SEPARATE OPINION OF JUDGE DILLARD

While I am in agreement with the Opinion and the approach taken by the Court, my reasons do not altogether coincide with those set out in the Opinion. Furthermore it seems to me desirable to make a few comments touching the operative clauses of the Opinion and especially the significance which, in my view, attaches to the response to Question II. This furnishes my excuse for appending a separate opinion.

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At the very threshold of our enquiry doubts assailed me as to both the existence and relevance of any legal question. Unless the Court were seised of a legal question it would not be competent to respond to the request in light of Article 96 (1) of the Charter of the United Nations. On the other hand, even if a legal question were present, its lack of apparent relevance to any contemporary problem might well induce the Court to invoke, however, reluctantly, its discretionary power of refusal conferred upon it by Article 65 (1) of its Statute.

These doubts were prompted by two significant facts. First it was immediately apparent that the two questions were exclusively confined to an historical period and second they raised no issue whatever as to the legitimacy of Spain's original occupation of the territory or its present authority over it. It appeared, therefore, that the two questions invited an enquiry which, while no doubt historically fascinating, was far removed from any contemporary problem whatever [1].

Furthermore, it was urged upon the Court that it should confine itself to a strict and literal reading of the questions for fear otherwise that it might trespass on the prerogatives of the General Assembly. This view was fortified by the argument that during the debates in the Fourth Committee, Spain and a number of other delegates among the 43 who had abstained in the voting, objected to the manner in which the questions had been framed. Nevertheless, despite these objections, they emerged and were voted on in the historically confined manner referred to above.

Spain strenuously urged upon the Court the view that the questions were merely "academic" or "historical". Its argument was based on the premise that the General Assembly had already decided on both the principles and

[1] Readers of Judge Petrén's separate opinion will observe that he entertained similar doubts.

methods to be applied to the decolonization process and furthermore the decision carried the concurrence of both the Kingdom of Morocco and the Islamic Republic of Mauritania. The reply to the two questions would thus be devoid of object or purpose. The Opinion has dealt with this argument in great detail in paragraphs 48-74 and no repetition is called for in this separate opinion.

The doubts which assailed me were not grounded on the same premise as that advanced by Spain and analysed in the Opinion. They centred on the proper scope of the Court's powers of interpretation in light of the contention that the questions were clear, precise, legal and relevant. This string of assertions left open the natural enquiry "relevant to what", an enquiry which also bore upon the legal character of the questions as well.

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

Finally it did not appear to me sufficient to say that the questions would be rendered legally relevant on the mere assumption that the answers would tend to enlighten the General Assembly in the exercise of its political functions. Absent from this assumption was the notion of contemporary *legal* relevance [1].

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It is immediately apparent that these doubts were based on the assumption that the Court was strictly confined to a literal reading of the two questions. Wisely, however, the Court, as revealed in paragraph 52, did not so confine itself but instead located the two questions in the total context of the contemporary decolonization process. An analysis of the genesis and terms of resolution 3292 (XXIX) which the Court has undertaken in paragraphs 66-69

[1] Although made in connection with a contentious case, a *dictum* in the *Northern Cameroons* case bears on the observation above. In the course of its reasoning the Court stated ". . . it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved" (*I.C.J. Reports 1963*, p. 37).

clearly justifies this approach. Furthermore it is fully justified by the jurisprudence of the Court. As stated in the *Certain Expenses of the United Nations* case it cannot be assumed that the General Assembly seeks:

> "... to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion" (*I.C.J. Reports 1962*, p. 157).

While stated in general terms and in a different context this well-known dictum appears relevant. Perhaps even more relevant is the equally well-known pronouncement of Judge Lauterpacht in the case concerning *Voting Procedure in Questions relating to Reports and Petitions concerning the Territory of South West Africa*. He was concerned with a question incidental to the one asked and its relation to the role of the Court. His statement deserves the respect it has generated.

> "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." (*I.C.J. Reports 1955*, pp. 92-93.)

Statements of similar import could be culled from many other cases. It results from the above that there is nothing in the jurisprudence of the Court which can support the proposition that it would be presumptuous on its part to so interpret the questions as to give them a contemporary legal significance by invoking the larger context in which they are framed. By so locating the questions in the contemporary setting of the decolonization process the Court has thus, in my opinion, countered the view that the question invited an answer of a purely "academic" or "historical" character.

In addition to providing a contemporary setting for the questions it has also emphasized the importance of resolution 1514 (XV) in so far as it applies to the Western Sahara as well as other resolutions dealing with the decolonization of that territory. This in turn has a distinct bearing on an important aspect of one of the operative clauses and especially the response to Question II.

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Turning specifically to Question II in the operative clauses it will be observed that the specific reference to paragraph 162 incorporates that paragraph into the operative part of the Opinion. Otherwise the reply would not be responsive to the question since obviously the question did not ask the Court merely to *confirm* the existence of legal ties but to determine their nature. Furthermore paragraph 162 is not, properly speaking, part of the reasoning of the Court but a statement of conclusions drawn from its reasoning. An understanding of the thrust and significance of the answer to Question II thus focuses on that paragraph.

It will be observed that paragraph 162 breaks down into three parts. The first, dealing with legal ties, proclaims the existence of "legal ties of allegiance" between the Sultan of Morocco and "some of the tribes found in Western Sahara" and also the existence of "rights" including some that relate to the land which constituted legal ties between the Mauritanian entity and Western Sahara.

In the second part, dealing with territorial sovereignty, the Court concludes, however, that the materials and information presented to it "do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco and the Mauritanian entity".

Finally in the third part, dealing with self-determination, the Court asserts that *no ties* were of such a nature as to affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and in particular no ties which might affect the "principle of self-determination through the free and genuine expression of the will of the peoples of the territory".

Whether the first conclusion is sufficiently supported by the evidence is, in my view, questionable. The matter is largely one of interpreting many complex sets of disputed historical facts and intangible relations in order to determine their significance in light of the "principles and procedures to be applied in the decolonization of Western Sahara". The debates in the Fourth Committee provided no specific clue as to the meaning to be attached to the term "legal ties" and the Opinion in paragraph 85 merely locates the meaning in the context of the decolonization process, "... in conformity with resolution 1514 (XV) of 14 December 1960".

However, no matter what may be said about it, the first conclusion seems to me to be of minor importance when consideration is given to the relationship between all three conclusions and the overriding significance of the second and third.

The second conclusion, which carries my complete concurrence, that no tie of *territorial sovereignty* existed between the Western Sahara and the Kingdom of Morocco and the Mauritanian entity is, of course, critically significant and especially so in light of the debates in the Fourth Committee and the legal controversy which prompted the request for the present Advisory Opinion. The matter has been thoroughly analysed in the Opinion and repetition would be superfluous. It may be helpful, however, to

emphasize at least three implications which, in my view, flow from this conclusion.

First, it negates the notion advanced by the two interested States that the territory was, legally speaking, an integral part of a "parent" State (the Kingdom of Morocco) or that it was "included" within the confines of what has now emerged as the Islamic Republic of Mauritania. It follows that the image of a kind of colonial amputation beginning in 1884 of a pre-existing territorial unity is distorted.

Second, it implies that any claim to what has been called automatic retrocession is not applicable to the Western Sahara and therefore it was unnecessary for the Court to pronounce upon the principle of territorial integrity embedded in paragraph 6 of resolution 1514 (XV) [1].

Third, while it may not have resolved every legal aspect of the problems debated in the Fourth Committee it has certainly done so with respect to the principal controversy which stimulated the adoption of resolution 3292 (XXIX).

The implications above appear to me to be warranted even if it is conceded with respect to Morocco that the legal ties noted in the restrained conclusion in paragraph 129 of the Opinion can be said to have been established. The implications also hold for the Islamic Republic of Mauritania even if full weight is given to the nature of the legal ties summarized in paragraph 152 of the Opinion.

The relative lack of importance of these ties is, in my view, further fortified when consideration is paid to the third point stressed in paragraph 162 dealing with the potential application of resolution 1514 (XV) and the principle of self-determination.

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It will be recalled that paragraph 162 reaffirms the continuing applicability of resolution 1514 (XV). It asserts that *no legal ties affect* this conclusion and it places renewed emphasis on the principle of self-determination "through the free and genuine expression of the will of the peoples of the territory".

This part of the operative clause invites comment of three kinds. At the

[1] This controversial matter is alluded to in the Opinion in connection with the arguments of the two interested States. It is also alluded to in paragraphs 57, 58 and 59. The Court might have felt called upon to consider the matter more fully had it decided that the Moroccan claim to immemorial possession had been established.

My personal view is that both the genesis and language of paragraph 6 of resolution 1514 (XV), especially when read in light of principles VII and IX of resolution 1541 (XV), make it unlikely that paragraph 6 could justifiably be applied to the decolonization of the Western Sahara as a principle of territorial integrity overriding the right of the people to self-determination which has been so firmly announced in all the resolutions dealing with that particular area.

broadest level there is the problem of determining whether the right of self-determination in the context of non-self-governing territories can qualify as a norm of contemporary international law; second there is the more limited level concerned with the impact of the right in possibly rendering without object the historically oriented questions posed in resolution 3292 (XXIX) and finally there is the delicate problem of determining the extent if any by which the "right" limits the possible policies open to the General Assembly in the decolonization process of the Western Sahara. I shall deal with each briefly.

As is well known the first problem has elicited conflicting views which, in terms of opposing poles, may be described as follows. At one extreme is the contention that even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law. According to this view, this is the precise situation manifested by the long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing territories.

At the opposite pole are those who, resisting generally the law-creating powers of the General Assembly, deny that the principle has developed into a "right" with corresponding obligations or that the practice of decolonization has been more than an example of a usage dictated by political expediency or convenience and one which, in addition, has been neither constant nor uniform.

I need not dwell on the theoretical aspects of this broad problem which, as everyone knows, commands an immense literature [1]. Suffice it to call attention to the fact that the present Opinion is forthright in proclaiming the existence of the "right" in so far as the present proceedings are concerned.

This is made explicit in paragraph 56 and is fortified by calling into play two dicta in the *Namibia* case (*I.C.J. Reports 1971*, p. 31) to which are added an analysis of the numerous resolutions of the General Assembly dealing in general with its decolonization policy and in particular with those resolutions centring on the Western Sahara (Opinion, paras. 60-65).

The pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.

It should be added that the force of these pronouncements is in no way diminished by virtue of the theoretically non-binding character of an

[1] My statement of the contrasting "poles" draws on an article (Emerson, "Self Determination", 65 *AJIL* (1971) 459) in which some of the opposing views of Dr. Rosalyn Higgins and Professor Leo Gross are crisply summarized.

advisory opinion. It is a misconception, no less real for being widely held, that in this respect an advisory opinion differs markedly from a judgment in a contentious case. This follows because, as with a declaratory judgment and also a judgment in a contentious case, it is in its statement of the law along with its assessment of facts that the Court fulfills its principal function.

In its Opinion, the Court deals extensively with the second problem noted above. Indeed its discussion of the numerous resolutions including resolution 3292 (XXIX) is primarily directed toward countering the Spanish contention that the principle of self-determination has the effect of rendering entirely without object or purpose the historically oriented questions referred to the Court. On this point I have little to add except to reinforce the conclusion of the Court by one observation. The Spanish argument, as previously noted, is rested on the premise that the General Assembly had already foreclosed itself by its former resolutions or that a kind of estoppel was operative against the claims of the Kingdom of Morocco and the Islamic Republic of Mauritania by virtue of their approval of them. But this contention attempts to prove too much since clearly the General Assembly has not forfeited its paramount supervisory power over any future decolonization process including the Western Sahara. On the other hand the right of self-determination may bear upon the character and scope of that power.

This brings me to the third problem referred to earlier. To what extent, if any, does the right of self-determination limit the possible policy choices open to the General Assembly? The Court has treated this delicate question with great circumspection in paragraphs 71 and 72 of the Opinion. In the former it states that the right of self-determination "leaves the General Assembly a measure of discretion with respect to the *forms and procedures* by which that right is to be realized" (emphasis added). In the latter it calls attention to "various possibilities" which exist for the future action of the General Assembly as "for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people".

It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient "legal ties" of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people. This in turn fortifies the view, expressed earlier, that the first conclusion in paragraph 162 of the Opinion is of limited significance.

At one point Spain asserted, principally in its written statement, that in the free exercise of the population's right to self-determination allowance *must* be made for the *independence of the territory as a legal possibility.* She drew this conclusion from an analysis of resolution 1541 (XV) and the broader

options designated in resolution 2625 (XXV). She also intimated that the General Assembly had committed itself to holding a referendum. I can find nothing in these resolutions, however, or in the legal aspects of the "right" itself which compels such conclusions. On the contrary it may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.

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The many votes cast on specific questions in the operative clauses, coupled with the elaborate reasoning of the Court, tended, in my view, to put into too dispersed a focus what were the two centrally significant aspects of the Court's Opinion. This has been my excuse for emphasizing Question II.

I now turn briefly to Question I. Not without some misgivings I voted with the majority in favour of responding to this question. Having done so I concurred without any misgivings in the conclusion that the territory, at the time of colonization, was not *terra nullius.*

My misgivings were prompted by the seeming irrelevance of the question even when viewed in the context of the contemporary decolonization process.

The concept of *terra nullius* has meaning with reference and *only* with reference to the well-established principle of international law that title to territory *may* be acquired through "effective occupation". A *condition* to the legitimacy of this method of acquiring original title is that the territory be *sans maître,* i.e., *terra nullius.* Furthermore the problem becomes legally important only when the legitimacy of the occupation either as originally manifested or as geographically extended is challenged by a third State as was true in many cases of which the *Legal Status of Eastern Greenland (P.C.I.J., Series A/B, No. 53),* the *Island of Palmas* (*UNRIAA,* Vol. II, p. 829), and the *Clipperton Island* (*ibid.,* p. 1105) cases furnish familiar examples.

In the present request no issue whatever was posed concerning the legitimacy of Spain's original exercise of authority over the territory. Furthermore, no State appearing before the Court, including Spain, asserted that the territory was *terra nullius.* How then could it be deemed relevant?

The answer, in my view, is quite subtle. As the questions were presented in resolution 3292 (XXIX) the Court could not, *a priori,* dismiss Question I because had the Court come to the conclusion that the territory was *sans maître* it would have automatically eliminated the principal contentions of both the Kingdom of Morocco and the Islamic Republic of Mauritania that the territory at the time of colonization *belonged* to the former or was *included* as an integral part of the domain of the latter. The question therefore

appeared to have a certain remote legal relevance. This seemed to justify responding to the question. It helped to clear the decks for Question II.

At the same time it was arguable that the two questions were so linked that to avoid circular reasoning the second had to be considered before the first could be analysed. On the other hand it was possible to respond to the second question without reference to the first.

This seeming difficulty was compounded by another. The manner in which the two questions were framed and linked together appeared to confront the Court with what, in logical discourse, is known as a loaded question. Thus a literal reading of the two questions appeared to compel the conclusion that if the answer to the first question was that Western Sahara was *not terra nullius* then by necessary implication there *must* have been legal ties between the territory and that of the two interested States. But this was the subject of the second question and remained to be determined. These difficulties were not, however, insurmountable and were easily overcome. The conclusion that the territory was *not sans maître* did not imply that it was under the sovereignty of either of the interested States because of the presence in the area of independent tribes with a degree of political and social organization.

The conclusion that the Western Sahara was not *sans maître* has been analysed in the Opinion and I am disposed merely to add a few words. Despite a measure of doctrinal discord on the subject of sparsely inhabited lands a controlling factor in the present case centred on the nature of the Spanish occupation. Not merely was it effected through numerous treaties with independent tribes, the treaties themselves were of a special character. This is important because the treaties, of which the Bonelli Treaty of 1884 was a prototype, did not provide for more than a relationship of protection. As was cryptically put in the proceedings: you do not *protect* a *terra nullius*. On this point there is little disagreement.

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Having disposed of my views on both Questions I and II it remains for me only to offer certain comments on the general posture of the case.

In paragraphs 87 and 88 of the Opinion the Court makes clear that it was not insensitive to the particular characteristics and circumstances which dominated life in the vast Saharan area. Furthermore it took these characteristics and circumstances into consideration in its analysis of the questions addressed to it.

In this separate opinion I have felt it incumbent upon me to emphasize the contemporary legal significance of what, in my view, the Court has decided.

In doing so I have downgraded the importance of legal ties. At the same time I wish to record that I was not unaware of the need to consider the facts in light of the circumstances of time and place.

In doing so I shall venture, even at the risk of appearing pedagogical, to indicate two distinct approaches which could be taken in analysing the fascinating problem of determining the nature of legal ties in a time long past and in an area with its own peculiar attributes. One approach is highly analytical; the other is more broadly oriented and in effect challenges the premise on which the first is rested. I turn first to the analytical approach.

Under this approach it would seem obvious that the meaning of "legal ties" can only be understood by ascribing to the term "ties" a special characteristic which differentiates it from other kinds of ties, namely the characteristic of being "legal". Admittedly this raises a difficult point since it appears to invite a preliminary analysis of what is meant by "law" which, like the concept of "sovereignty", jurists, philosophers and political theorists have debated for some two thousand years.

Nevertheless if intellectual confusion is to be avoided the effort must be made to provide a specific criterion by which to differentiate one kind of tie from another. Applied to the Western Sahara a tie, say between the Sultan and Ma ul-'Aineen or the Emir of the Adrar and the chiefs of nomadic tribes can be characterized as a legal one only if it expresses a *relationship* in which there is a *sense of obligation* of a special kind. Put more concretely the evidence must support the view that the inhabitants of the territory had a sense that the wishes of the Sultan or the Emir (however expressed and by whatever investiture of authority) not only "should" be obeyed out of a feeling of religious affiliation or courtesy, but "must" be obeyed out of a sense of deferential *obligation.* This *sense of obligation* need not be inspired by the fear of sanctions, nevertheless it must exist in the sense of being pervasively felt as part of the way of life of the people. The point is that it is this quality which, at least intellectually, differentiates a tie based on religious, cultural, ethnic, linguistic or other factors from one that is legal.

The broader approach which, in view of the posture of the case, is applicable more particularly to the Islamic Republic of Mauritania asserts that a concept of law and hence of "legal" ties is misconceived if patterned on the kind of sense of obligation which now prevails in post-Reformation western oriented societies. In these societies, ever since the Reformation, the sense of obligation to the sovereign has been sharply focused on his secular authority which is not only paramount but permits a dissociation between obligations owed to the State and those owed to religious authority.

Concepts of this kind are not applicable to a society, such as prevailed in the Sahara, in which a distinction between *modes* of authority are not sharply delineated and are not part of the consciousness of people. It is artificial,

therefore, to say that a tie is not "legal" merely because it fails to qualify as one in which a sense of obligation is owed vertically to the secular power of someone with authority. The manifestation of power is neither secular nor religious since the distinction, itself, has little meaning.

From all this it follows that the *relation* between those in power in the Mauritanian entity on the one hand and the wandering tribes, on the other hand, is of secondary importance. The important thing is that the tribes criss-crossing in the Western Sahara felt themselves to be a part of a larger whole, while also claiming rights in the territory focused on the intermittent possession of water-holes, burial grounds and grazing pastures. All this should suffice to characterize ties as being legal once we rid ourselves of the preconceptions which identify "legal" with deference to mere secular authority. Such an identification, applied to the Western Sahara, would be responsive neither to reality nor to any notion of law then prevalent in time and space.

While, in my view, the evidence failed to support any claim to *territorial* sovereignty and while I thought the evidence of sufficient allegiance to the Sultan of Morocco was questionable, yet considerations of the kind noted above made me reluctant to vote against the existence of any legal ties whatever. At the same time it seems to be abundantly clear that attributing the quality of being "legal" to the ties which existed in 1884 has only limited significance in the contemporary setting of the decolonization process. The legal component only appears as a kind of gloss on the bigger reality. The bigger reality lies in the possible sense of unity and belonging which the people themselves feel with respect to their own or neighbouring territories. This can only be adequately determined by consulting them one way or another. There is nothing to preclude them from expressing that feeling in accordance with whatever procedures the General Assembly may see fit to adopt including the choices indicated in resolutions 1541 (XV) and 2625 (XXV).

(Signed) Hardy C. DILLARD.
