DECLARATION OF JUDGE TOMKA

[Original English Text]

Agreement with the conclusions of the Court — Disagreement with the reasoning, in particular in answering the second question — Unfortunate treatment of the Chagossians — Role of advisory proceedings — General Assembly did not consider the situation of the Chagos Archipelago and its population for half a century — Bilateral dispute — Mauritius initiated the request for the Advisory Opinion — Need for restraint in exercising advisory function relating to a bilateral dispute — Failure to interpret properly the text of Question (a) *— Law of the Charter of the United Nations on decolonization, and not law on State responsibility, relevant for the completion of the process of decolonization.*

1. I agree with the conclusion reached by the Court that the process of decolonization of Mauritius was not lawfully completed when it acceded to independence in 1968 following the separation of the Chagos Archipelago in 1965. I also agree that the United Kingdom is under an obligation to bring to an end its administration of the said Archipelago. I have deep sympathy for the unfortunate Chagossians who were removed from the Archipelago between 1967 and 1973 against their will and who have been prevented from returning. In the critical period when both the separation of the Archipelago and their removal therefrom were effected, they were not represented in — and defended vigorously enough by — the Government of Mauritius; they were in fact abandoned by the United Nations, which, after 1968, was not interested in their destiny, as the situation of the Chagos Archipelago and of its population was no longer on the agenda of the General Assembly or the Special Committee on Decolonization.

2. To my regret, however, I cannot share the reasoning by which my colleagues have reached the conclusion on the second question asked by the General Assembly, as I will explain. Furthermore, I am concerned that advisory proceedings have now become a way of bringing before the Court contentious matters, with which the General Assembly had not been dealing prior to requesting an opinion upon an initiative taken by one of the parties to the dispute.

3. One such example is the request, initiated in 2008 by Serbia, with which the Court dealt in the advisory proceedings on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403). I was in favour of the Court exercising its discretion and not answering the question (*ibid.*, declaration of Vice-President Tomka, pp. 454 *et seq.*, especially pp. 454-456, paras. 2-9). I, and also Judge Keith (*ibid.*, separate opinion, pp. 482 *et seq.*, especially p. 489, para. 17), did not see any "sufficient interest" for the General Assembly in requesting the Opinion (*ibid.*,

p. 455, para. 5). This was because the General Assembly was not dealing with the issue of Kosovo, with which the Security Council was then, and remains even today, seised. The Court expressed the view that "[t]he advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly . . . may obtain the Court's opinion in order to assist [it] in [its] activities" (*I.C.J. Reports 2010 (II)*, p. 417, para. 33). The Court recalled, almost in a self-gratifying way, that "its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization'" (*ibid.*, p. 416, para. 30, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). Did the Court really "assist [the General Assembly] in [its] activities"? It seems not so much. The General Assembly, in its resolution 64/298 of 9 September 2010, simply "*[a]cknowledge[d]* the content of the advisory opinion" without any further action or consideration of the matter.

4. The General Assembly has not dealt with the issue of the Chagos Archipelago for half a century. It requested the present Advisory Opinion in resolution 71/292 of 22 June 2017, as recalled in the Advisory Opinion itself (para. 1). However, the crucial facts the Opinion fails to mention relate to the history of the adoption of resolution 71/292. This history reflects that there is a long-standing dispute over the Chagos Archipelago between Mauritius and the United Kingdom, and that the Request for the present Opinion has its origin in that very dispute. It was Mauritius which, in 2016, requested to inscribe an additional item into the provisional agenda of the seventy-first session of the General Assembly[1]. In the explanatory memorandum that Mauritius annexed to the letter requesting the inclusion of this item into the agenda, Mauritius notes that the status of the Chagos Archipelago had already been brought by it before an arbitral tribunal acting under Part XV of the United Nations Convention on the Law of the Sea in the context of contentious proceedings between itself and the United Kingdom. It also recalls certain findings of that tribunal[2]. Speaking in the general debate of the General Assembly, in late September 2016, the then Prime Minister of Mauritius, Sir Anerood Jugnauth, expressed willingness to delay consideration of the item to allow for bilateral talks with the United Kingdom[3]. The agreement to postpone consideration of the item until at least June 2017 is reflected in

[1] United Nations, General Assembly, "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", UN doc. A/71/142 (14 July 2016).

[2] *Ibid.*, Annex, para. 5.

[3] United Nations, *Official Records of the General Assembly, Seventy-First Session, Plenary Meetings*, 17th meeting, A/71/PV.17, p. 39.

the official records of the General Assembly[4]. Accordingly, no meeting was scheduled to deal with the request. Only when no progress had been achieved in the eight months that followed, during which Mauritius and the United Kingdom held three rounds of talks, did Mauritius, on 1 June 2017, ask that the item be discussed in the plenary "at the earliest date possible"[5]. It also informed the General Assembly that a draft resolution would be tabled shortly by Mauritius. The text of the draft resolution was prepared by Mauritius and included as part of an aide-memoire circulated by its Permanent Mission in New York in May 2017 to all Member States of the United Nations. The African Group then formally presented this draft resolution (with no change to its text). The draft was adopted without any modification by a majority vote on 22 June 2017[6].

5. It is to be recalled that, while, as the Court notes, the General Assembly has a "long and consistent record in seeking to bring colonialism to an end" (Advisory Opinion, para. 87), these efforts have barely touched on the Chagos Archipelago after Mauritius achieved independence in 1968. Indeed, from 1969 until the request for the present Advisory Opinion, the issue of the Chagos Archipelago was on neither the agenda of the United Nations General Assembly nor that of the Special Committee on Decolonization.

6. The Court is, however, convinced that its replies in the present Advisory Opinion will assist the General Assembly in the performance of the latter's functions and that "by replying to the Request, the Court is [not] dealing with a bilateral dispute" (*ibid.*, para. 89) and is, therefore, not "circumventing the principle of consent by a State to the judicial settlement of its dispute with another State" (*ibid.*, para. 90). The Court is thus willing to provide "its advice" to the General Assembly on an issue which the latter had not considered for half a century, despite the undisputable role assigned to the General Assembly by the Charter of the United Nations in matters of decolonization. If one can accept this course of action, one must also exercise caution not to go further than what is strictly necessary and useful for the requesting organ[7]. The Court must

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[4] United Nations, *Official Records of the General Assembly, Seventy-First Session, Plenary Meetings*, 2nd meeting, A/71/PV.2, p. 6; United Nations, General Assembly, "First report of the General Committee", A/71/250 (14 September 2016), p. 14, para. 73.

[5] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, documents received from the Secretariat of the United Nations, Part II, letter dated 1 June 2017 from the President of the General Assembly addressed to the Permanent Representatives and Permanent Observers of the United Nations and attachment [UN dossier No. 4].

[6] United Nations, General Assembly, draft resolution, A/71/L.73 and Add.1 (15 June 2017); United Nations, *Official Records of the General Assembly, Seventy-First Session, Plenary Meetings*, 88th meeting, A/71/PV.88, pp. 17-18.

[7] Judge Owada, in a similar situation, rightly stressed that

> "the Court . . . should focus its task on offering its objective findings of law to the extent necessary and useful to the requesting organ, the General Assembly, in

not forget that what looms in the background is a bilateral dispute over which the Court lacks jurisdiction.

7. The Court, in my view, has not given sufficient attention to the formulation of the questions by the General Assembly in the two official languages of the Court, English and French. As a consequence, the Court has gone further than what was required to assist the General Assembly and intrudes upon the bilateral dispute between Mauritius and the United Kingdom. In the first question, the General Assembly asks: "Was the process of decolonization of Mauritius *lawfully completed* when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius" (emphasis added). Thus, the requesting organ was interested to know whether the process of decolonization was completed from the point of view of the applicable law, which, as the Court states, is the law on self-determination (see Advisory Opinion, para. 161). The General Assembly has not asked the Court to rule on any possible unlawful conduct of the administering Power. The French text of resolution 71/292, equally authentic, makes this abundantly clear when it formulates the question in these terms: "Le processus de décolonisation a-t-il été *validement mené à bien* lorsque Maurice a obtenu son indépendance en 1968, à la suite de la séparation de l'archipel des Chagos de son territoire" (emphasis added). The term "validité" is a legal term describing whether the act in question fulfils all the legal requirements in order to produce its intended consequences. *The Basdevant Dictionary of International Legal Terminology* defines "validité" as "[c]aractère de ce qui vaut, de ce qui réunit les conditions requises pour produire ses effets juridiques"[8]. A more recent dictionary (known as the *Salmon Dictionary*) provides a similar definition. According to it, "validité" is "[la] qualité des éléments d'un ordre juridique qui remplissent toutes les conditions de forme ou de fond pour produire des effets juridiques"[9].

8. The Court, despite stating that it is not "dealing with a bilateral dispute" between Mauritius and the United Kingdom, makes an unnecessary pronouncement on "an unlawful act of a continuing character" of the latter in its answer to the second question of the General Assembly (Advisory Opinion, para. 177). Advisory proceedings are not an appropriate forum for making these kinds of determinations, especially when the Court is not asked to make them and they are not strictly necessary for providing advice to the requesting organ.

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carrying out its functions relating to this question, rather than adjudicating on the subject-matter of the dispute between the parties concerned" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Owada, p. 265, para. 14).

[8] *Dictionnaire de la terminologie du droit international*, J. Basdevant (ed.), Paris, Sirey, 1960, p. 636.

[9] *Dictionnaire de droit international public*, J. Salmon (ed.), Brussels, Bruylant, 2001, p. 1126.

9. In my view, the consequence under international law that follows from the Court's conclusion that the process of decolonization of Mauritius was not lawfully completed in 1968 ("n'a pas été validement mené à bien"[10]) is that this process remains to be completed in accordance with the obligations of the administering Power under the United Nations Charter. The Charter, as subsequently interpreted, is a source of obligations for the administering Powers of non-self-governing territories, and not customary rules of international law on State responsibility. Moreover, it is a more appropriate role for the General Assembly to see to it that obligations under the Charter of the United Nations are complied with, and not that the rules on State responsibility are implemented. Accordingly, considering that there was no need to decide on matters of State responsibility in order to answer the General Assembly's second question and to "assist it in the performance of its functions", I am unable to share the reasoning of the Court.

10. The process of decolonization in relation to the Chagos Archipelago can be successfully completed only in negotiations between the key actors, in particular between Mauritius and the United Kingdom. The highest representative of Mauritius expressed, in the spirit of realism and being concerned about security in the region, reassurances that "the exercise of effective control by Mauritius over the Chagos Archipelago would not in any way pose any threat to the military base" and that "Mauritius is committed to the continued operation of the base in Diego Garcia under a long-term framework, which Mauritius stands ready to enter into with the parties concerned"[11]. He reiterated this view before the Court when he stated that "Mauritius recognizes [the] existence [of the base on Diego Garcia] and has repeatedly made it clear to the United States and Administering Power that it accepts the future operation of the base in accordance with international law"[12].

He continued, "[t]his is a solemn commitment on behalf of Mauritius and we trust the Court will recognize it as such"[13].

The Court, however, remained silent on this point.

(Signed) Peter TOMKA.

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[10] It is to be noted that the authoritative text of the Advisory Opinion is the French text.

[11] Statement of Sir Anerood Jugnauth in the General Assembly, on the occasion of the adoption of resolution 71/292 requesting the advisory opinion. United Nations, *Official Records of the General Assembly, Seventy-First Session, Plenary Meetings*, 88th meeting, A/71/PV.88, p. 8. A similar statement was made by the Prime Minister of Mauritius, Mr. Pravind Jugnauth, at the meeting of legal advisers in The Hague on 27 November 2017.

[12] CR 2018/20, pp. 30-31, para. 18. Reference was made to the diplomatic correspondence between the Prime Ministers of Mauritius and of the United Kingdom, as well as to the diplomatic correspondence of the Prime Minister of Mauritius and the President of the United States.

[13] *Ibid.*