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POLICY PAPER
January 2021

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PP-21/05

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Summary

In the *Western Sahara Advisory Opinion*, formal questions specifically requested by the General Assembly were only on terra nullius and 'legal ties' at the time of Spain's colonization of the Saharan Provinces. however, two other issues, which had not been specifically requested, were added to the formal question of 'legal ties." The additional issues concern the right to self-determination and 'territorial sovereignty.' The statements on additional issues have recently been referred to in the courts. Was the issue of the right to self-determination indispensable in deciding on 'legal ties' in 1884? The statements throughout the *Western Sahara Advisory Opinion* would indicate that the addition was politically motivated, under the guise of assisting the General Assembly in solving the Saharan Issue. Furthermore, in the statements, 'territorial sovereignty' is focused practically on 'legal ties' in a contradictory manner, because the opinion declares that 'legal ties' should not be limited to territorial ties. However, the phrase, "legal ties of allegiance," which was demonstrated as one of the 'legal ties,' was referred to only to confirm the non-existence of a territorial tie between the Saharan Provinces and Morocco or Mauritania. Such statements shall be considered more specifically in relation to Article 65 (2), providing for 'a written request.' They may not form precedents. In the end, a proper way international and domestic courts or States should adopt when invoking the statements in advisory opinions, taking the Saharan Advisory Opinion as an example.

On Additional Issues in the *Western Sahara Advisory Opinion*

I. Introduction

Due to the separatist Polisario's recent references in the judicial courts to the *Western Sahara Advisory Opinion*[1], requested in 1974 by the UN General Assembly and rendered in 1975 by the International Court of Justice (ICJ), 45 years later, a review of this advisory opinion has, once again, come to be highly recommended. The statements that have been repeatedly referred to by Polisario, which pushes groundless claims of secession of the Saharan Provinces from Morocco[2], are those on additional issues, which were not specifically required by the General Assembly. These additional issues concern the right to self-determination and 'territorial sovereignty'.

Advisory opinions of the ICJ are not legally binding[3], different from decisions in contentious cases, although the legal reasoning embodied in an advisory opinion has been viewed as reflecting its authoritative views on issues of international law[4]. In short, an advisory opinion is "an authoritative but non-binding explanation of a question or issue[5]." Thus, it is misleading to express such as "in violation of international law and the ICJ advisory opinion[6]." While international law involves international obligations which may be violated[7], advisory opinions as such do not involve international obligations, if not otherwise provided in an international agreement.

What matters in relation to the ICJ's advisory opinions is the propriety of additional issues which are not specifically requested by a UN body, such as the General Assembly. Though advisory opinions are legally non-binding, there are reasons, including the above-mentioned authority, to analyze this propriety from international legal perspectives[8]. These reasons shall be examined, taking the Saharan Advisory Opinion as an example. The examination would explain the significance of making research on the propriety of additional issues, and would highlight the relations between advisory and contentious cases.

As Fuad Zarbiyev confirms, "[m]ore often than not advisory cases so clearly imply a clash of legal thesis between two parties that they can be recharacterized as disguised contentious cases[9]." Besides,

1. *Western Sahara, Advisory Opinion*, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders (ICJ Rep), 1975. Hereinafter cited as 'Saharan Advisory Opinion.'
2. Andrew G. Lewis observes, concerning the Sahara Issue, "[t]he conflict has dragged on through present time when the norm of self-determination has come to mean something less expansive that it once did. Self-determination no longer means independence," in idem., "A Disappearing Right to Self-Determination: The Ongoing Impasse in Western Sahara," The Fletcher School, Tufts University, 2010, pp. 90-91.
3. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case, Advisory Opinion, ICJ Rep 1950, p. 65. Hereinafter cited as 'Interpretation of Peace treaties.'
4. Pieter H. F. Bekker, "The UN General Assembly Requests a World Court Advisory Opinion On Israel's Separation Barrier," Insights, American Society of International Law, Vol. 8, 2003, https://www.asil.org/insights/volume/8/issue/27/un-general-assembly-requests-world-court-advisory-opinion-israels.
5. Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice 1946–2005, Springer, 2006, p. 12.
6. Sidi M Omar, "The Right to Self-Determination and the Indigenous People of Western Sahara," Cambridge Review of International Affairs, Vol. 21, 2008, p. 56.
7. James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge University Press, 2002, p. 83, (7).
8. Bekker, loc. cit., supra note 4.
9. Fuad Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis," Journal of International Dispute Settlement, Vol. 3, 2012, p. 272. See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, ICJ Rep 1950, p. 65.

Jo Pasqualucci observes that advisory opinions may be more influential than decisions in contentious cases, because the former would affect "the general interpretation of International Law for all States rather than just for the parties to an individual opinion[10], like decisions in a domestic constitutional court. That is why Paul Szasz has concerns about advisory opinions, highlighting the potential for "the collusive submission of disputes for the purpose of establishing some principle of international law[11]." Unfortunately, this fear is not unfounded, because it is submitted that "advisory proceedings may and must be a valid component to overcome the excessively horizontal nature of the contemporary international community[12]."

In this way, there would be a risk that the possible far-reaching influence of advisory opinions substantially transforms the ICJ into a legislative body in the international community. It has been almost universally agreed that legally binding force of international law is based on the 'grundnorm' of 'pacta sunt servanda' among States[13]. Although it is true that in the General Assembly the Spain's decolonization of the Sahara was the issue at hand when the General Assembly requested an advisory opinion, the function of the ICJ's advisory opinion is not to politically solve the Saharan Issue, but only to answer the questions submitted.

At that time, the decolonization of the Sahara was meant to be implemented by Spain. Ahmedou Ould Souilem, a founding member of, affirmed that the 'liberation' originally referred to in Polisario's name was liberation from Spanish colonial domination, and did not signify any political program of independence for the Saharan Provinces[14]. However, the relevant phrases on the decolonization of the Sahara in the Saharan Advisory Opinion have been cited by the Polisario to justify the separation of the Saharan Provinces from Morocco.

Besides, as Charles Brower and Pieter Bekker have demonstrated, a provision in an international agreement which is specifically stipulating that legally binding force would be granted on the otherwise non-binding advisory opinion for the parties[15]. In fact, the ICJ held, in the advisory opinion of Immunity of Special Rapporteur Case, " the advisory opinion given in this case is to be regarded as decisive and binding and would have effect for the State concerned[16]." In such cases, advisory opinions would have legally binding force, just like the decisions of contentious cases, owing to the provision having a legally binding effect on an advisory opinion. Therefore, advisory opinions should not be made light of, even though they are not legally binding in principle.

10. Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, Cambridge University Press, 2003, p. 29. See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case, Advisory Opinion, ICJ Rep 1950, p. 71.
11. Paul C. Szasz, "Enhancing the Advisory Competence of the World Court," in Leo Gross (ed.), The Future of the International Court of Justice, Vol. 2, Oceana Publications, 1976, p. 524.
12. Juan Soroeta Liceras, "International Law and the Western Sahara Conflict," Wolf Legal Publishers, 2014, p. 88. See also Leo Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order," American Journal of International Law, Vol. 65, 1971, p. 253.
13. Shoji Matsumoto, "Jus Cogens and the Right to Self-Determination - Falsifiability of Tests -," Policy Center for the New South, Research Paper, RP-20/12, 2020, pp. 37-38.
14. Interview with Ahmedou Ould Souilem, a founding member of the Polisario and a longtime member of the committee overseeing the group's external relations, February 22, 2010, quoted in J. Peter Pham, "Not Another Failed State: Toward a Realistic Solution in the Western Sahara," Journal of the Middle East and Africa, Vol. 1, 2010, p. 7.
15. Charles N. Brower and Pieter Bekker, "Understanding 'Binding' Advisory Opinions of the International Court of Justice," in Nisuke Ando, Edward McWhinney and Rudiger Wolfrum (eds.), Liber Amicorum Judge Shigeru Oda, Vol. 1, Kluwer Law International, 2002, pp. 351-368.
16. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Rep 1999, para. 25.

On the contrary, advisory opinions may not be implemented by the States or bodies concerned because they are not legally binding. That may suggest a reflection on the jurisdiction of the ICJ over heavily controversial cases. In favor of judicial restraint on the part of the ICJ, Derek W. Bowen has once suggested that the ICJ should refrain from giving an advisory opinion, if there is a likelihood that it will be ignored[17]. Is this judicial restraint not applicable to additional issues? Based on this judicial restraint, the ICJ should have refrained from giving opinions on additional issues, as there was a likelihood, in the case of the Saharan Advisory Opinion, that all or a part of the advisory opinion would be ignored by Spain, Morocco, and Mauritania. Actually, none of these States has welcomed the entire opinion. Generally speaking, as James L. Brierly explains, "[t]here are historical instances in which the decisions of courts have had exactly the reverse effect, and have been contributory causes of the outbreak of a war[18]."

Actually, on the contrary, in the Saharan Advisory Opinion, the ICJ maintains its positive role in the political interest of the General Assembly as follows[19]:

"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. The function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose."

However, the ICJ's predecessor, the Permanent Court of International Justice (PCIJ) of the League of Nations, had to adhere to its judicial character even while acting in an advisory capacity by participating in the activities of the League of Nations as its body[20]. The judicial character was once subject to controversy when an advisory opinion was requested on a dispute pending between two States was requested[21]. As Ibrahim I. Shihata notes, "a request related directly to a dispute, being closely assimilated to an application invoking the contentious jurisdiction of the Court, raises the question of whether the consent of the parties would be required for the exercise of the advisory function[22]."

In the Status of Eastern Carelia Case in 1923, the PCIJ held that the submission of a dispute between Russia and Finland "could take place only by virtue of their consent[23]." And, it was proclaimed, concerning the rule of consent, that "the Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court[24]."

As the need for consent by interested States in advisory cases is not explicitly articulated in the ICJ Statute, there has been controversy over whether the ICJ can accept a request for an advisory opinion

17. Derek W. Bowen, "The Court's Role in Relation to International Organizations," in Vaughan Lowe and Malgosia Fitzmaurice (eds.), Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings, Grotius Publications, 1996, p. 186.
18. James L. Brierly, The Law of Nations: An Introduction to the International Law of Peace, 6th edition, Oxford at the Clarendon Press, 1963, p. 370.
19. Saharan Advisory Opinion, para. 73.
20. The Interpretation of Peace Treaties Case (First Phase), ICJ Rep., 1950, p. 71.
21. Ibrahim I. Shihata, The Power of the International Court to Determine its Own Jurisdiction, Martinus Nijhoff, 1965, p. 119.
22. Ibid., p. 120.
23. Status of Eastern Carelia Case, Advisory Opinion, PCIJ Series B, No.5, 1923, p. 27. Hereinafter cited as 'Eastern Carelia Case.'
24. Ibid., p.29.

that concerns a pending dispute without the consent of the parties[25]. According to the Eastern Carelia Case, it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation, arbitration, or any other kind of pacific settlement[26]. Although it is not clear to what extent the rule of the Eastern Carelia was followed by the ICJ in the advisory opinion of the Interpretation of the Peace Treaties Case in 1950, the opinion did not explicitly deny the rule. Instead, the opinion dispenced its commitment to the rule by stating that the circumstances of the two cases were "profoundly different[27]," though how "different" was not explicitly demonstrated[28]. Thus, Ian Brownlie observes that "[t]he rule still holds[29]."

Regarding the principle of consent of interested States to the advisory jurisdiction, it is noted, in the Application for Review Opinion in 1972, that "[i]n certain circumstances, … the lack of consent of the interested States may render the giving of an advisory opinion incompatible with the Court's judicial character," and "[a]n instance of this would be when the circumstances describe 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[30]." But the ICJ did not elaborate on what is "the effect of circumventing the principle[31]." On the contrary, in the Israeli Wall Opinion, the ICJ observed that the lack of consent to the ICJ's contentious jurisdiction by interested States has no bearing on the ICJ's jurisdiction to give an advisory opinion[32]. As such, Julia Wagner argues that lack of consent may be considered "when it comes to the question of discretion and propriety," and the only way for the ICJ to take lack of consent into account is "through its discretionary power[33]." Indeed, lack of consent is considered under the heading of 'Discretion' in the ICJ's advisory opinions[34]. However, the ICJ's discretion on jurisdiction over advisory opinions is equivalent to compulsory jurisdiction for the interested States.

25. In the Saharan Advisory Opinion, the ICJ holds, "the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court but the propriety of its exercise," citing the case of Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, ICJ Rep 1950. Hereinafter, cited as 'Interpretation of Peace Treaties.' Spain has based on the absence of its consent an objection against both the competence and the propriety of its exercise. Ibid., para. 21. The ICJ elaborates only on the latter. Ibid., paras. 22-33. Regarding the problem on consent to the competence, how and when the rule of Eastern Carelia fell into desuetude should have been explained, so that the General Assembly may exercise its own functions.
26. Eastern Carelia Case, p. 27.
27. Interpretation of the Peace Treaties, p. 65. James L. Brierly argues hypothetically that if the PCIJ had been asked for an opinion relating to a dispute as to the violation of human rights clauses in the treaties, the refusal of the three States to participate would have made it impossible to give one. Idem., The Law of Nations, 6th edition, Clarendon Press, 1963, p. 364.
28. Hersch Lauterpacht, The Development of International Law by the International Court, Stevens & Sons Limited, 1958, pp. 352-358. Lauterpacht argues that States have consented in advance as Members of the United Nations. Ibid., p.358. However, both the UN Charter and the ICJ Statute are silent on the Eastern Carelia rule of consent to be applied to an advisory case. In this regard, it is recalled that "Silence gives consent."
29. Ian Brownlie, Principles of Public International Law, 6th edition, Oxford University Press, 2003, p. 691, n. 131. But, the rule was not applied to the establishment of jurisdiction in the Saharan Advisory Opinion, on the ground that the General Assembly was concerned in the exercise of its own functions under the UN Charter, and not the settlement of a particular dispute between States, Saharan Advisory Opinion, paras. 25-28. If based on the above arguments on the authority and influence of advisory opinions, however, the 'quasi-legislative competence' of the General Assembly should have been be discussed. See Richard A. Falk, "On the Quasi-Legislative Competence of the General Assembly," American Journal of International Law, Vol. 60, 1966, pp. 782-791.
30. Application for Review of Judgment No. 158 of the UN Administrative Tribunal, ICJ Rep 1972, para. 33.
31. In the Chagos Advisory Opinion, as an advisory opinion is not given to any State but rather to a UN organ authorized to request it, the ICJ does not require the consent of any State to provide an advisory opinion, nor can any Sate prevent an advisory opinion from being given. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Rep 2019, paras. 81-91.
32. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 2004, paras. 47-50.
33. Julia Wagner, "The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to Do When Opportunity Knock," Questions of International Law, Vol. 55, 2018, p. 180.
34. Chagos Advisory Opinion, p. 112, II, B.

In the proceedings of the Saharan Advisory Opinion, Spain invoked the fundamental rule that a State cannot, without consent, be compelled to submit its disputes with other States to the ICJ's advisory jurisdiction[35]. Though the ICJ recognized that "lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion," an instance of this would be "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[36]." In the ICJ's view, the dispute had not arisen in bilateral relations between States[37]." Accordingly, it is suggested by Judge Nagendra Singh that a need for the General Assembly to gain consent from an interested State still applies even to advisory cases, in his declaration in the Saharan Advisory Opinion[38].

From the other perspective, even if the ICJ is not allowed to express its view on a wider range of legal issues, Alessandra De Tommaso submits, "it is undeniable that most bilateral disputes could be contextualised in a 'broader frame of reference,' thus arguably partially eroding the principle of consent by a State to the judicial settlement of its dispute with another State[39]." Though this argument may be accurate, addition of not specifically requested issues is a different problem.

Proper questions in the Saharan Advisory Opinion specifically requested by the General Assembly were only two: one on terra nullius in Question I[40]; and another on 'legal ties' in 1884 between the territory of the Saharan Provinces and Morocco or Mauritania in Question II[41]. However, two other issues are covertly included. The issues were improperly added to Question II. One is on the right to self-determination, and another on 'territorial sovereignty.'

The ICJ statements on the additional issues have sown the seeds of aggravating the Saharan Issue[42]. In fact, they have been quoted by Polisario in order to justify its unsuccessful claims to interfere

35. Saharan Advisory Opinion, para. 28.
36. Ibid., paras. 32-33.
37. Ibid., pars. 34.
38. Nagendra Singh, Declaration, Saharan Advisory Opinion, p. 74.
39. Alessandra De Tommaso, "The ICJ's Advisory Opinion on the Chagos Archipelago: Bilateral Dispute or Question of General Interest?," International Law Blog, 2019, https://internationallaw.blog/2019/03/28/the-icjs-advisory-opinion-on-the-legal-consequences-of-the-separation-of-the-chagos-archipelago-from-mauritius-bilateral-dispute-or-question-of-general-interest/.
40. Regarding Question I, the separate opinion of Judge Ammoun would worth citing: "the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonisation, stands condemned." Idem., separate opinion, Saharan Advisory Opinion, p 86.
41. UN GA Res 3292, 1974, para. 1. With respect to proper questions, J. J. P. Smith admits that "there was perhaps only a single question that ought to have been properly put to the Court if the UN's decolonization process was to be credibly maintained." Then, Smith propounds, "[t]hat was simply whether the Sahrawi people in the Spanish Sahara colony were entitled to exercise a right of self-determination." Idem., "State of Self-Determination: The Claim to Sahrawi Statehood," p. 6, n. d., https://www.arso.org/Self-DeterminationJSmith310310.pdf. Smith thus uncovers an ulterior motive underlying an improper issue on the right to self-determination added to the question of 'legal ties.'
42. In spite of a ceasefire agreement between Morocco and the Polisario in 1991 and the efforts of the UN Security Council to achieve "a realistic, practicable and enduring political solution" to the Saharan Issue based "on compromise," it remains largely at a stalemate. UN SC Res 2494, 2019, para. 2. On the recent developments, see Matsumoto, "2019 Secretary-General Report on Sahara: What's New - 'Neighbouring States as Parties' in Roundtable -," Policy Center for the New South, Policy Brief, PB-19/22, 2019. In this way, the Saharan Advisory Opinion would consist of giving a negative idea to David Sloss's conclusion that "the I.C.J. advisory opinion mechanism is an underutilized tool that may be helpful in promoting political settlement of some secessionist disputes." Idem., "Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims," Santa Clara Law Review, Vol. 42, 2002, p. 389. And, Gentiane Zyberi is not always accurate in asserting that the Saharan Advisory Opinion has contributed to establishing a referendum and keeping the Saharan Issue on the UN agenda, in idem., "Self-Determination through the Lens of the International Court of Justice," Netherlands International Law Review, Vol. 56, 2009, p. 10. Because later it is clearly indicated that the abortive referendum approach has been replaced by the UN-sponsored dialogue approach by the Security Council (UN SC Res 690, 1991), which is in charge of keeping the Saharan Issue on the UN agenda through the MINURSO.

with the trade of natural resources from the Saharan Provinces, in the judicial courts in the UK, the EU, Panama, South Africa, Uruguay and New Zealand[43]. "After losing all its legal battles launched at EU, UN, US Congress, Africa … against Morocco's territorial integrity, its agricultural, fisheries and phosphate deals including Moroccan Sahara", it is reported, "Polisario tried once again its disruptive game in New Zealand but to no success[44]." The ICJ's statements on additional issues appear to have been abused to obstruct the process to achieve "a just, lasting, and mutually acceptable political solution, based on compromise," to the Saharan Issue based on compromise in conformity with the Security Council resolutions[45].

Finally, the reasons why additional issues are made in advisory opinions will be considered. Then, as a conclusion, a proper way to be adopted by the international and domestic courts for dealing with the ICJ's statements on the issues added to specifically requested questions will be proposed.

II. Issue on Self-Determination not Requested

The phrase 'the right to self-determination' is "simply loaded with dynamite," Robert Lancing warned a hundred years ago[46]. Recently, Rosalyn Higgins warned, the right to self-determination "now faces a new danger: that of being all things to all men[47]." Lamentably, these warnings still hold good all over the world. Emilio Cárdens and María Caňás are of the opinion that self-determination has begun to undermine the potential for peace in regions of the world[48]. The Saharan Provinces is one such region. When the use of the phrase is not absolutely indispensable, therefore, its use should be withheld. When it is indispensable, on the other hand, it should be used with extreme discretion even in the ICJ's advisory cases.

The Saharan Advisory Opinion refers to "the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory," of the Saharan Provinces[49]. In framing its answer to Question II, which addresses 'legal ties' in 1884, not even touching self-determination and decolonization, the ICJ holds that it cannot be unmindful of the purpose for which its opinion is sought, and states that "[i]ts answer is requested in order to assist the General Assembly to determine its future decolonization policy[50]." However, Question II concerned only 'legal ties' between the territory of the Saharan Provinces and Morocco or between the territory and Mauritania at the time of Spain's colonization in 1884. An opinion concerning the right to self-determination was not formally requested by the General Assembly[51].

43. Matsumoto, "Morocco's Sovereignty over Natural Resources in Saharan Provinces - Taking Cherry Blossom Case as an Example -," Policy Center for the New South, Policy Paper, PP 20/01, 2020. See also "After Panama, Uruguay Dismisses Polisario's Complaint about Moroccan Phosphates," North Africa Post, 2017, https://northafricapost.com/19193-panama-uruguay-dismisses-polisarios-complaint-moroccan-phosphates.html. See also «Pro-Polisario Activists Protest Moroccan Phosphate in New Zealand," Morocco World News, 2018, https://www.moroccoworldnews.com/2018/12/260906/polisario-moroccan-phosphate-new-zealand/.
44. "Sahara: Polisario Hit by Another Major Setback in New Zealand," North Africa Post, 2020, https://northafricapost.com/40956-sahara-polisario-hit-by-another-major-setback-in-new-zealand.html.
45. UN SC Res S/RES/2548, 2020, preamble.
46. Robert Lansing, The Peace Negotiations : A Personal Narrative, Houghton Mifflin Co., 1921, p. 97.
47. Rosalyn Higgins, Problems and Progress: International Law and How We Use It, Oxford University Press, 1994, p.128.
48. Emilio J. Cárdens and María Fernanda Caňás, "The Limits of Self-Determination," in Wolfgang Danspeckgruger and Arthur Watts (eds.), Self-Determination and Self-Administration, Lynne Rinner Publishers, 1997, p. 155.
49. The term "the right to self-determination" is referred to in paras. 54-59 in the Saharan Advisory Opinion, for example.
50. Ibid., para. 161.
51. UN GA Res 3292 (XXIX), 1974, para. 1.

In the proceedings the Saharan Advisory Opinion, it is true, Spain suggested that it was prepared to join in the request only if the questions put were supplemented by another issue establishing a satisfactory balance between the historical and legal exposition of the matter and decolonization of the territory[52]. Thereupon, the ICJ states[53]:

"[T]he legal questions of which the Court has been seized are located in a broader frame of reference than the settlement of a particular dispute and embrace other elements. These elements, moreover, are not confined to the past but are also directed to the present and the future.

The above considerations are pertinent for a determination of the object of the present request."

Within the framework of law, it is far beyond imagination to embrace the future element for considering 'legal ties' that existed in 1884. In law any future elements should not be taken into account in evincing a historical fact. Usually, moreover, the future element is not relevant to the interpretation and application of the existing international law. Besides, jurisdiction over the future element is, normally, conferred on a political body, not a judicial court. If this is the case, the element concerning the future in the above-quoted statement must have been taken into account politically. It is considered, outside the framework of law, for the benefit of a political body, i.e. the General Assembly, "in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy[54]."

On the political element, the ICJ holds in the Legality of the Threat or Use of Nuclear Weapons Case that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion[55]." That may be exact, not only in establishing the ICJ's jurisdiction, however, but also in adding not specifically requested issues to a proper question. Then, as a matter of course, any addition of issues and statements in an advisory opinion should not be politically motivated, in conformity with the declaration in open court that every judge will exercise the powers "impartially and consciously" under Article 20 of the ICJ Statute.

Based on the statistical research of the ICJ's contentious cases, Eric Posner and Miguel de Figueiredo conclude, "[t]he data suggest that national bias has an important influence on the decision making of the ICJ. Judges vote for their home states about 90 percent of the time. When their home states are not involved, judges vote for states that are similar to their home states—along the dimensions of wealth, culture, and political regime[56]." Regrettably, impartiality of the ICJ judges would be empirically doubted. "Despite an ICJ judge's obligation to be impartial," Nadia Nedzel criticizes, "there is significant evidence of judicial bias[57]." This criticism may be more or less applicable to advisory cases involving a dispute between States, like the Sahara Issue. Essentially, however, arguments in an advisory opinion

52. Saharan Advisory Opinion, para. 29.
53. Ibid., paras. 38-39.
54. Ibid., para. 39.
55. The Legality of the Threat or Use of Nuclear Weapons Case, WHO Advisory Opinion, ICJ Rep 1996, para. 13.
56. Eric A. Posner and Miguel F. P. de Figueiredo, "Is the International Court of Justice Biased?," Journal of Legal Studies, Vol. 34, 2005, p. 624.
57. Nadia E. Nedzel, "The International Court of Justice – A Predictable Failure," Gateway Pundit, 2018, https://www.thegatewaypundit.com/2018/09/nadia-nedzel-the-international-court-of-justice-a-predictable-failure/#_ftn6. See also Gleider Hernández, "Impartiality and Bias at the International Court of Justice," Cambridge Journal of International and Comparative Law, Vol. 1, 2012, pp. 183-207.

should be based on external logic or methods that are neutral among the parties[58]. For that reason, discretion of the ICJ should be narrowed as much as possible, especially in advisory proceedings, because the interested States are not positioned as the proper parties in the proceedings.

In addition to the problem of political bias, there has been controversy, though not widespread, with regard to the propriety of not specifically requested additional issues in an advisory opinion[59]. Legal consideration of the propriety would unravel a political element in determination to add improper issues to an advisory opinion.

Judge Lauterpacht adopted a positive stance toward not specifically requested issues incidental to the advisory opinion in the South West Africa Cases (Voting Procedure) in his separate opinion, as below[60]:

"I cannot disregard that aspect of the matter on the alleged ground that the Court cannot answer this - or any other legal question - incidental to the Opinion, seeing that the General Assembly has not specifically asked for an answer to these questions. The General Assembly has asked only one substantive question; that issue, and that issue only, is answered in the operative part of the unanimous Opinion of the Court. Clearly, in order to reply to that question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions which carry conviction and clarify the law."

"A variety of legal questions," including issues improperly added to a proper question, may be positively considered, if they are really indispensable for answering a proper question that was formally requested. In the Saharan Advisory Opinion, however, the ICJ referred to the right to self-determination ultra vires, beyond its judicial competence[61], because the statements on the right to self-determination were not legally indispensable for answering 'legal ties' in 1884[62]. Even the need to consult the wishes of the people of the territory of the Saharan Provinces as to their political future cannot justify the addition. Because such need is one thing and the need to include an issue on the right to self-determination in the question on 'legal ties' in 1884 is another. Thus, Karen Knopp criticizes the ICJ for having inaccurately «blurred the line between 'self' and 'territory' arguments that it had drawn by equating the right of self-determination with the free will of the colonial population, and legal ties with pre-colonial claims to territory[63]."

Arguably, the political purpose of using the word 'people' might have been only to connect the term 'people' in 1884 to the right to self-determination in 1975 in the final paragraph of the advisory

58. Martii Koskennicimi, "The Politics of International Law – 20 Years Later," European Journal of International Law, Vol. 20, 2009, p. 12.
59. The following paragraph addresses the establishment of the ICJ's jurisdiction over proper questions: "[t]he 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." Saharan Advisory Opinion, para. 41.
60. Voting Procedure in Questions relating to Reports and Petitions Concerning Territory of South West Africa, Advisory Opinion, ICJ Rep 1955, pp.92-93.
61. Judge Leo Gross criticizes that the ICJ exceeds its competence under Article 65 of the ICJ Statute, when it attributes a legal character to facts, on the decolonization of the Saharan Provinces, that are not legal. Idem., Saharan Advisory Opinion, declaration, p. 77. See Liceras, loc. cit., supra note 12, p. 102.
62. Saharan Advisory Opinion, para. 162.
63. Karen Knop, Diversity and Self-Determination in International Law, Cambridge University Press, 2009, pp. 132-3.

opinion[64], which has been criticized as ambiguous[65]. That is why the statements in the relevant paragraphs, which refer to 'people', occasionally end up stating "the tie is not territorial," not further elaborating on the most crucial relations between "ties of allegiance" and sovereignty[66]. On the ties, Henry Wager Halleck, a US scholar and a General-in-Chief of all Union armies during the American Civil War, stated in 1861 that "the sovereignty of a state has reference to its political character, rather than to the nature of its territorial possessions[67]." It may be reasonably speculated that the ICJ applied the contemporary concept of sovereignty, retrospectively, to sovereignty in 1884. Such retrospective application is unreasonable. Its unreasonableness may be illustrated by the hypothetical application of the latest conditions for Statehood declared in the 1991 EU Guidelines on the recognition of new States in Eastern Europe[68], such as the rule of law, democracy, human rights, minority rights, and disarmament[69]. If these conditions for Statehood were applied to Europe in 1884, there would have been almost no State in Europe.

Subsequently, Thomas Joseph Lawrence, a nineteenth-century European scholar of international law[70], stated in 1895 that "in a state the tie which binds the members together is political; that is to say, their sense of corporate unity comes from common obedience to the same government. In a nation the tie arises from community of blood, or language, or religion, or historical tradition, or some or all of these.[71]" In line with Lawrence's concept of sovereignty, Peter Pham observes, quoting Abdeslam Maghraoui[72], as below[73]:

"Morocco's claims to territorial sovereignty based on Muslim legal norms with its particular juridical notions and authority relations between state and sub-state groups such as tribes 'proved an enigma to the International Court in The Hague' that 'simply did not know how to interpret these claims'. Thus, the opinion is 'questionable because it evaluates the authority of a premodern state structure on the basis of modern mechanisms of sovereignty such as taxation records, voting districts, or a national currency. According to this interpretation of sovereignty, most Moroccan provinces would be considered illegal annexations, and indeed the entire Moroccan state would be considered illegitimate.'"

In a similar vein, J. Liceras argues, "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[74]." In respect of the ''Green March'', moreover, Benjamin Stora regards it as the massive evidence of the deeply felt Moroccan belief in "historical

64. Saharan Advisory Opinion, para. 162.
65. Liceras, loc. cit., supra note 12, p. 106.
66. See Jacques Eric Roussellier, "Elusive Sovereignty—People, Land and Frontiers of the Desert: The Case of the Western Sahara and the International Court of Justice," Journal of North African Studies, Vol. 12, 2007, pp. 55-78.
67. H. W. Halleck, Rules Regulating the Intercourse of States in Peace and War, H. H. Bancroft & Company, 1861, p. 64.
68. Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,' adopted by the EC on 16 December 1991, reproduced in European Journal of International Law, Vol. 4, 1993, pp. 72-73.
69. Jessica Almqvist, "EU and the Recognition of New States," Euborders Working Paper 12, 2017, pp. 12-16.
70. See "In Memoriam Thomas Joseph Lawrence, 1849-1920," American Journal of International Law, Vol. 14, 1920, pp. 223-229. See also "Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture," Harvard Law Review, Vol. 106, 1993, pp. 723–740.
71. Thomas Joseph Lawrence, The Principles of International Law, 7th ed., Macmillan & Co., Ltd, 1925, p. 48, n. 1. Its first edition was published in 1895 from D. C. Heath & Co., Publishers.
72. Abdeslam Maghraoui, "Ambiguities of Sovereignty: Morocco, The Hague and the Western Sahara Dispute," Mediterranean Politics, Vol. 8, 2003, p. 119.
73. Pham, loc. cit., supra note 14, p.12.
74. Liceras, loc. cit., supra note 12, p. 104.

and legal claims based on Islamic concepts of allegiance and sovereignty[75]." Hence, Judge Boni holds in his separate opinion of the Saharan Advisory Opinion, "[a]s 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[76]." Moroccan Permanent Ambassador to the UN Omar Hilale reiterates that the disputed territory was Morocco's long before the Spanish colonization the late 19th century, and the region has been a part of Morocco's territory. "This was confirmed by the advisory opinion of the International Court of Justice in 1975, which recognized the existence of ties of allegiance of the populations of the Sahara to the Kings of Morocco and the authority of the Moroccan Sovereigns over this region," Hilale continues[77].

Meantime, according to the Chagos Advisory Opinion[78], the ICJ seems to have departed from the language of the question put to it where the question is not adequately formulated or does not reflect the "legal questions really in issue[79]." Similarly, where the question requested is ambiguous or vague, the ICJ may clarify it before giving its opinion[80]. In practice, however, judging from its reasoning in the Saharan Advisory Opinion, the ICJ could actually arrive at the conclusion on the question of 'legal ties', without referring to the right to self-determination.

The reason why the ICJ refused to exclude an additional issue on the right to self-determination is, according to the ICJ, because "the Court cannot accept the view that the legal ties in the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it[81]." However, any legal ground for holding that "the Court cannot accept the view" is hard to be found, though politically understandable. From the legal point of view, the ICJ should have accepted that view, because legally the right to self-determination in 1975 has nothing to do with 'legal ties" in 1884.

As such, Samuel J. Spector's following statements, which unravel the political bias that is inconspicuously involved in the Saharan Advisory Opinion, is worth quoting[82]:

"Two justices … offered separate opinions that challenged the international court's pro-Sahrawi independence leanings and instead proposed that the Moroccan counter-narrative, rooted in Morocco's pre-colonial historical ties of sovereignty to « Western Sahara », as well as its claim of decolonization by 'reversion to former sovereignty'[83], be accorded appropriate emphasis in arriving at the court's decision."

75. Benjamin Stora, ''Algeria/Morocco: The Passions of the Past. Representations of the Nation that Unite and Divide," Journal of North African Studies, Vol. 8, 2003, p. 25.
76. Separate Opinion of Judge Boni, Saharan Advisory Opinion, p. 173. Though 'Eurocentricism' and 'Africa bias' of the International Criminal Court have been criticized, they are beyond the scope of our discussion. See Awol K. Allo, "The ICC's problem is not overt racism, it is Eurocentricism," Aljazeera, 2018, https://www.aljazeera.com/opinions/2018/7/28/the-iccs-problem-is-not-overt-racism-it-is-eurocentricism/; Rebecca Davis, "Analysis: Is the International Criminal Court biased against Africa?," Daily Maverick, 2015, https://www.dailymaverick.co.za/article/2015-06-19-analysis-is-the-international-criminal-court-biased-against-africa/.
77. Safaa Kasroui, "Morocco's Ambassador to the UN: Algeria Created Polisario," Morocco World News, 2019, https.//www.moroccoworldnews.com/2019/05/272425/moroccan-un-ambassador-algeria-created-polisario/.
78. Chagos Advisory Opinion, ICJ Rep 2019, paras. 135-136.
79. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Rep 1980, para. 35.
80. Application for Review of Judgment No. 273 of the UN Administrative Tribunal, Advisory Opinion, ICJ Rep 1982, para. 46.
81. Sahara Advisory Opinion, para. 85.
82. Samuel J. Spector, "Western Sahara and the Self-Determination Debate," Middle East Quarterly, Vol. 16, 2009, https://www.meforum.org/2400/western-sahara-self-determination#_ftnref45.
83. Michla Pomerance, Self-Determination in Law and Practice, Springer, 1982, p. 44.

III. 'Legal Ties' and 'Territorial Sovereignty'

Overall, it seems that the ICJ's statements on the additional issue of 'territorial sovereignty[84]' are much more impressive than those on the question of 'legal ties' other than 'tie of territorial sovereignty'. The statements in the Saharan Advisory Opinion are focused on 'territorial sovereignty.' 'Legal ties' other than 'territorial integrity' are negatively or passively referred to as if they were run-up for 'territorial sovereignty.' Its example is as follows[85].

"[T]he 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."

'Legal ties' other than 'territorial sovereignty' are described further as: "ties of allegiance or of personal influence[86];" "authority or influence of the Sultan[87];" "a legal tie of allegiance[88];" "Sultan's authority or influence[89];" and "legal ties of allegiance between the Sultan of Morocco and some of the tribes[90]." What the ICJ consistently examined throughout the Saharan Advisory Opinion was 'territorial sovereignty', not 'legal ties' as such.

In truth, however, when submitting the questions, the General Assembly did not use the words 'territorial sovereignty', in spite of the controversy over this issue between Morocco and Spain. The wording should be construed as the rejection of issue on 'territorial sovereignty'. So, it can be reasonably inferred from the wording 'legal ties' that the General Assembly must have carefully used the words 'legal ties' in the questions of the written request. At least verbally, the General Assembly seems to have set aside the issue of 'territorial sovereignty', though it might have had ulterior motives. In practice, the ICJ itself states that "the Court finds that the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over the territory. Nor does the Court's Order of 22 May 1975 convey any implication that the present case relates to a claim of a territorial Nature[91]."

Thus, in its reasoning, the Saharan Advisory Opinion is inconsistent. On the one hand, the ICJ views that 'legal ties' should not be limited to territorial ties and should refer to "the people who may be found in it," because the words «'legal ties' must be understood as referring to such 'legal ties' as may affect the policy to be followed in the decolonization of « Western Sahara ». In particular, the ICJ states as below[92]:

84. M. A. de La Pradell discussed the meaning of 'territorial sovereignty' in the Nationality Decrees in Tunis and Morocco Case as below: "territory is neither an object nor a substance; it is a framework. What sort of framework? The framework within which the public power is exercised … territory as such must not be considered, it must be regarded as the external, ostensible sign of the sphere within which the public power of the state is exercised." PCIJ Rep, Ser. C, No. 2, 1923, pp. 106, 108. According to Malcolm N. Shaw, 'territorial sovereignty' has a positive and a negative aspect: the exclusivity of the competence of the State regarding its own territory; and the obligation to protect the rights of other States. Idem., International Law, 4th edition, Cambridge University Press, 1997, p. 333.
85. Saharan Advisory Opinion, para. 107.
86. Ibid., para. 118.
87. Ibid., para. 128.
88. Ibid., para. 129.
89. Ibid.
90. Ibid., para. 162.
91. Ibid., para. 43. The Court's Order of 22 May 1975 finds that Morocco is entitled to choose a person to sit as judge ad hoc in the present proceedings. « Western Sahara », 1975 ICJ 6 (Order of May 22).
92. Saharan Advisory Opinion, para. 85. Likewise, with regard to Mauritania, it is held that "the question to ties of sovereignty would … be to ignore the special characteristics of the Saharan region and peoples …, and also to disregard the possible relevance of other legal ties to the various procedures concerned in the decolonization process." Ibid., para. 151. However, "the possible relevance of other legal ties" should have been to the situation in 1884, not to decolonization in 1975. On the decolonization, however, Mark A. A. Smith points out that "the Court incorporated the General Assembly's 'ties' language into its holding, it did not discuss the relationship between 'legal ties' and decolonization in the rest of the opinion." Idem., "Sovereignty Over Unoccupied Territories—The « Western Sahara » Decision," Case Western Reserve Journal of International Law, Vol. 9, 1977, pp.143-144.

"[T]he Court cannot accept the view that the legal ties the General Assembly had in mind in framing Question II were limited to ties established directly with the territory and without reference to the people who may be found in it. Such an interpretation would unduly restrict the scope of the question, since legal ties are normally established in relation to people."

On the other hand, the 'legal ties' in relation to people, such as legal ties of allegiance, are referred to actually only for evincing that the ties are not territorial[93]. Thus, Judge Gross states on the combination of 'legal ties of allegiance' with the denial of 'territorial sovereignty', in his declaration in the Saharan Advisory Opinion, as below[94]:

"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 … 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 …"

According to Gross's opinion, a contradiction is involved in the thus implicated identification of 'legal ties' with ties of territorial sovereignty, because the latter ties are not of a legal nature, but of ethnic, religious or cultural nature. If "legal ties are normally established in relation to people," moreover, 'legal ties of allegiance' should have been focused and elaborated from the viewpoint of sovereignty and its relations to territory, not unduly restricting the scope of the question[95]. Otherwise, "such an interpretation would unduly restrict the scope of the question," as the Saharan Advisory Opinion itself warns, albeit the warning might be made for ulterior purposes[96].

There is a reason for that contradiction. The reason may be because, in the ICJ's conception, a not specifically requested issue on the right to self-determination had to be added to Question II by any means, even if the addition was not legally justified. Indeed, the only possible means for the ICJ to include an issue on the right to self-determination in Question II would have been to manage somehow to apply the issue to the question 'legal ties' in 1884. As the right to self-determination could not be directly applied to 'legal ties' in 1884, however, it was inevitable to resort to the concept of 'people', even ineptly, so as to correspond to the 'self' in self-determination and finally connect 'legal ties' to the right to self-determination. In practice, thanks to the use of the word 'people', the focus of the Saharan Issue was adjusted, successfully or not, on the right to self-determination in the conclusion of the advisory opinion. Thus, Mohamed Mael-Ainin, ex-Ambassador of Morocco to Australia and New Zealand, points out as below[97]:

"In 1974, Morocco requested that the UN refer the dispute with Spain, the former colonizer, over « Western Sahara » to the International Court of Justice. Shortly afterwards, Algeria, which claimed that it is not concerned, designated its present Minister of Foreign Affairs, Mr. Bedjaoui, as lawyer, to fog the Morocco-Spanish dispute through incorporating separatist ideas into the literature of the ICJ. Algeria was acting for the 'polisario' which was only one year old, and could not therefore convey its own ideas."

93. Ibid., paras. 129, 158, 161.
94. Judge Leo Gross, declaration, Saharan Advisory Opinion, p.75.
95. Thomas Joseph Lawrence defines a State in his famous classic book on international law, as below: "In a state the tie which binds the members together is political; that is to say, their sense of corporate unity comes from common obedience to the same government. In a nation the tie arises from community of blood, or language, or religion," in idem., The Principles of International Law, Macmillan & Co., Ltd, 1925, p. 48.
96. Saharan Advisory Opinion, para. 85.
97. Mohamed Mael-Ainin, "Is Western Sahara Moroccan?," Embassy of Morocco Australia-New Zealand-Pacific States, http://moroccoembassy.org.au/?q=%C2%AB-western-sahara-%C2%BB-moroccan.

For legal purposes, it is hard to be convinced of a need to add an issue on 'territorial sovereignty' to Question II. Why the phrase 'territorial sovereignty' was not chosen when the General Assembly requested the advisory opinion in 1974? The reason why the general Assembly determined to use the words 'legal ties', instead of 'territorial sovereignty,' must be examined.

With respect to the formulation of a question for an advisory opinion, Guenter Weissberg is of the opinion that "[e]xtensive public and private negotiations, indeed, long-rolling have occurred before the final formulation", and quoted a remark, which is vert telling: "every question contained within itself its own reply[98]." Therefore, it should be asked why the phrase 'territorial sovereignty' was avoided in Question II when considering the relations between Morocco and Spain when it was formulated in the General Assembly.

Before the beginning of advisory proceedings, in fact, 'territorial sovereignty' was one of the most controversial topics between Morocco and Spain. Thus, Morocco proposed the joint submission with Spain to the ICJ in the communication of 23 September 1974[99]. An issue on 'territorial sovereignty' was proposed for contentious proceedings. As Spain made no reply to the letter setting out the proposal, however, the legal issue of 'territorial sovereignty' ended. In contrast, politically, even after the failure of joint submission, the issue of 'territorial sovereignty' may survive. Besides, both Morocco and Mauritania were concerned with the future of the territory[100].

As regards the purpose of advisory function, it is reaffirmed by the ICJ that the purpose is "not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion," in the advisory opinion of Interpretation of the Peace Treaties Case[101]. Quoting this opinion, Malcolm N. Show states that "[u]nlike contentious cases, the purpose of the Court's advisory jurisdiction is not to settle, at least directly, inter-state disputes[102]." Thus, the purpose of the Saharan Advisory Opinion would not be to settle the Saharan Issue, but only to give legal advice to the General Assembly on the specifically requested questions[103]. Therefore, the reference to "the decolonization of Western Sahara", quoted above, would constitute a self-contradiction for the ICJ.

In the Sahara Advisory Opinion, the ICJ seems to have been more concerned with the political settlement of the Saharan Issue than with giving legal advice to the General Assembly. However, the ICJ and the requesting General Assembly are independent entities, as Judge Michael Bustamante stated in the Certain Expenses of the UN Opinion. Based on this statement, he suggests that "the General Assembly's power to determine the limits of the questions upon which it asks an opinion is not incompatible with the power of the Court[104]." Viewed in this way, the ICJ's limitation of the questions to "legal ties" other than "territorial sovereignty" would not be, equally, incompatible with the power of the General Assembly.

98. The quoted remark is made by the representative of Brazil in connection with the South West Africa issue (General Assembly Official Records, 4th Session, Fourth Committee, 140th Meeting, November 29, 1949, para. 22, p. 275), cited in Guenter Weissberg, "the Role of the International Court of Justice in the United Nations System: The First Quarter Century," in Leo Gross (ed.), The Future of the International Court of Justice, Vol. I, Oceana Publications, 1976, p. 136.
99. Ibid., para. 26.
100. UN GA Res 3292 (XXIX), 1974, preface.
101. Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 1996, para. 15. Cf. Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, ICJ Rep 1950, p. 71.
102. Shaw, op. cit., supra note 84, p. 772.
103. That is why "[t]he fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested," Legality of the Treat or Use of Nuclear Weapons, ICJ Rep 1996, supra note 101.
104. Judge Michael D. Bustamante, Dissenting Opinion, Certain Expenses of the United Nations Case, ICJ Rep 1962, p. 288.

If an issue on 'territorial sovereignty' had been taken over to the advisory proceedings, on a hypothesis, then the proceedings would have resulted, in effect, in compulsory jurisdiction being achieved by majority vote in a political body, i.e. the General Assembly, as Spain warned[105]. Advisory proceedings are neither a substitute for nor a second chance to contentious proceedings. As Spain suggested, advisory proceedings are not even 'indirect means' to contentious proceedings[106]. In this way, it may not be unreasonable to presuppose that the phrase 'territorial sovereignty' was consciously avoided by the General Assembly.

Under Article 65 (2) of the ICJ Statute, questions upon which an advisory opinion is requested shall be laid before the ICJ by means of 'a written request.' As a principle, therefore, questions should not be created by the ICJ, like an additional issue on 'territorial sovereignty.' Moreover, a written question should contain 'an exact statement of the question.' Accordingly, any question already accepted by the ICJ should be deemed as 'exact[107],' even when it is found that interpretation is inevitable. If 'territorial sovereignty' was a legal question really at issue, the General Assembly could use this very commonly used term in international law.

As regards the interpretation of a question specifically requested, the ICJ recalls that it may depart from the language of the question put to it where the question is not adequately formulated[108] or does not reflect the "legal questions really in issue[109]." Similarly, where the question requested is ambiguous or vague, the ICJ may clarify it before giving its opinion[110]. However, an addition of issues is different from the interpretation of a question specifically requested.

IV. Conclusion

The ICJ Statute prescribes that the ICJ can render a narrow opinion restricted to the terms of the submission[111]. Judge Mohammed Bedjaoui himself suggests that even in the case of a formally requested question, if a request for an advisory opinion risks "prejudicing the integrity of its judicial function," the ICJ should not be obliged to comply with the request[112]. P. Szasz adds, in a similar vein, that since any legal process would be subject to misuse by the parties, the ICJ can counter any threat of abuse by declining to render an opinion requested[113]. In respect of a biased question, he argues that the ICJ can to an extent guard itself "by declining to respond to part or all of a blatantly biased question or by sufficiently reformulating one susceptible of correction, provided it recognizes the trap in a particular query[114]."

105. Saharan Advisory Opinion, para. 27.
106. Ibid.
107. As described above, in Saharan Advisory Opinion, the issue of 'territorial sovereignty' was not included in "a written request" in General Assembly resolution 3292 (XXIX) in 1974, let alone not containing "an exact statement."
108. Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, PCIJ Series B, No. 16, 1928.
109. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Rep 1980, para. 35.
110. Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Rep 1982, para. 46.
111. The Statute of the ICJ, Arts. 66, 34 (2)-(3).
112. Mohammed Bedjaui, "Expediency in the Decisions of the International Court of Justice," British Yearbook of International Law, Vol. 71, 2000, p. 18.
113. Szasz, loc. cit., supra note 11, p. 521.
114. Ibid., p. 524.

Szasz's argument above may be particularly true of additional issues on the right to self-determination and 'territorial sovereignty' in the Saharan Advisory Opinion. As a matter of fact, the ICJ's statements on these additional issues have been abused politically by Polisario in courts such as the EU, the UK and South African courts to deny Morocco's sovereignty over natural resources in the Saharan Provinces[115], 'prejudicing the integrity' of the courts.

Concerning the terms of reference between the ICJ and the General Assembly with regard to an advisory opinion, Michla Pomerance is critical of viewing a request for an advisory opinion by the General Assembly as if it were 'client–lawyer' consultation[116]. The term 'client–lawyer' consultation would underestimate the uniqueness of the ICJ as the principal judicial organ of the UN[117], and would imply that "the court may be ready to sacrifice its judicial character for the sake of assisting the UN in reaching whatever conclusions the UN wants the court to provide[118]." In practice, in the Saharan Advisory Opinion, the ICJ conceives that "[i]ts answer is requested in order to assist the General Assembly to determine its future decolonization policy," as quoted above. However, in the case of Legality of the Threat or Use of Nuclear Weapons, the ICJ proclaims that "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions[119]."

Any future policy, if taken account, would exceed the limits of the ICJ's proper competence as a judicial body, i.e. interpretation and application of international law[120]. Actually, however, in the Saharan Advisory Opinion the ICJ concerned more with the future decolonization policy of the General Assembly than with 'legal ties' in 1884. Properly, the ICJ should not have taken future policy into account in its application of international law. Otherwise, the advisory opinion would result in "prejudicing the integrity of its judicial function."

According to Chittharanjan F. Amerasinghe, however, while the ICJ has striven to satisfy the interests of the UN, it has nevertheless taken a "sagacious approach to interpreting and applying the principle that its own judicial character must be protected[121]." Indeed, the ICJ should not be changed from an independent judicial body into 'a legitimizing political body' for the UN political organs in the 'client–lawyer' relations[122].

On the reasons of absence of an ICJ philosophy of 'judicial restraint' in those days, as opposed to the US Supreme Court which has often resorted to a 'political question doctrine[123]," M. Pomerance

115. The Queen on the application of « Western Sahara » Campaign UK v The Commissioners for Her Majesty's Revenue and Customs, The Secretary of State for the Environment Food and Rural Affairs, High Court of Justice Queen's Bench Division Administrative Court, 19 October 2015, Case No: CO/1032/2015, para. 40; Council of the EU v Front Polisario, the Court of Justice of the EU, Grand Chamber, 21 December 2016, Case C-104/16 P, para. 104; Polisario v NM Cherry Blossom, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, 15 June 2017, Case No. 1487/17, para. 37.
116. M. Pomerance, The Advisory Function of the International Court in the League and UN Eras, John Hopkins University Press, 1973, pp. 292-296. According to Paul C. Szasz, pure legal counseling has two aspects, i.e. to advice a proposed course of conduct and to predict the outcome of legal controversies, are neither generally appropriate for a judicial organ that might later be called on to evaluate such conduct or to decide such controversies in a litigation concerning the interests of parties not involved in original consultation. Szasz, loc. cit., supra note 11, p. 521.
117. UN Charter, Art. 92.
118. Szasz, loc. cit., supra note 11, p. 521.
119. And, it is reconfirmed that "[t]he General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs". Legality of the Treat or Use of Nuclear Weapons, ICJ Rep 1996, para. 16.
120. ICJ Statute, Art. 36 (2)—
121. Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals, Kluwer Law International, 2003, p. 537.
122. Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice, 1946-2005, Springer, 2006. pp. 239-240.
123. Andrew Coleman, "The international Court of Justice and Highly Political Matters," Melbourne Journal of International Law, Vol. 4, 2003, pp. 29–75.

interestingly concludes that it was linked to the then dearth of cases with which the ICJ was seized. "Difficulties which have stood in the way of compliance with requests have, ineluctably and consistently, been either overlooked or overcome," Pomerance observes[124]. In response to the difficulties, Arthur Rovine proposes giving the ICJ more business "by permitting international organizations to appear as parties, or by permitting states to request advisory opinions[125]." Stephen M. Schwebel suggested that the power to request advisory opinions should be extended to the UN Secretary-General[126], and to States and domestic courts[127]. Setting aside the proposals which are beyond the scope of this paper, the dearth of cases would not justify the addition of issues to the proper questions. In practice the statements on issues added to a specifically requested proper question have contributed to aggravating the Sahara Issue.

The concept of 'judicial restraint' is basically correlated with that of non-justiciable 'political questions'. As regards 'political questions', Ellen Yang Gao submits, "whether a dispute is justiciable or not is dependent upon the magnitude of the issues involved. All disputes that could affect the vital interests of states and the structure of international relations should be seen as non-legal disputes and thus nonjusticiable." Indeed, nothing would be more political than "' vital interests of states' in the international community. In this way, Gao concludes that the ICJ "should shy away from answering such nonlegal questions[128]." In a similar vein, in Tom Ginsberg's observation, "for political interests are involved in establishing international courts and providing them with ongoing material and political support," the courts would operate normally within political constraints[129]. As to a political bias on the part of international institutions in general, Martti Koskenniemi critically points out that most international institutions, including the ICJ[130], have a 'structural bias,' preferring certain normative outcomes or distributive choices to others[131]. Assuming that the absence of the ICJ's 'judicial restraint' would continue, Pomerance finally suggests, the requesting bodies themselves should exercise 'political restraint[132]' In consequence, the ICJ should be free from political bias in the statements in an advisory opinion, regardless if they are on formal questions or not, on the basis of reflection on the Saharan Advisory Opinion.

Then, desirable measures to be taken by the international and domestic courts or parties in invoking the statements on additional issues should be considered. First of all, it should be recalled that "the ICJ always emphasizes that its opinion is given not to the States, but to the organ which is entitled to request it," as Mahasen M. Aljaghoub emphasizes[133]. So, under international law, an advisory opinion

124. M. Pomerance, "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms," in A. S. Muller and D. Raic, et al. (eds.), The International Court of Justice: Its Future Role After Fifty Years, Martinus Nijhoff, 1997, p. 318.
125. Arthur W. Rovine, "The National Interest and the World Court," in Leo Gross (ed.), The Future of the International Court of Justice, Vol. I, Oceana Publications, 1976, p. 326.
126. Stephen M. Schwebel, "Authorizing the Secretary-General of the United Nations to Request Advisory Opinions," American Journal of International Law, Vol. 78, 1984, p. 4.
127. Idem., "Preliminary Rulings by the International Court of Justice at the Instance of National Courts," Virginia Journal of International Law, Vol. 28, 1988, p.485.
128. Ellen Yang Gao, "The International Court of Justice and Political Questions: Defending the Rule of Law or a Continuation of Politics by Other Means?," Haverford College, 2017, https://scholarship.tricolib.brynmawr.edu/bitstream/handle/10066/19359/2017GaoE.pdf?sequence=1&isAllowed=y.
129. Tom Ginsburg, "Political Constraints on International Courts," University of Chicago Public Law & Legal Theory Working Paper, No. 453, 2013, p. 501.
130. On the ICJ's 'structural bias', see Andrea Bianchi, "Choice and (the Awareness of) its Consequences: The ICJ's 'Structural Bias' Strikes Again in the Marshall Islands Case," American Journal of International Law, Vol. 111, 2017, pp. 81-87.
131. Koskenniemi, loc. cit., supra note 58, p. 11.
132. Pomerance, loc. cit., supra note 124, p. 319.
133. M. Aljaghoub, "The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints Reflections on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004," Arab Law Quarterly, Vol. 24, 2010, p. 206. See also Interpretation of the Peace Treaties, p. 71.

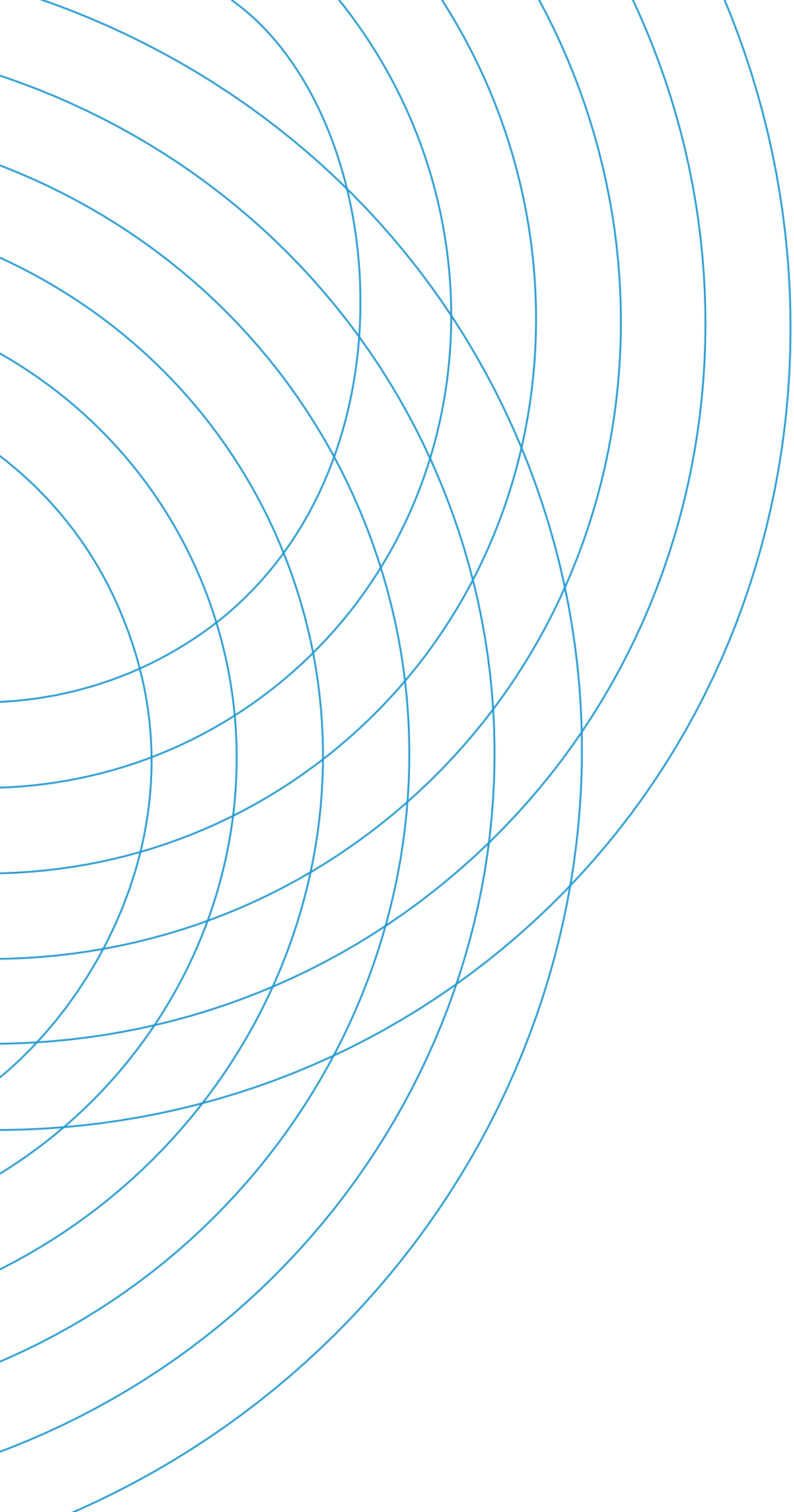
is authoritative only for the body that requested it, i.e. the General Assembly in the case of the Saharan Advisory Opinion. The ICJ's statements on additional issues, which are not specifically requested, should not be relied on by the parties, such as Polisario and pro-Polisario groups, in the domestic judicial courts. Quotes from the statements on additional issues in an advisory opinion, if any, should be excluded by the courts, whether domestic or international.

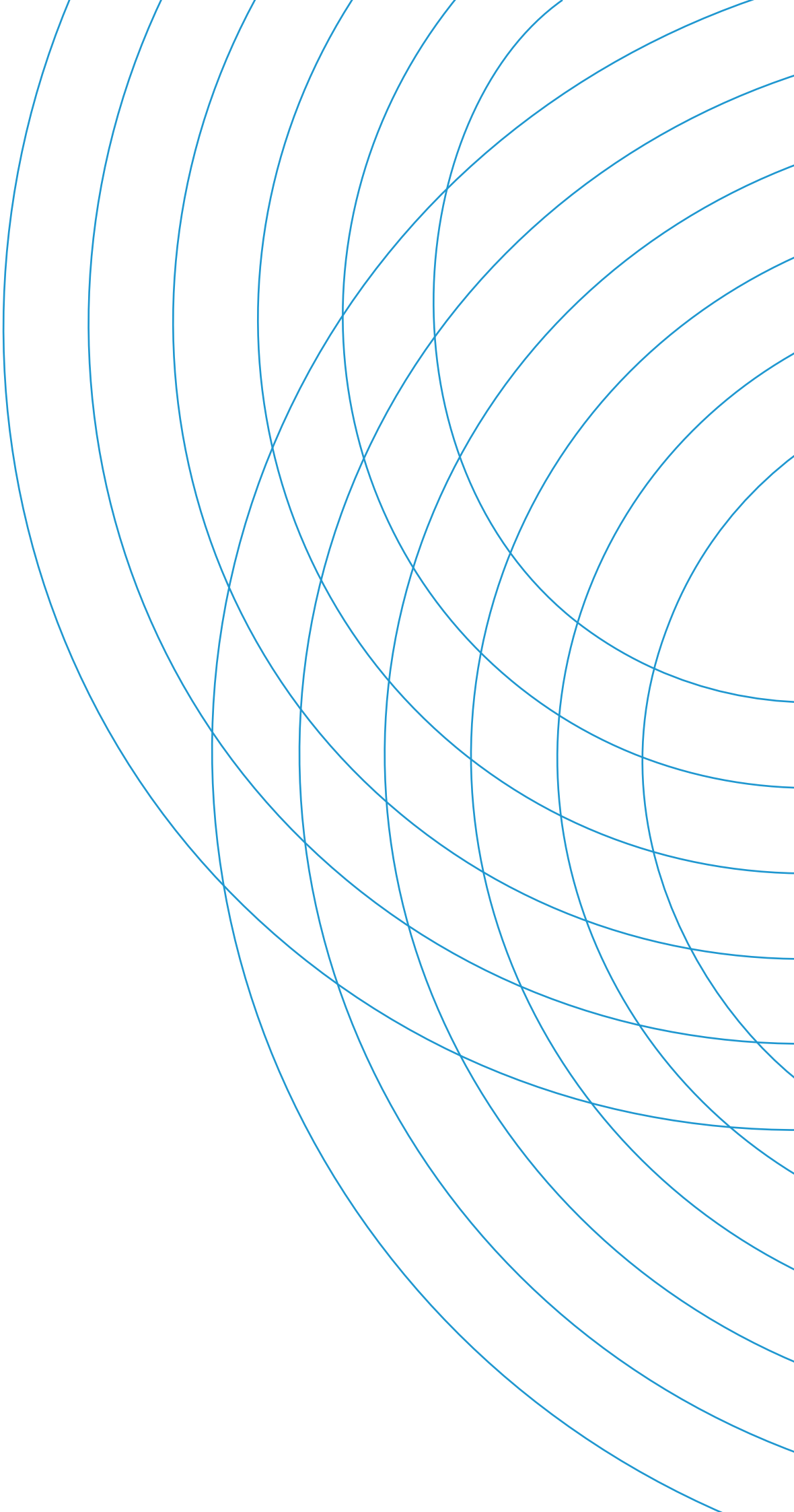
The statements on additional issues would be reminiscent of 'obiter dictum', which includes words introduced by way of illustration, or analogy or argument, usually in contentious cases. With respect to 'obiter dictum', it is argued that "however excellent the original proposition may be, the case is not a precedent for that proposition[134]." The ICJ's statements on the additional issues concerning the right to self-determination and 'territorial sovereignty' in the Saharan Advisory Opinion are far from 'obiter dictum', rather they are substantially 'ratio decidendi', which signifies the reason for deciding[135], but they were not proper statements due to lack of formal request.

Therefore, as a matter of course, the statements on additional issues would not form precedents[136]. Statements on additional issues in an advisory opinion are in contravention of Article 65 (2), which provides that a question asking for an advisory opinion should be laid down before the ICJ by means of "a written request containing an exact statement of the question." Furthermore, on the basis of the ICJ's own reasoning, in rebutting the Eastern Carellia rule of consent of interested States, an advisory opinion is not given to States[137]. Therefore, the allegations of the parties in the courts based on the statements on not specifically requested issues should not be admitted.

In practice, however, the separatist Polisario and pro-Polisario groups continue to quote the statements as its 'lawfare' tactics[138], a parody of warfare, aggressively politicizing and weaponizing the judicial courts of the EU, the UK, South Africa, New Zealand, and so on[139]. Nevertheless, such inappropriate statements should not be accepted in the decisions of judicial courts, whether domestic or international, so that the 'lawfare' tactics can be caused to fail and the integrity of the judicial courts can be respected.

134. Henry Cambell Black, Black's Law Dictionary, 5th edition, West Publishing Company, 1979, p. 967.
135. On the test to differentiate 'ratio decidendi' from 'obiter dictum,' see State of Gujara v Utility Users' Welfare Association and Ors., Supreme Court of India, Civil Appeal Nos. 14697, 13451 of 2015, 2018, 6 SCC 21, 2018, para. 103.
136. "What is Inversion Test for Determining Ratio Decidendi?," Law Web, 2018, https://www.lawweb.in/2018/10/what-is-inversion-test-for-determining.html.
137. Interpretation of Peace Treaties Case, p. 71.
138. Orde F. Kittrie, Lawfare: Law as a Weapon of War, 1st edition, Oxford University Press, 2016, pp. 4-7.
139. The Queen on the application of Western Sahara Campaign UK v The Commissioners for Her Majesty's Revenue and Customs, The Secretary of State for the Environment Food and Rural Affairs, High Court of Justice Queen's Bench Division Administrative Court, Case No: CO/1032/2015, 2015, para. 40; Council of the EU v Front Polisario, the Court of Justice of the EU, Grand Chamber, 21 December 2016, Case C-104/16 P, para. 104; Polisario v NM Cherry Blossom, High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, Case No. 1487/17, June 15, 2017. para. 37.





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