

SEPARATE OPINION OF JUDGE FORSTER

[Translation]

I subscribe to the Advisory Opinion of the International Court of Justice of 16 October 1975, inasmuch as it:

states: "that Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no one (*terra nullius*)",

finds that the materials and information presented to the Court:

- (a) show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara;
- (b) 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.

But at this point my adherence to the Opinion is replaced by the following express reservation: I cease to agree with the Advisory Opinion when the Court concludes that the materials and information presented to it do not establish any ties of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity.

Here I can no longer agree, for this conclusion goes too far in minimizing the exceptional importance of the geographical, social and temporal context of the problem. It is Western Sahara which is in question, at the time of Spanish colonization, that is to say around 1884. It is Africa of former times which is in question, as to which it cannot arbitrarily be required that its institutions should be a carbon copy of European institutions, for on that basis almost the entire African continent would have to be declared *terra nullius*. It is also Morocco and the Mauritanian entity which are in question, with their specific structures and traditional systems. It is from this viewpoint that the "legal ties" recognized in the Opinion should be confronted with the classic notions conveyed by the expression "State" and "sovereignty".

I personally consider that the "legal ties", in particular those of allegiance, described in 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.

(Signed) I. FORSTER.