: that they were born near Smara and that, following the drought, emigrated to Morocco in 1971, lived in Marrakech and returned to Sahara in 1991; that they were orphans of mother and father, and had no brothers or sisters; that they knew the designated \textit{Sheikh} by Morocco; that they had no Spanish or Moroccan documentation. The POLISARIO Front considers that the following data are inconceivable among the Saharan population, and that it is also "too systematic to be accidental". The memorandum also states that the \textit{Sheikh} appointed by the POLISARIO Front checked the falseness of the data after a few questions. But the most worrying issue is related to the future of the identification process: "how will the Commission resolve in the case of thousands and thousands of persons that a) do not figure in the 1974 census, b) do not present any kind of document to prove their own identity or allegations, c) about whom both Sheikhs do not agree?". The POLISARIO Front draws attention also on the problems that the post-referendum phase would cause and in the case it should be favourable to independence, how the United Nations should guarantee the mechanisms of peaceful transfer of the Territory Administration to the POLISARIO Front.

\textsuperscript{614} ORSC: S/1994/1257, par. 20. The POLISARIO Front continues to insist on this approach. In this sense, for example, \textit{cfr.} intervention of his representative before the Fourth Commission, October 7, 1996. In public statements of the President of the SADR, the POLISARIO Front outlined its intention to return to arms in the case the Peace plan should fail (\textit{cfr. El País}, June 10, 1995).
Once Butros Gali accepted this situation, in his next reports the Special Representative the Sharia Civil Register for Western Sahara my Deputy Special representative. We do not understand the reason for which this material should not have been forwarded at the beginning of the process, but now nearly twenty years after the Spanish withdrawal from the Territory.

The two main questions of the identification process during this phase are related to the designation of the Sheikhs for both parties and the identification of the tribes proposed by Morocco. Butros Gali took decisions concerning both matters. Regarding the first, and since on numerous occasions the POLISARIO Front could not present a sheikh to identify these groups when dealing with tribes which, in its opinion, are not Western Saharans, the Secretary General decided that the procedure should be followed regardless of the cooperation of the parties. Firstly, both parties will be invited to present a sheikh, or deputy from the sub-fraction concerned who would act as representatives during the identification process. The OAU is also invited to name an observer. In these circumstances, as well as in the situation where one of the parties does not name a sheikh or deputy, “identification will take place on the basis of appropriate documentation, with the assistance of one of the sheikhs present” and anticipating that “in the situation where neither party wants to or is able to present a sheikh or deputy, identification will be based solely on documentary evidence”.

This proposal once again violated the spirit of the Peace Plan, which always took the agreement of both Parties as the starting point during the whole identification process. This question could have been overcome, maybe, during the Transitional Period, in which the power of the Special Representative would have allowed a decision to be made without taking into account the opinions of the parties, but during the identification phase this is not possible, not even if the SG proposed so, as time would show. According to the decision of the SG, the identification of 85 of the 88 resident subfractions of the territory and camps of Tinduf posed no problem regarding the designation of sheikhs and alternates and was carried out in the same conditions as before, with one exception: in the case of there being no representative for one of

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the Parties, one of the sheikhs and/or the observer from the OUA would continue the identification process as long as the established formal procedures were followed (communication to the Parties of the date of identification and publication of the lists). In the case of the rest of the three tribal groups (H41, H61 and J51/52),618 and in the case of all identification which took place outside the Territory and in the camps of Tinduf, the SG decided to continue the process even in the absence of a representative of the Parties, one of the sheikhs and/or an OAU observer, but in this case "although the sheik who is present will be able to assist in identifying the applicant, the latter’s claim for inclusion in the electoral roll, under any of the five criteria, will be evaluated on the basis of documentary evidence". For this purpose two documents will be required: first, a birth certificate issued by the competent authorities in the country of the applicant’s birth to substantiate that he or she is the child of a father born in the Territory; secondly, a document issued by the competent authorities within the internationally recognized frontiers of the Territory before 1974 to substantiate the father’s birth in the Territory.

As it was expected, both Parties rejected the proposal, though each one for different reasons. Since it had already refused that the only valid documents

618 The POLISARIO Front refused to include in the census applicants that belongs to groups of tribes H41, H61 and J51/52, belonging to the “Tribes of the North”, “Chorfa” and “Costeras and del Sur”, respectively, because, in its opinion, they were groups of tribes and are not formed by subfractions in the strict sense of the Spanish census of 1974. In this census tribes were classified in alphabetic order (A, B, C, D, E, F, G, H, I, J), subdividing the seven first letters (A to G) in subfractions (A11 to A62; B11 to B81; C11 to C35; D11 to D22; E11 to E21; F11 to F51; G11 to G61). But, the most controversial aspect is the one related to tribes H, I and J, because these are not classified in subfractions, being groups of tribes: H41 is composed of a non determined number of tribes, H61 by more than 17 tribes and J51/52 by nearly 62. The most complicated question is related precisely to determine the subfractions and the Sheikhs of these groups, being in the majority persons that, according to Morocco, had been expelled by Spanish authorities during the colonization of the then Spanish Sahara. Among 242,000 applications to be identified, 181,000 were by Morocco and 61,000 by the Frente POLISARIO, and among those presented by Morocco approximately 110,000 belong to these three tribal groups. According to the census made by Spain, 7,908 of the persons in the census belonged to these three groups, which means 14% of the census. The Moroccan proposal of increasing the solicitors to 110,000 would increase the participation of these groups from the 14% mentioned to 45%, which logically, was rejected by the POLISARIO Front. In this sense, for example, regarding group H61, in the census of 1974 there were a total of 536 persons and Morocco has presented for their identification 56,000, from which 46,000 continue to live in Morocco (ORSC: S/1996/366, p. 10). This is precisely the key-point of the census, so consecutive interruptions of the process, until its reactivation by Kofi Annan, will be related nearly always to this question.

should be the ones issued by the Spanish authorities, Morocco considered the reference to appropriate documentation as too vague and therefore liable to a restrictive interpretation. It further found unacceptable the proposal that identification could take place without the participation of any sheikh since this would exclude the oral testimony that this State believed should take priority over documentary proof. The POLISARIO Front would not subscribe the proposal but rejected it from a very different approach. In its opinion, the implementation of the new proposal would again give Morocco the opportunity to introduce, by means of a sheikh of its choice and its own documents, 13,000 applicants who had no ties with Western Sahara, which would be tantamount to holding a referendum for a people “other than those from Western Saharan”, and according to M. Abdelaziz, it would prompt the POLISARIO Front to draw "appropriate" conclusions as to its involvement with regard to the Settlement Plan. Resolution 1033 (1995) of the SC confirmed the need that in order to make progress in the identification process, both Parties should cooperate, though it asked the SG that in the case that no significant progress should be made he should inform the Council about the possible options, including the option of a progressive withdrawal of the MINURSO. In this way, the Council came to reflect the feeling of both Parties (the decision of the Secretary General was unviable with the collaboration of the Parties) and set an important precedent which fatally wounded the political future of Butros Gali as Secretary General of the UNO by rejecting the draft of the resolution that endorsed the proposals of the SG.

As a way of unblocking the process, deadlocked since the POLISARIO Front’s decision of not taking part in the identification of the applicants belonging to groups H41, H61 and J51/52 (with the exception of those part of groups included in 1974 census), and the corresponding denial of Morocco to continue the identification of other tribal groups in identification centres of Tinduf and as an attempt to regain credibility following the disavowal by the Security Council, the SG proposed to enter into direct talks between the Parties, and even proposed, for the first time, the possibility of creating a

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622 In opinion of Morocco this regretful precedent, by which "nothing can be done without the agreement of both parties, even though the settlement plan does not demand their cooperation" gives advantage to the "obstinate refusers", the POLISARIO Front, unique guilty of the paralysis of the process. Letter of May 10, 1996 addressed to the SG by the permanent representative of Morocco before the United Nations (ORSC: S/1996/345, Annex, p. 3).
"contact group" which could consist of regional and non-regional States". Nevertheless, after recommendation of the Secretary General in May of 1996, the Security Council decided to suspend the identification process until "such time as both parties provide concrete and convincing evidence that they are committed to resuming and completing it without further obstacles, in accordance with the Settlement Plan".

In these circumstances the Security Council was not able to retract from the inertia that the SG had given to the process and set out a gradual dismantling of the MINURSO, approving a 20% reduction of the military component, although he decided to maintain an "Acting Special Representative" in charge of pursuing the dialogue between the Parties. The dismantling of the MINURSO followed the path traced by Butros Gali, closing the identification centres of the Territory (centres of Bojador, Dajla, Smara and El Aaiún) and those of the camps of Tinduf (Auserd, El Aaiún, Smara and Dajla), and then moving the identification registrations to the Offices of the United Nations in Geneva (16-23 July 1996).

Against this attitude of the Security Council, the USA launched into action its overwhelming diplomatic machinery, in view to obtaining two clear objectives: on the one hand, to avoid the reappointment of Butros Gali as the Secretary General of the UN, and on the other, to start up direct contact between the Parties "to explore direct dialogue between them that enables the situation to come out of the impasse" which the process was in. As expected, this effort was successful.

4. The Kofi Annan phase

4.1. The Houston Agreements. The unblocking of the identification process

The appointment of Kofi Annan as Secretary General of the UN was very well received by the representatives of the POLISARIO Front, given that they

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625 In words of the SG himself, "It is for this purpose that I have proposed and carried out, with the consent of the Security Council, considerable reductions in the size and functions of MINURSO in the past few months" (ORSC: S/1996/913, par. 25).
626 El País, September 11, 1996. Apparently, these activities were communicated by the USA Embassy in Madrid to the Spanish Minister for Foreign Affairs before his visit to Algeria in those days.
627 The renewal proposition of Butros Gali as SG, for a second mandate, between 1st of January 1997 and the 31st of December, 2001, proposed through a resolution draft.
were now to deal with an individual with significant experience in decolonization processes and one who was a national in a State (Ghana) which recognised the SADR. His first steps in the process seemed correct to those who considered that he was the correct person to unblock the identification process and find an appropriate way to bring the Settlement Plan to fruition. However, this optimism only lasted a few months, time which showed that if it seemed that the unblocking of the process would allow the advancement towards the holding of a referendum, in reality the Secretary General had assumed that once the census was drafted, Morocco would retire from the peace process and had entrusted James Baker with the task of finding a solution outside of the Peace Plan. But let’s break it down.

Kofi Annan’s interest in reactivating the MINURSO was not coincidental, given that since March 1996 he occupied the position of Under-Secretary-General for Peace-keeping operations, after having assumed, during the transitional period which followed the signing of the Dayton Agreements, the functions of Special Representative of the Secretary General for the former Yugoslavia and Special Envoy before NATO. Regarding the census, negotiations carried out by the Personal Envoy of the SG, James Baker, initiated on April 22 and concluded with the signing of the Agreements of Lisbon, London and Houston on September 16, 1997, achieved a concrete agreement on the controversy referring tribal groups H41, H61 and J51/52, in the following terms:

“1. The parties agree that they will not directly or indirectly sponsor or present for identification anyone from tribal groupings H41, H61 and J51/52 other than persons included in the Spanish census of 1974 and their immediate family members, but the parties shall not be obligated to actively prevent individuals from such tribal groupings from presenting themselves. The parties agree that identification of any such individuals who may present themselves shall proceed as soon as possible.

Presented by Germany, Botswana, Chile, China, Egypt, France, Guinea-Bissau, Indonesia and the Russian Federation, was rejected by 14 votes in favour and one against, that of USA, that in exercise of its right of veto right did not allow such renewal (ORSC: CS/749, November 19, 1996). The 13th of December 1996, the SC approved unanimously the appointment of Kofi Annan as the new SG of the UNO, for the period for which the second mandate had been to Butros Gali (ORSC: CS/760).
2. The parties agree that persons from all other tribal groups from census categories H, I and J may come forward to be identified.

3. The parties agree that the Special Representative of the Secretary-General shall notify the parties of the results by number, but not name, of the identification process to date.

4. The parties acknowledge that, from the time of the original Settlement Plan, they have understood that credible oral testimony to the Identification Commission would be required, and the parties agree that the Identification Commission shall receive and consider oral testimonies, as provided for in the Settlement Plan.”

It is not difficult to appreciate the subtlety of the reached agreement. So, on the one hand, the first paragraph corresponds, though not categorically given the farfetched formula used, with the POLISARIO Front approach that limits the danger that, being presented by Morocco, the applicants of these controversial groups should reach excessive figures. On the other hand, the third (the second paragraph is not really an agreement, as it had already been set out during the process up until this time) corresponds partially to an express demand of the POLISARIO Front demanding that the result of the identification process should be notified to the Parties (number and also name of identified person). But, the fourth paragraph is closer to the Moroccan intentions to give more weight to the oral testimony. The truth is that even as a result of the first paragraph’s confusing drafting, as expected, the process would again find the same obstacle, but at least it reactivated the process at a moment when, once again, it was doomed to failure.

These agreements led to the gradual reactivating of the MINURSO. The first and most significant step was that identification files stored in the United Nations Office in Geneva were returned to El Aaiún and Tinduf and the initial reopening of four identification centres with the intention of reaching a total of twelve, nine of which should function concurrently. Finally, the identification process resumed on December 3, during the course of which the problems related to the identification of applicants belonging to the three

628 ORSC: S/1997/742, annex I (underlined by the author).
629 These movements were made between October 23 and November 6, 1997 (Report of SG to the SC on November 13, 1997, ORSC: S/1997/882, par. 5 and 6).
controversial tribal groups again came up\(^{\text{631}}\). But, after the long succession of reports and resolutions, stoppages and reactivations of the process, all seemed to point that this time problems were going to be overcome. In effect, the process was reactivated after the appointment of the new Special Representative of the Secretary General, the American Charles F. Dunbar\(^{\text{632}}\).

Despite the continuing problems faced by the identification process, the Houston agreements had an important virtuality: though the identification of the "contested" tribal groups by the POLISARIO Front were the main obstacle of the process (the number of persons of these the tribes included in the 1974 census was of 603, while Morocco increased this number to 65,000 persons to identify)\(^{\text{633}}\), the agreements lead, in the first stage, to the conclusion of the identification process of all of the rest of the eighty five groups\(^{\text{634}}\) and in the second stage and with a surprising rapidity\(^{\text{635}}\), to the identification of the controversial three tribal groups.

During the months that followed the Houston agreements, the identification process continued to proceed with success. So, even if it had been the most controversial issue during the peace process, as it could alter substantially the referendum census, the POLISARIO Front finally felt forced to accept that the Commissions were to proceed to identify the applicants belonging to tribal groups H41, H61 and J51/52. The reasons of such concession, another but not the last, were that they were backed up by the reference data of the number of applicants that completed the provisional list of voters, corresponding to the eighty five non contested groups, which, in opinion of the Saharan movement, allowed them to trust the seriousness with which the UN had acted during the long identification process, and that the Organization would maintain during the identification of the aforementioned groups. As the only way out of the deadlocked process, the POLISARIO Front felt forced to take the risk that the census should be extended by including the

\(^{\text{631}}\) The fact that in a few days, 8,613 people, without being invited and most of whom belonged to the H61 group, presented themselves at El Aaiún led to the protests of the POLISARIO Front, which believed that Morocco had failed to comply with the Houston Agreements (Report of the SG, January 15, 1998, ORSC: S/1998/35).


\(^{\text{635}}\) Even if the groups were the most disputed ones, its identification took place from the 15th of June to the 30th of December 1999 (ORGA: S/2000/131, Report of SG of February 17, 2000).
mentioned tribal groups, trusting that, acknowledging previous data, the increase of the census would not be too big. As a counterpart of this concession was the fact that it was the concession of the weak party, and implies the acceptance of the main obstacle put in place by Morocco in the Peace Plan since its commencement: Morocco did not give way in its restrictions to the normal functioning of the MINURSO (for example, as some which have caused most problems to it, the one can mention the limitations on the use of MINURSO aircraft, which are “not in accordance of peacekeeping practices and could bring negative consequences to the process (...)”\footnote{ORGA: S/1998/634, July 10, 1998.}, the obstacles to UNHCR in their “preparatory work for the repatriation of Saharan refugees eligible to vote and their immediate families”\footnote{ORGA: S/1998/849, September 11, 1998, par. 22.}, or those related to the operational capacity of the technical support unit of the MINURSO\footnote{ORSC: Resolution 1204 (1998) of SC, approved October 30, 1998.}). As a result, it is clear that the concessions made by the Parties to allow the process to succeed were not of the same weight.

The faith of the POLISARIO Front was fruitful, as the United Nations continued the identification process with the rigor with which it had been carried out in precedent stages. So, on January 17, 2000 the SG published the results of the first part of the identification process and according to it, from the 198,469 applicants interviewed since the identification process began in 1994, the total number of persons included in the census was 86,386. Out of 147,249 from Saharan tribes other than the three controversial groups, 84,251 were eligible applicants and from the 51,220 corresponding to the three other groups (tribal groups H41, H61 and J51/52), 2,135 were accepted. These data, together with the rapidity with which the identification was carried out during the last months, reflect eloquently the "soundness" of the proof presented by the applicants. By that stage of the process, these data show at least two of the key issues of the process: on the one hand, the bad faith of Morocco in its demand that 65,000 persons should be considered residents of Western Sahara, and, on the other hand, the rigor of the United Nations in the identification of applicants. If the first issue was well known, the second was a good and encouraging news.

As expected, after publishing these data, Morocco resorted to the "penultimate" argument that was left to reject the right to self-determination of the peoples of the territory: the presentation of an appeal regarding practically all the applicants that the different Identification Commissions had rejected.
We say "penultimate" argument because only one was left: once this second stage of appeal was concluded, the Moroccan Government would reject the census drafted by the MINURSO on the grounds that the Organisation had acted with bias. Thus, the report of the Secretary General of 17 February, 2000 called to the Security Council's attention the reaction of the Moroccan Government on discovering the results: “the Moroccan officials questioned again the impartiality and objectivity of Identification Commission members, and warned that the referendum would not be held if any person originating from the Sahara were denied the right to participate”639.

Nevertheless, the certainty of this attitude will come after the last obstacle put by Morocco in the Peace Plan, consisting of provoking a "duplication" in the identification process, by appealing the majority of rejected applicants rejected by the MINURSO. The Secretary General himself pointed out in his report of October 28, 1999 that the overwhelming majority of the 79,000 appeals received by the Identification Centres in the last two weeks before the deadline for their presentation “correspond very closely to the number of persons omitted from the first part of the provisional list of potential voters issued on 15 July 1999”, so predictably “we might be confronted with a lengthy appeals process, involving almost all applicants rejected in the first instance, as well as a large number of applicants whose inclusion in the provisional voter list has been challenged”640. The doubts on whether these 79,000 could be increased with another 60,000, belonging to the applications rejected belong to persons from the controverted three tribal groups, were unfortunately confirmed when published, showing that they were increased in the "second identification process" to nearly 140,000 applicants641. Once these data were published, which in reality constituted an open secret, the SG, surprisingly, affirmed in his report of 6 December 1999 that "the problem posed by the current number of appeals and the opposing positions taken by the parties on the issue of admissibility seem to allow little possibility of holding the referendum before 2002 or even beyond"642.

639 ORGA: S/2000/131, par. 5.
641 The fact that among the presented appeals only a few hundred correspond to the Saharan part is eloquent. The Moroccan party interprets the high number of appeals as a sign of dissatisfaction of applicants due to the MINURSO attitude. In this respect, and regarding the eighty five tribal groups whose "Saharan" nature is no doubt for neither Party, the number of appeals presented by the Moroccan side is of approximately 68,000, for not including certain persons in the voting lists, and 10,000 for including certain persons that the appealing part consider as non Saharan. On the Saharan part, the numbers are of 840 and 2,000 respectively.
Given the circumstances, the President of the SADR, M. Abdelaziz stated before the SG of the UN what was only obvious: if the dispositions referring to admissibility of appeals were to be applied with rigor\textsuperscript{643}, the majority of the appeals presented should not be admitted. To this effect, it must not be forgotten that the applicants excluded from the census in the first phase have the right to appeal such decision, but only if the basis of the appeal is the testimony of witnesses that may give additional information to support their inclusion. Furthermore, in the second phase, only persons who have been previously included in the electoral census can testify as a witness. If the person wishing to testify had been excluded in the first phase of the MINURSO or was not an applicant to be included in the census, obviously, the witness cannot be considered as Saharan; given the tribal structure of the society, non-Saharans could hardly be expected to testify that the applicants are Saharan.

Once again we encounter a Moroccan move to delay the celebration of the referendum, just as the main obstacle of the process had been overcome and it at last seemed that it should have a smooth ending. Nevertheless, in his report of February 17, 2000 Kofi Annan noted the effects of the Moroccan move, making a particularly concerning statement, given who it was coming from: "even assuming that a referendum were held pursuant to the settlement plan and agreements of the parties, \textit{if the result were not to be recognized and accepted by one party, it is worth noting that no enforcement mechanism is envisioned by the settlement plan}, nor is one likely to be proposed, calling for the use of military means to effect enforcement"\textsuperscript{644}. That after nearly ten years of the Peace Plan the Secretary General calls attention to this issue, instead of requesting that the Security Council adopts the necessary measures to ensure that both Parties abide by the outcome of the referendum, resorting if necessary to Chapter VII of the Charter, was not reassuring.

As expected, at first the POLISARIO Front refused to accept that this huge quantity of applicants would go through the Identification Centres, since this would practically entail the re-commencement of a process which had already taken over five years, especially considering that about 95\% of them could not provide new evidence which could justify the appeal in accordance with the criteria established in the Settlement Plan and subsequent adjustments\textsuperscript{645}. However, the Sahrawi national liberation movement would eventually accept this latest affront to the Plan by the Moroccan Government, allowing even the possibility that the MINURSO would carry out the identification of the

\textsuperscript{643} ORSC: S/1999/483/Add.1, p. 13 et 14.
\textsuperscript{644} ORSC: S/2000/131, February 17, 2000, par. 36.
\textsuperscript{645} ORSC: S/1996/343.
appeals without the approval of the sheikhs or tribal chiefs proposed by the POLISARIO Front and Morocco\textsuperscript{646}.

But by this time, Morocco had already decided to definitively abandon the possibility of holding the referendum for self-determination in the territory at any point; although the Moroccan position was clear from the time of Pérez de Cuéllar\textsuperscript{647}, it was at this time that it openly expressed its total opposition to any type of referendum.

4.2. Reasons for the abandonment of the Settlement Plan. The “slips” of the Secretary General

Although Kofi Annan expressly welcomed the POLISARIO Front’s conciliatory attitude and its confidence in the UN in proposing that the final decision about the inclusion or not in the census of the appellants be left to the MINURSO, accepting even the absence of Sahrawi tribal chiefs in the process of identification, the Secretary General finally decided to propose to the Security Council the abandonment of the route agreed on by the Parties in 1988 (the Settlement Plan) and the commencement of a search for a political solution to the conflict. The arguments that underpin this proposal cannot be more disappointing. We will consider the most important\textsuperscript{648}.

Firstly, the reason for the inability to advance in the peace process could be found in the “fundamental differences between the parties over its interpretation” because of the “ill-defined nature of tribal affiliation with the Territory”\textsuperscript{649}. Inasmuch as the positions of the parties over the different aspects of the Settlement Plan that make reference to the issue of the census and its criteria have already been analysed, this issue requires no further commentary. The fact that Morocco uses this argument is unacceptable although understandable; however, that the Secretary General does it is neither acceptable nor understandable.

\textsuperscript{646} ORSC: “Official proposals submitted by the POLISARIO Front to overcome the obstacles to the implementation of the Settlement Plan”, S/2001/613, Annex IV, appendix, para. 1

\textsuperscript{647} Among the many examples that could be mentioned, in 1996, during a time of stoppage of the Plan Morocco explained to Butros Gali that meetings with the representatives of the POLISARIO Front “would not take place until such a time as when Morocco’s sovereignty was accepted as a prerequisite [sic] for the consideration of any proposal” (Report of the SG June 20, 2001, S/2001/613, para. 32). Given this Moroccan approach, the SG often “reiterated the promise of the POLISARIO Front to respect the outcome of the referendum”.


\textsuperscript{649} \textit{Ibid.}, par. 21.
Secondly, even in the situation that the MINURSO finally proceeded with the examination of the pending appeals and called a census in conformity with the criteria accepted by the parties, it lacks “an enforcement mechanism for the results of the referendum”\textsuperscript{650}. The very likely veto from France in the Security Council would have prevented recourse in the situation to Chapter VII of the Charter and more worryingly, the Security General tiptoed around the mechanisms provided in Chapter VII for such situations and avoided recommending their application. It must also be remembered that we are dealing here not only with an obligation on a State to comply with general International law, obligatory on all States, such as that of self-determination for all peoples but also an agreement (the Settlement Plan) entered into freely and voluntarily by it. It is inadmissible that an obligation voluntarily entered into by a State can be breached with absolute impunity and pretends that International law offers no mechanisms to enforce it.

Thirdly, the Secretary General argues that to move the process forward would require the agreement of Morocco, and that any alterations to the Settlement Plan would be unless since at the end with would still be “a winner and a loser”. He reiterates this idea by stating that “it is perhaps understandable that this full cooperation is difficult to achieve given the ‘winner-take-all’ nature of the referendum called for under the settlement plan”\textsuperscript{651}. This perverse expression is a constant in the reports of the Secretary General and deserves severe criticism since it seeks to put on the same plane the State who is illegally occupying a Non-Self-Governing Territory, and the people, its legitimate owners, who suffer from this illegal occupation. Can we really say that in the decolonization process one sees the sharing of territory, resources or rights between the colonizer and colonized? Must it be considered a “loser” the State, which, after years of violating International law, meets, or is bound to meet, its international obligations?

However, the most serious “mistake” of the Secretary General is the repeated affirmation that Morocco is acting “as the administering power”. Given that this is total legal nonsense and that its use by the person who holds the ultimate representation of the United Nations is not innocent, since even though this claim was disqualified by the Legal Department of the Organization it continues to figure in his reports, we will return to this issue later to analyse it further.

\textsuperscript{650} Ibid., par. 29.
\textsuperscript{651} Ibidem.
This report of the Secretary General opened the doors to “plan Bs”, “fourth routes” or political solutions to the conflict, outside of the Settlement Plan. James Baker had already been working on them since he took office\textsuperscript{652}.

4.3. **“The Framework Agreement on the Status of Western Sahara” (Baker Plan I)**

In June 2001, Kofi Annan presented to the Security Council the draft “Framework Agreement”\textsuperscript{653} which, if agreed to by the parties, would not entail the definitive abandonment of the peace process but it would be “suspended”, a term difficult to understand in reality.

4.3.1. The powers of the “Sahrawi” organs in the Territory

The Framework Agreement shares the competencies and powers in the Territory between “the population of Western Sahara” on one hand and Morocco on the other. In respect of the former, this theoretical “Sahrawi Government” would consist of an executive, a legislature and a judiciary and would have exclusive competence in respect of local government administration, territorial budget and taxation, law enforcement, internal security, social welfare, culture, education, trade, transport, agriculture, mining, fisheries and industry, environmental policy, housing and urban development, water and electricity, roads and other basic infrastructure.

An Assembly with a life of four years would exercise legislative power, and its members would be elected by those people who have lived continuously, without interruption, in the territory since 31\textsuperscript{st} October, 1998 and those who were included in the repatriation list of 31\textsuperscript{st} October, 2000.

Executive power would be elected for four years by those people included in the census made by the MINURSO, published on 30\textsuperscript{th} December, 1999. However, after this first mandate of four years, the new executive would not be voted for using this electoral census but instead by the Assembly. Thus, the

\textsuperscript{652} Given this snub by Morocco of the Settlement Plan, one should not be surprised by the POLISARIO Front’s response, in which it highlighted that if the process continued to suffer severe delays there would be no point in the MINURSO remaining in the Territory and that it may even act to resume the hostilities. As M. Abdelaziz claimed “if the UN does not intend to move the process forward, it is best to call it a day, proclaiming the mission a failure and leaving the Territory. The Sahrawi people would assume its responsibilities. It is not our preferred option, but it is the only one we are left with in the face of such delays and Moroccan stalling tactics” (El País, 19 February 2000)

first executive would be chosen by those who, according to the United Nations itself, are Sahrawi, while the Assembly would also be chosen by those who have resided in the Territory since October 1990.

Finally, judicial authority would be exercised by courts composed of judges originating from the Territory but selected by a Moroccan body, such as the National Institute of Legal Studies. These courts would have competencies as regards territorial law.

Further, both the laws passed by the Assembly and the decisions of the courts would have to respect the Moroccan Constitution, especially as regards the protection of civil liberties.

A) The powers of Morocco in the Territory

The Framework Agreement gives Morocco exclusive competencies as regards foreign relations (including international treaties), national security and external defence (including the determination of maritime, air and land borders, and their protection by “all appropriate means”), all matters related to the production, sale, ownership and use of arms and explosives and the preservation of territorial integrity “against secessionist attempts” (sic), whether they come from within or outside the territory. Further, the flag, currency, customs and postal and telecommunications systems of the Kingdom shall be the same for Western Sahara.

B) The referendum on the final status of the Territory

The status of Western Sahara would finally be submitted to a referendum that should be held at a date agreed on by the parties no later than five years after the initial actions of application of the agreement. The census would be comprised of those persons who have resided continuously in the Territory during the year prior to its celebration.

C) The virtuality of Baker Plan I

In view of these data, it does not escape the mind of anyone that we are here dealing with a project that ignores the decolonization doctrine and practice of the United Nations, especially as regards the critical moment of the consultation of the population, since it will involve Sahrawi’s…and Moroccan residents. Obviously, as is only logical, there is no precedent in this regard. Moreover, specific aspects of the powers conferred to Morocco, especially the applicability of its Constitution in the Territory, are totally and openly in
contradiction to the content of Resolution 2625 (XXV), which establishes a separate and distinct legal status of the Non-Self-Governing Territory from the metropolis. The same can be said about the attribution of exclusive competence to Morocco as regards foreign affairs.

Moreover, the attribution of exclusive competence to Morocco as regards the preservation of territorial integrity “against secessionist attempts”, related to the idea that part of the territory of this State intends to separate from the rest, which is to admit the Moroccan pretensions of Western Sahara forming part of its territory, which is unacceptable. As noted by the Algerian representative “this project ratifies the illegal occupation of the territory of Western Sahara and it is a report of a planned integration, in violation of International law”654.

For its part, in response to this report, the POLISARIO Front reiterated that the only way to resolve the conflict was through the agreement of both parties to the Settlement Plan, reaffirmed its strong commitment to accept the result of the referendum and recalled the responsibility of the United Nations and the Security Council itself when it comes to enforcing the results. Needless to say that Morocco expressly accepted the Framework Agreement.

4.4. “The Peace Plan for the self-determination of the people of Western Sahara” (Baker Plan II)

A) The powers of the “Sahrawi” organs in the Territory

The second Baker Plan655 modified some of the aspects of the Framework Agreement, although it maintained a very similar structure to its predecessor. Thus, it maintains the share of competences between “the population of Western Sahara” and Morocco, but with some alterations. The future “Sahrawi Government” would have the same composition as that proposed by the Framework Agreement (to be made up of executive, legislative and judicial powers), and it would have exclusive competences in relation to local government administration, territorial budget and taxation, law enforcement, internal security, social welfare, culture, education, trade, transport, agriculture, mining, fisheries and industry, environmental policy, housing and urban development, water and electricity, roads and other basic infrastructure.

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655 ORSC: S/2003/565, Anex II.
An Assembly, that would have practically the same competences as in the prior project, would exercise the legislative power, but, differently, it would be elected by a census that would not include residents. This same census would elect the executive power, which would be exercised by a Chief Executive which would have similar powers to those proposed in the first Baker Plan. Elections would take place a year after the entry into force of the Plan, and would be for a term of four years or “until the governmental authority of Western Sahara is modified in conformity with the referendum on its final status”. Finally, the judicial power would be exercised by the Supreme Court of Western Sahara, which, together with the inferior courts, could form the Western Saharan Authority. Its members would be named by the Chief Executive, with the prior consent of the legislative Assembly. The Supreme Court would have competence to determine the compatibility of any Western Saharan law with the Plan with the exception on those relating to competencies reserved to Morocco, in which case the Supreme Court of this State would be competent. Moreover, the Supreme Court of Western Sahara would be the court of last instance as regards the interpretation of the law in the Territory.

B) The powers of Morocco in the Territory

The competences attributed to Morocco are very similar to those in the Framework Agreement. The only ones that change are firstly those related to the production, sale, ownership and use of arms and explosives, in the case of “of weapons by the law enforcement authorities of the Western Sahara Authority” and secondly, although again it makes an unfortunate reference to the “preservation of territorial integrity against secessionist attempts”, it states that “the right to preserve territorial integrity shall not authorize any action whatsoever that would prevent, suppress, or stifle peaceful public debate, discourse or campaign activity, particularly during any election or referendum period”. Finally, it is noted that the authority of Morocco as regards the foreign affairs of the Territory shall be exercised in consultation with the Western Saharan Authority in the case of questions that directly affect the interests of the Territory. In this sense, it points out that “Morocco may authorize representatives of the Authority to serve as members of the Kingdom’s diplomatic delegations in international meetings concerned with economic issues and other issues of direct interest to Western Sahara”.

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C) The referendum

a) The right to self-determination of “bona fide residents”

The Plan provides for a transitional period during which there will be a sharing of responsibilities between the parties before the celebration of the referendum on self-determination, which, in the words of the Secretary General himself “would provide the bona fide residents of Western Sahara with an opportunity to decide their future”. The reference to “the Sahrawi people” or “the people of Western Sahara” is abandoned as the true recipient of self-determination in favour of the “bona fide residents”. We find ourselves before an innovation in International Law in which, surprisingly, new subjects are discovered: from now on, together with those people subject to colonial, foreign and racist domination and insurgent movements, we will see the inclusion of “residents in good faith”. For reasons discussed later, despite the obvious affront to International Law posed by this idea, the POLISARIO Front will eventually accept this so called “Peace Plan for the self-determination of the people of Western Sahara”, which would be rejected by Morocco.

Under the Plan, those individuals over 18 years of age may participate in the referendum if:

- They figure in the provisional list of voters of 30th December, 1999 made by the Identification Commission of the MINURSO (without the possibility of appeal or objection), or if
- They are included in the repatriation list drawn up by UNHCR on October 31st, 2001, or if
- They have lived continuously in the Territory since 30th December 1999.

The United Nations will determine which individuals have the right to vote and its decision shall be final and appeal shall not be possible. New voters may only be included in the event that their permanent residence in the Territory since 30th December 1999 can be “supported by testimony from at least three credible persons and/or credible documentary evidence” which will be analysed by the UN which will take the decision which will be final and without appel.

b) The third option of the referendum: autonomy

The Secretary General noted in his report that the main objection of Morocco to the Plan is the inclusion of the option of independence among the possibilities in the referendum and he mentions two reasons why Morocco
should accept it, reasons that perplex even the most expert analyst. Firstly, for the “the stated commitment of Morocco to the settlement plan” (should this not in fact be used as an argument to enforce the implementation of the entire Settlement Plan?) and secondly for the inclusion in the electorate for the referendum of “all of those who have resided continuously in Western Sahara since 30 December 1999, as opposed to only those who would be included in the voter list, which was created on the basis of the work of the Identification Commission”\(^{656}\). In other words, Morocco should accept the option of independence because in recognizing the right to participate in the referendum not only to Sahrawis but also to Moroccan settlers it means that the chances of victory for the independence option would be practically non-existent. But Morocco, which saw it as completely logical that residents would participate in the referendum (it considered it literally “just, equitable and in accordance with democratic practices”), asked why the mentioned date, 30\(^{th}\) December 1999, should be the limit for residence in the Territory.

To overcome the problem posed by the refusal of Morocco to accept this option, the Secretary General suggested a third option along with those agreed by the parties (integration and independence): autonomy. In case none of the three options won a majority of votes, the option that receives the fewest votes would be eliminated and a second round of voting would take place to allow the voters to choose between the two remaining options. Should the third option prevail, that of self-government or autonomy, the electorate for future elections for the executive and legislative authority of the Territory would be made up of the aforementioned “bona fide residents of Western Sahara” who are over 18 years old.

c) Other issues

The Baker Plan II tries to concretize more questions related to its implementation, including:

- It ensures the commitment of the parties “not to hinder the ability of persons to campaign peacefully for or against any person standing for election or any option or ballot question offered to the voters in the referendum on final status”.
- It guarantees the respect of the Statute of the Territory by noting that neither Morocco nor the Western Saharan Authority can unilaterally “change or abolish the status of Western Sahara, except for the adoption of

\(^{656}\) ORSC: Report of the Secretary General, 23 May 2003, S/2003/565, par. 52.
such laws as may be necessary to conform to the results of the referendum on final status”.

- It also ensures the release of all political prisoners and prisoners of war.
- Finally, the Plan advances the surprising prevision of the Security Council to modify the name and mandate of the MINURSO “to enable it to assist in the implementation of this plan, in particular during the period between the plan's entry into force and the holding of the election for the Chief Executive and the Legislative Assembly of the Western Sahara Authority”. This attempt to change the name of the MINURSO is not innocent since it would suppose an attempt to abandon its real raison d'être: the organization of the referendum for self-determination.

4.5. Farewell to the Baker Plan: Morocco is left on its own

The Security Council, through Resolution 1495 (2003) of 24th July, “acting under Chapter VI of the Charter”, decided to support Baker Plan II, “as an optimum political solution based on agreement between the parties”. For his part, the Secretary General urged Morocco “to seize the opportunity and to participate positively in the plan by accepting and implementing the Plan”. Despite this, Morocco representatives noted to the Secretary General that “over the years, the proposed referendum has always been inapplicable in the way it has been planned and it has lost its raison d'être”, since with a referendum, “after all, there would be a winner and a loser”. As shown, Morocco did not have time to dig deeper into the on-going slips of the Secretary General.

Among other arguments for refusing to accept the Peace Plan, Morocco claims that it is in clear contradiction with its Constitution. If this argument had any truths, many of the decolonization processes could not have come about, since in the majority of, if not in all, Constitutions of colonial powers the colonial territories are considered as an integrated part of their territory. For the same reason, Morocco considered incompatible its domestic laws with the judicial decentralization envisaged by the Plan. It even came to criticize the fact that the Secretary General should reserve to himself the power to interpret the Plan and that his decision should be binding and without appeal in order to

accuse him expressly of trying to place in an “untenable position of being both judge and party”\textsuperscript{660}. Judge, yes, but party? As we have examined so far, the Sahrawi’s have more reasons to question the impartiality of the Secretary General.

As a result of the intransigence of Morocco, on 11\textsuperscript{th} June 2004, the Secretary General announced the resignation of James Baker, who left the post of Personal Envoy having done “everything in his power” to find a solution to the conflict. He was replaced in office by Peter van Walsum, who as we shall see later, was as a fleeting as a disastrous step in the conflict\textsuperscript{661}.

The POLISARIO Front noted in a comprehensive report\textsuperscript{662} many of the reasons for its refusal to accept the Peace Plan, despite the fact that eventually it ended up agreeing to it. As a starting point, it lamented that the new plan would entail the abandonment of the Settlement Plan, the only one agreed to voluntarily by both parties, to substitute it for another which left unresolved many issues of significant importance, including the cantonment of military contingents, the time and guarantees of the return of Sahrawi refugees, the release of prisoners of war\textsuperscript{663}, the need to prevent future “Green Marches”, as well as the fact that the Plan did not guarantee respect for the result of the referendum.

It also reiterated the main mistake contained in the Plan: Morocco is not the administering Power but instead the occupying Power of the Territory, so it cannot be the representative of the Sahrawi people in foreign affairs nor can it conclude agreements relating to the exploitation of Sahrawi natural resources, nor can it determine the international borders of the Territory. For this same reason, the symbols of Moroccan sovereignty over the Territory (flags, currency) are also not acceptable. In this sense, it recalled that reference in the


\textsuperscript{661} Report of the SG 11 June 2004 (ORSC: S/2004/492). In later declarations, Baker expressly blamed Morocco for the failure of the peace process and did not hesitate to refer to the possible return to armed struggle by the POLISARIO Front against the Moroccan intransigence as “logical” (text from an interview of 19 August 2004 at http://arso.org/site.voila.fr/BakerPBSes.htm).

\textsuperscript{662} Letter of 8 March 2003 to the SG from the Secretary General of the POLISARIO Front (ORSC: S/2003/565, Annex III).

\textsuperscript{663} At the height of repression in the occupied Sahrawi territories, the POLISARIO Front decided unilaterally to release those Moroccan prisoners of war who remained in their power, while Morocco does not even recognise this status of prisoner of war and has not disclosed the whereabouts of more than 500 Sahrawi soldiers who are desappeared since the time of the war.
Plan to possible “secessionist interference” was another unforgivable *lapsus linguae* given that it is based on the idea that Western Sahara forms part of the territorial integrity of Morocco, which is openly contrary to the doctrine of the UN itself.

The report of the POLISARIO Front also details some of the times when the peace process has been halted as a result of obstructions by Morocco, to highlight that after each of these the Sahrawi movement backed down or compromised, as well as the United Nations, while Morocco maintained absolute intransigence.

Finally, the POLISARIO Front considered the census for the referendum proposed by the Plan unacceptable, since in it would participate 86,425 Sahrawis and a far higher number of Moroccan settlers, without any guarantees that the results of the referendum would be respected in the situation that the independence option won.

Although, as we have seen, specific aspects of the Baker Plan II clearly contradict the provisions of the Settlement Plan and it aligns itself to the pretensions of Morocco, in June 2003, the POLISARIO Front decided to accept it, “to show their sincere commitment to peace and cooperation with the work done by Mr Baker and the Secretary General”\textsuperscript{664}, probably convinced that Morocco will never give its approval to the Plan, once again using its spot on diplomatic intuition to show the true intentions of the occupying State.

The stagnation of the peace process led different representatives of the POLISARIO Front to note the possibility of re-employing weapons in the event that the deadlock was indefinite, about which Kofi Annan expressed concern, urging the parties to “refrain from inflammatory statements or taking any action, including legal, political or military, which would have the effect of further complicating the search for a solution or cause unnecessary friction”\textsuperscript{665}. Although it is conceivable that what the Secretary General asked of the parties is prudence, the request to the party who for more than three decades has been on the receiving end of violations of International law to avoid taking any legal action is simply grotesque. Indeed if any aspect of the approach of the POLISARIO Front can be criticized, it is not the lack of prudence or patience, but instead the lack of legal initiatives involving not only Morocco but also those States and international organizations (including the

\textsuperscript{664} Memorandum on the question of Western Sahara directed to Member States of the UN by the POLISARIO Front (\textit{ORGA}: A/59/314 and S/2004/704, 1 September 2004).

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EU) which negotiate with the occupying State over the exploitation of natural resources in the Territory or which make significant investments in it.

5. The Ban Ki-moon phase: The Mansahett round of talks, negotiations without a future

On 1st January 2007 Korean Ban Ki-moon became the eighth Secretary General of the United Nations. In the last half of his term, it is certain that his involvement in the Western Sahara has been more discreet. His first steps were accompanied by the so-called “Moroccan initiative for negotiating a statute of autonomy for Western Sahara” presented on 11th April, 2007, a proposal for resolving the conflict through the establishment of autonomy in the Territory, which would be approved through a referendum, incorrectly referred to as one of “self-determination” since it excludes the option of independence. It did not get any further since it was in effect a proposal to integrate the Territory into Morocco.

The negotiations driven by the new Secretary General, which took place in Manhasset (New York) over four rounds, were of limited scope, since in the erroneous words of the Personal Envoys to the Secretary General, Van Walsum and Christopher Ross, the differences between the parties as to the way in which self-determination should be exercised in the Territory are insurmountable. And they are wrong, because given that Morocco will never accept independence as an option, one cannot speak of “differences as to the way in which self-determination should be realized”; one must instead speak of the differences as to the acceptance or not of self-determination as a way to end the conflict.

Reports from the Secretary General would not deserve even a mention if they were not aimed almost exclusively at issues relating to respect for human rights. Indeed, while highlighting that both parties criticize the other for violations of human rights in the occupied territory and the refugee camps (the Secretary General treats with the same value those criticisms made by “different NGO’s”, including none other than Amnesty International and

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Human Rights Watch, as those made by the “Moroccan media”), the reports resemble more of a request to the Security Council and less of a lamentation that:

“The MINURSO has no specific mandate to defend human rights, has no staff to observe the situation of human rights in the Territory and the refugee camps near Tinduf (...) and the Office of the High Commissioner of Human Rights is not integrated into the operations of the Mission”.

Indeed, one of the main criticisms of the functioning of the MINURSO is that after 20 years in the Territory, it does not have the competence to denounce human rights violations occurring in the occupied territories under its helpless gaze: not only can it not intervene, it cannot even report a violation. It is true that the reason for this bizarre limitation lies in its mandate from the Security Council, but it is also the case that the MINURSO itself has taken an unduly restrictive view of its competencies, since, as the Secretary General has noted,

“The United Nations recognizes its duty to uphold human rights standards in all of its operations, including the Western Sahara, where the two conflicting parties often accuse each other of violating human rights in the media and in communications with the UN”.

Attempts to expressly expand the powers of the MINURSO into the ambit of human rights have always proved unsuccessful given the persistent and shameful veto exercised by France, who does not shudder at denying a UN Mission the ability to ensure the respect of human rights. But the most unfortunate of all of this is that in these circumstances the MINURSO does not itself act exclusively in line with human rights; some of its own members have committed exploitation and sexual abuse, and this has been reported in numerous reports of the Secretary General. As if that weren’t enough, the Secretary General himself acknowledged that in 2008 members of MINURSO committed acts of vandalism on sites of archaeological and cultural importance in the areas of Tifariti and Agwanit (Western Saharan

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668 In debates prior to the adoption of Resolution 1871 (2009), approved by the Security Council on 30 April 2009, and in the face of the proposal of extension of the mandate in field of the human rights championed by Costa Rica, Uganda, Mexico and Austria, France was the only State to reject it, which had been met by silence from the other permanent members of the Security Council. Moreover, although the Spanish Government in 2005 supported the possibility of extending the MINURSO’s mandate, the EU’s lack of influence is very clear, at least on this issue.
territories under control of the Saharawis) and that he had to require the Organization to fund the restoration work\footnote{ORSC: S/2009/200, 13 April 2009.}, a sad image of a Mission that during the process of identification of voters had managed to gain the trust of the weakest party.

The truth is that until the time of writing the position of the Secretary General in relation to the conflict leaves a lot to be desired. It is true that, under pressure from the POLISARIO Front, he was forced to dismiss\footnote{The formula of dismissal used was the non-renewal of his mandate, although in reality this was a full dismissal because it is a mandate that, barring resignation, automatically renews itself.} the Special Envoy who had replaced Baker, Peter van Walsum, after the latter stated that despite International law being openly sided towards the Sahrawi’s, given that the Security Council was not going to use the powers conferred to it by Chapter VII of the Charter to enforce its respect by Morocco, the option of independence “was not realistic”. Sahrawi hopes now lie in the new Special Envoy\footnote{Relating to the Special Envoy, cfr. SOROETA LICERAS, J., “Las Naciones Unidas, entre la realpolitik y el Derecho. Algunas reflexiones en torno al papel del Enviado Especial en los conflictos de Kosovo y del Sahara Occidental, in El Derecho Internacional en el Mundo Multipolar del Siglo XXI. Obra Homenaje al Profesor Luis Ignacio Sánchez Rodríguez, ed. Iprolex, Madrid (2013): 585-595.}, Christopher Ross, former US Ambassador to Algeria, but as yet his actions have not borne fruit.

Giving him the benefit of the doubt, it is still surprising that the highest representative for the United Nations has come to strongly argue that the role of the UN in Western Sahara is limited to “facilitating negotiations”, reducing it to merely offering its good offices and forgetting, evidently, that there exists a Peace Plan which has been voluntarily negotiated and agreed upon by the parties. Also, it is not encouraging at all that, on the occasion of the celebration in 2010 of the 50\textsuperscript{th} anniversary of the International Declaration of Independence to Colonial Countries and Peoples- Resolution 1514 (XV)- and, in order to complete this historic task, to ask the international community for “creative solutions for the remaining territories without self-government”, as if one was dealing with a vulgar competition of ideas; solutions which should be adopted should be “pragmatic and realistic, taking into account the specific circumstances of each case”.

\footnote{ORSC: S/2009/200, 13 April 2009.}
\footnote{The formula of dismissal used was the non-renewal of his mandate, although in reality this was a full dismissal because it is a mandate that, barring resignation, automatically renews itself.}