CASE ANALYSIS:
The Influence of Colonial International Legal Discourse in ICJ's Advisory Opinion on Western Sahara (1975)*
บทวิเคราะห์คำพิพากษาศาลยุติธรรมระหว่างประเทศ: อิทธิพลของวาทกรรมทางกฎหมายระหว่างประเทศแบบอาณานิคมในความเห็นเชิงแนะนำของศาลยุติธรรมระหว่างประเทศ กรณีซาฮาราตะวันตก (ปี 1975)

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1. CASE OVERVIEW[1]

On 13 December 1974, the General Assembly requested an advisory opinion on the following questions: "I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?" If the answer to the first question is in the negative, "II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?" In its Advisory Opinion, delivered on 16 October 1975, the Court replied to Question I in the negative. In reply to Question II, it expressed the opinion that the materials and information presented to it showed the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally showed the existence of rights, including some rights relating to

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[1] International Court of Justice, "Western Sahara: Overview of the Case," accessed 29 December 2025, https://www.icj-cij.org/case/61

the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion was that the materials and information presented to it did 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 did not find any legal ties of such a nature that might affect the application of the General Assembly's 1960 resolution 1514 (XV) — containing the Declaration on the Granting of Independence to Colonial Countries and Peoples — 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.

2. CASE ANALYSIS

2.1 Theory and Analytical Framework

Recent legal scholarship argues that contemporary international law is dominated by colonial doctrine. However, one question arises from this assertion: how is international law dominated by colonialism? To answer this question, I will employ two theoretical concepts. Firstly, recent developments in international legal scholarship suggest that to understand the unfolding of the current form of the international legal system, one should observe any international dispute and perceive international law in such a dispute as a field in which all the rivals compete, using legal argument and counter-argument to present their position on the issue at hand. The result of this competition is a final judgement deciding which stance will be used as a central standard for the international legal doctrine made by the dispute resolution bodies. Building upon this insight, and blending it with recent developments in post-colonial international relations theory, I argue that sometimes in international legal disputes, especially those concerning the decolonisation process or even sovereign territories, two discourses will be presented to the settlement bodies as the legal stances of the rivals: the indigenous one and the imperialistic one. However, because the international legal field is not a level playing field, but a field under the domination of one of the strongest discourses in world politics—the *Eurocentric discourse*[2]—the result of the dispute mechanism will be in favour of the imperialistic doctrine, affecting the attempts to resolve the conflicting issues in the long run.

[2] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 32–114.

The attempt to clarify my mentioned argument has led me to the consultation of the ICJ's advisory opinion on the Western Saharan Question that was delivered about 50 years ago, in 1975.

2.2 Historical Background and Doctrinal-Legal Side of the Opinion

After nearly a decade of controversy between various interested states regarding the status and the future of a territory located on the west coast of the African continent, the Western Sahara, the United Nations, as a cardinal international body responsible for decolonising any non-self-governing territory worldwide, had nearly reached the final stage of handling the Western Sahara issue: to hold the referendum determining the territory's future by its inhabitants. However, a difficulty appeared in the General Assembly session. Some legal questions were raised before the UN about whether the UN could permit the exercise of the right of self-determination to the indigenous people living in that territory, the Sahrawi people, or not. While there existed a consensus among the international society, including the major powers that permanently sit in the UNSC and Spain, the former coloniser of Western Sahara,[3] that a free and genuine referendum is the best solution for Western Sahara, many other interested states, all of which are neighbours of Western Sahara, insisted that by virtue of historical and legal ties, the Western Sahara territory must belong to them, bypassing the process of self-determination by the people.[4] This kind of legal argument made world policymakers, who did not want to cause any violent conflict in the region, unable to decide whether a referendum would be held or not, prompting them to seek legal consistency to assist them in making a decision. Then, despite the resistance made by Spain, the UNGA, in its 29th session, had to resort to the International Court of Justice, asking it to give an advisory opinion regarding two consecutive questions, which read:

> "*I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?*
>
> *If the answer to the first question is in the negative,*
>
> *II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?*"[5]

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[3] *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 13 (Oct. 16).

[4] See *Western Sahara*, I I.C.J. Pleadings 135 (Request for Advisory Opinion).

[5] Question of Spanish Sahara, G.A. Res. 3292 (XXIX), U.N. Doc. A/9631 (Dec. 13, 1974); *Western Sahara*, 1975 I.C.J. at 12, ¶ 1.

This request for an advisory opinion, however, as the Court stated, did not aim to settle the question about the sovereignty over the Western Sahara territory; conversely, the GA perceived the answer from the Court as assistance, helping it formulate policy regarding the territory more effectively and in accordance with international law. This meant that the Court opinion, at least due to its non-obligatory nature, would not affect any existing international right and duty of anyone, but the opinion of the Court would provide the GA with a legal framework that should be adopted regarding the Western Sahara.[6] Precisely speaking, in every way that the Court responds to each question, there would appear to be the possibility that the GA should follow. If the Court observes that Western Sahara, at the time of colonisation by Spain, was *terra nullius*, this colonial concept will justify the imperialistic behaviour of Spain in conquering and annexing Western Sahara, meaning that Western Sahara, since that time, has been legally part of Spain. Therefore, if Spain wanted to leave this territory, the legal consequences would be one of these: either Western Sahara would be inherited by Spain's successor state in the region (but there was no such state in reality) or Western Sahara would be decolonised in the light of the principle of self-determination accepted at that time (and contemporary) legal framework. On the other hand, if the Court observes the negative answer for the first question, the second one will be considered; and if the Court finds any legal (limited only to territorial sovereignty) ties between Western Sahara and either Morocco or Mauritania, Western Sahara should belong to that country according to the principle of territorial integrity; but if the Court does not find such a tie, the principle of self-determination would prevail for the future of Western Sahara.

To protect their national interest on the international scene, all of the interested countries made various kinds of arguments responding to the request for the Court's opinion. By scrutinising all the arguments for each issue (that is, much more than the question), we will see how international law (and international courts) becomes a field for states' struggle for their stances. First of all, in the question of the Court's competence to consider the case, there is only Spain, which had consistently refused to bring the dispute regarding this territory to the Court, that objects to the Court's jurisdiction, arguing that the request for an advisory opinion is inherently a contentious dispute between herself and Morocco; so, bringing the case before the Court by the competence of the GA is a circumvention that violated the principle of consensual jurisdiction of international

[6] *Western Sahara*, 1975 I.C.J. at 30, ¶¶ 32–33.

settlement bodies.[7] This objection, however, was rejected by the Court, confirming that to give an opinion in this case, the Court would just advise the GA about its function in the decolonising process, not settle any bilateral dispute or affect the right and duty of anyone.[8]

2.3 The First Question: Terra Nullius

After securing its jurisdiction, the Court moved to the merits of the request. On the first question regarding the *terra nullius* status of Western Sahara, there was a consensus among related parties that the answer to this question would be negative. However, the way that the Court approached the answer to this question could also imply how the imperialistic, colonial discourse remains in international law. To determine that any territory is a *terra nullius*, the Court stated that two characteristics are required: (1) such a territory should belong to no one, meaning that there must be no human being inhabiting that territory, and (2) such a territory should be acquired only by way of occupation, not conquest, annexation, or agreement.[9] Following these criteria, the Court's finding was aligned with the argument made by Spain, maintaining that Western Sahara, at the time of colonisation by Spain, was not a *terra nullius* because at that time there existed people organised into tribes, each with their own competent chief, inhabiting that territory, and, moreover, Spain acquired this territory not through occupation of an empty land, but a protecting agreement between the Spanish government and the local tribe's chief.[10] This opinion, on the one hand, seemed to emphasise the rights of indigenous people who lived for a long time in Western Sahara as a unit that can be perceived under international law, not a non-existent group that can be oppressed and persecuted in any way the colonised powers want. However, the contemporary studies reveal that the concept of *terra nullius*, contrary to the conventional wisdom, has not been perceived and exploited for colonisation at the outset of the imperialistic era. European states usually acknowledged that a territory inhabited by tribal people is not a *terra nullius*, and colonisation was generally viewed through the legal frameworks of conquest or cession, rather than settlement of empty land,[11] long before the Court established this criterion,

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[7] *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23).

[8] *Western Sahara*, 1975 I.C.J. at 33, ¶ 39.

[9] *Id.* at 40, ¶ 79.

[10] *Id.* at 40–41, ¶¶ 80–81.

[11] Lauren Benton and Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28, no. 1 (2010): 24.

meaning that at the time of colonisation, Spain did not refer to the principle of *terra nullius* to justify its imperialistic action, but, as it stated to the Court, by the mutual agreement for protection between its government and the tribes living there. This, ultimately, validated the standard practices of colonial powers, not by the special legal principle, but by a regular one: tribes have enough legal competence to sign treaties with European countries to be under the "protection" of such states, but they were not considered sovereign states compared to those in Europe, without any consideration of the power asymmetry in capability of the two sides.

2.4 The Second Question: Legal Ties

After dealing with the first question, the negative of the Court led the Court to handle the second one. This question required the Court to identify any legal ties between Western Sahara and the two claiming states in the region, such as Morocco and Mauritania. By "legal ties", the Court defined that there were two types of legal ties with which the Court had to deal with Morocco and Mauritania separately: one is the territorial sovereign ties, and another is other legal ties, including ties between the people who lived in the territory.

By considering legal ties with Morocco, we can observe that two legal arguments compete to establish a legal doctrine relating to the non-European relations of political units in the non-Western sphere. On the one hand, Morocco insisted that it has a territorial sovereign tie with Western Sahara for two reasons. Internally, Morocco claimed that (1) the system governing the interaction between political authorities in the northern Africa in ancient times was not the same as a Westphalian system found in Europe, but the *Sherifian* State, the model of states based on the Islamic public law, in which the sultan at Rabat was the central authority, not in terms of governing power but a religious one: all of the tribes' chief had to "Bay'a" (swear) that they accept the sultan as the commander of faithful and then they will offer Friday prayers in the Sultan's name and fight under his banner,[12] even though the taxing capability of the central government did not reach the territory of Western Sahara, which was a *Bled es-Siba*. (2) The fierce resistance of Sahrawi leaders against French and Spanish incursions in the late 19th and early 20th centuries was done in the name of the Sultan, signalling that the population considered itself subject to the Moroccan crown. Internationally, Morocco claimed that a lot of treaties and agreements it concluded with European powers have recognised its

[12] *Western Sahara*, III I.C.J. Pleadings 1, ¶¶ 12–25 (Written Statement of the Government of Morocco).

authority and sovereignty over Western Sahara. These arguments, on the other hand, were objected to by other disputed parties in the case. Spain leveraged the international agreements which Morocco had with it to oppose Morocco's claims and prove that Morocco had acknowledged by itself that it had no authority over Western Sahara.

In this issue, we can observe competition between European and non-European discourses in this field of international litigation. Although a lot of arguments, such as the interpretations of treaties as an international recognition, are based on European international law, Morocco raised one of the critical non-European arguments: the *Sherifian* State. The legal tie between political units in this region should not be determined by any non-regional, European perspectives, meaning that, in Morocco's view, the applicable law at that time should consider religious and personal ties that can establish what is referred to as "territorial sovereignty" between two political units. This argument has been objected to by Spain by placing more emphasis on the modern concept of treaty and treaty-making competence rather than these unique characteristics of international relations in this region. And, ultimately, the Court's opinion is contrary to Morocco's arguments, determining that there were certain spiritual and political ties between the tribes of Western Sahara and the Sultanate of Morocco, but these kinds of legal ties did not prove effective, exclusive territorial sovereignty over Western Sahara.[13]

By considering legal ties with Mauritania, the same pattern of legal rivals exists. Mauritania, on the one hand, argued that although there was no Mauritanian state at the time of Spanish colonisation, ties existed between Western Sahara and the so-called "Mauritanian entity," a coherent human, cultural, and legal community spanning the borders of modern Mauritania and Western Sahara.[14] Culturally, there was a shared religion (Maliki Islam), language (Hassania), and social structure (maraboutic and warrior tribes) in that region. Legally, there were specific legal relations involving migration routes, water rights, and inter-tribal dispute resolution mechanisms that functioned irrespective of colonial borders. This concept of Bilad Chinguetti established sufficient legal ties that can establish the territorial sovereignty of the modern Mauritania over Western Sahara. However, Spain, as well as Morocco, rejected these claims, arguing that the "Mauritanian entity" was a vague sociological concept, not a legal personality capable of holding

[13] *Western Sahara*, 1975 I.C.J. at ¶¶ 93, 108, 129.

[14] *Western Sahara*, III I.C.J. Pleadings 1, 8–15 (Written Statement of the Government of the Islamic Republic of Mauritania).

territorial sovereignty and cultural and linguistic similarities were insufficient to establish a claim of territorial title that would negate the separate existence of the Western Saharan tribes.

The Court, although it did not admit the counterarguments made by Spain directly, rejected the Mauritanian stance, emphasising that the entity that can have any competence in the international scene has to have the characteristics the Court stated in the Reparation Advisory Opinion,[15] the opinion that affirmed the international legal personality to an international organisation. Therefore, the "Mauritanian entity" that has no institutions or corporate personality distinct from the tribes themselves cannot establish any territorial sovereign ties between Mauritania and Western Sahara, although the Court acknowledged that nomadic routes, pastures, and wells created "other" legal ties.[16]

In conclusion, the Court advised that there were only "other" legal ties between Western Sahara and Morocco and Mauritania since all non-Western arguments (aligned with other European concepts that Morocco and Mauritania lost the evidence contest) could not establish any territorial sovereign ties between them.

2.5 Post-Colonial Analysis of the Opinion and the Future of Western Sahara

Regarding the rejection of both Morocco's and Mauritania's arguments, we can observe how colonial discourse dominated the judicial process. The Court used only the standards of the "modern Western nation-state" (Westphalian State), while neglecting the traditional forms of local governance, which were not bound by borders but were tied to individual loyalty. The Court's rejection of the meaning of Bay'a and tribal interaction as sovereignty amounted to a declaration that the colonial (European) legal system was superior and more legitimate than the indigenous legal system. This leads us to the main argument of this article, that although international law is a field for many legal arguments to compete in establishing a consistent legal doctrine, only European legal arguments will win.

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[15] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

[16] *Western Sahara*, 1975 I.C.J. at 68, ¶ 152.

After all, the Court, considering the request of this advisory opinion in the light of the decolonising process stated in UNGA resolution 1514 (XV),[17] confirmed that these legal ties the Court found between Western Sahara and Morocco and Mauritania did not affect the right of self-determination by the people, implying that the only way to resolve the problem of independence of Western Sahara should be free and genuine expression of the will of the peoples of the Territory through referendum.[18] This conclusion appears to be a satisfactory end to this decolonising process. However, the reality was more complex. By refusing to recognise the sovereignty of both Morocco and Mauritania, the Court cast all legitimacy back to the UN's self-determination process, which, while seemingly democratic, is actually a denial of local history and leads to an irresolvable political vacuum: The UN Settlement Plan collapsed because rigid, European-style census methods could not accommodate the fluid nature of nomadic tribalism, leading to an impasse over voter eligibility.[19] The conflict subsequently hardened as Morocco claimed exclusive territorial sovereignty while the Frente POLISARIO demanded the Western legal right to statehood, rejecting flexible indigenous solutions.[20] Diplomatic efforts stagnated because both sides utilised international law to justify mutually exclusive demands for absolute state control rather than shared authority.[21] The 2020 ceasefire collapse further emphasised this reliance on hard borders and military dominance rather than traditional forms of integration,[22] making Western Sahara still "the last colonised territory" in the world.[23]

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[17] *Id.* at 68, ¶ 162; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV) (Dec. 14, 1960).

[18] Question of Spanish Sahara, G.A. Res. 3292 (XXIX), U.N. Doc. A/9631 (Dec. 13, 1974).

[19] Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/2001/613, ¶¶ 22–23 (June 20, 2001).

[20] Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/2023/729, ¶¶ 20–25 (Oct. 3, 2023).

[21] S.C. Res. 2703, U.N. Doc. S/RES/2703 (Oct. 30, 2023).

[22] Report of the Secretary-General (2023), *supra* note 21, at ¶¶ 2–8.

[23] Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2023, U.N. Doc. A/78/23, chap. VIII (2023).

3. Conclusion: Colonial Legacy Still Remains

By examining that case, this article contends that the ICJ's Western Sahara Advisory Opinion constitutes a triumph for colonial doctrine. Although the Court has glorified the right of self-determination of the Sahrawi people, the reasoning the Court used to reach such a conclusion resulted in three main consequences that still affect the status of Western Sahara today: (1) By refusing the application of *terra nullius* in the disputed territory, the Court has justified the occupation and colonization of Spain in the present-day Western Sahara using other colonisers' views; (2) By rejecting the non-European defenses raised by Morocco and Mauritania, the Court affirmed that only European-accepted concepts could hold title in the international legal system; And (3) By accepting only the imperialistic resolution—that is, the exercise of the right to self-determination—the Court has pushed Western Sahara into the political sphere, leaving it unresolved for decades. This influence of imperialist international law has not ended with the downfall of colonialism; indeed, the colonial legacy still remains in the world.