DISSENTING OPINION OF JUDGE DONOGHUE

There are compelling reasons for the Court to exercise its discretion not to render Advisory Opinion — Advisory Opinion has effect of circumventing absence of United Kingdom consent to judicial settlement of dispute with Mauritius regarding sovereignty over Chagos Archipelago.

1. I agree with my colleagues that the Court has jurisdiction to give the requested Advisory Opinion. I also concur in the Court's rejection of several grounds on which it was claimed that the Court should exercise its discretion not to render an advisory opinion (the contentions that the facts are complex and disputed, that the Advisory Opinion will not assist the General Assembly and that an arbitral tribunal has already settled certain matters presented by the request). However, I consider that the Advisory Opinion has the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court's judicial function. For this reason, I believe that the Court should have exercised its discretion to decline to give the Advisory Opinion.

2. Successive advisory opinions have stated that the Court has discretion to decline to render an advisory opinion. This discretion exists "so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations" (*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29). However, as the Court recalls today, only "compelling reasons" will lead it to decline a request as to which it has jurisdiction (Advisory Opinion, paragraph 65). There are "compelling reasons" to decline to give an advisory opinion when "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" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33).

3. I fully understand the impetus for today's Advisory Opinion. Both the events leading to the detachment of the Chagos Archipelago and the treatment of the Chagossians cry out for an authoritative judicial pronouncement. The General Assembly, which made the request, has played a significant role in shaping the law relevant to self-determination. Its resolutions during the 1960s addressed decolonization, both generally and with particular reference to Mauritius. I do not take issue with the Court's statement today that "[t]he issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable" (Advisory Opinion, paragraph 88). However, these circumstances do not alter my conclusion that the response to the request has the effect of circumventing the lack of United Kingdom consent to adjudicate its bilateral dispute with Mauritius and thus that there is a compelling reason for the Court to decline to give an advisory opinion.

4. The Court has chosen to say very little today about the substance of the bilateral dispute, the persistent refusal of the United Kingdom to consent to adjudicate that dispute and the relationship between that dispute and the questions presented in the request. I set out my understanding of these points in the following paragraphs.

5. There is a bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago. In 2001, Mauritius proposed that the two States take their dispute to the International Court of Justice (Written Statement of the United Kingdom, Ann. 62). The United Kingdom did not agree (*ibid.*, para. 5.12).

6. Because the United Kingdom's 1 January 1969 optional clause declaration excluded disputes with Commonwealth States, that declaration could not serve as the basis for the Court's jurisdiction in a contentious case. In 2004, after Mauritius indicated that it would withdraw from the Commonwealth in order to provide a basis for the Court's jurisdiction, the United Kingdom amended its optional clause declaration to exclude disputes with States that are or have been members of the Commonwealth (*ibid.*, para. 5.19 *(b)*). In that same year, the Minister for Foreign Affairs of Mauritius, while addressing the United Nations General Assembly, affirmed that "Mauritius has always favoured a bilateral approach in our resolve to restore our exercise of sovereignty over the Chagos Archipelago" and stated that "we shall use all avenues open to us in order to exercise our full sovereign rights over the Chagos Archipelago" (United Nations General Assembly, *Official Records*, *Fifty-ninth Session*, 14th Plenary Meeting, Tuesday, 28 September 2004, 3 p.m. (verbatim record A/59/PV.14) [extract], dossier No. 300).

7. On 20 October 2011, Mauritius proposed to the United Kingdom negotiations within the meaning of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) on the basis that Mauritius "has sovereignty over the Chagos Archipelago", and that Mauritius "does not recognize the so-called 'BIOT' ['British Indian Territory'] which the United Kingdom purported to create by illegally excising the Chagos Archipelago from Mauritius prior to its independence" (Written Statement of the United Kingdom, Anns. 70 and 72). (Earlier that year, the Court had determined that Article 22 requires, as a precondition to the Court's jurisdiction, negotiation or the procedures expressly provided for in the Convention (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 130, para. 148).) The United Kingdom declined on the basis that there was no dispute within the meaning of Article 22 of the CERD (Written Statement of the United Kingdom, Ann. 71).

8. In arbitration that it initiated in 2011 pursuant to Annex VII of the United Nations Convention on the Law of the Sea, Mauritius asked the Arbitral Tribunal to find that the United Kingdom was not the "coastal State" with respect to the Chagos Archipelago because the "UK does not have sovereignty over the Chagos Archipelago" (*Chagos Arbitration*, Memorial of Mauritius, para. 1.3 (i), quoted in Written Statement of the United Kingdom, para. 5.19 *(c)*, footnote 231). As the United Kingdom observed during oral proceedings in this Advisory Opinion proceeding, Mauritius asked the Tribunal to apply "the rules of general international law that are applicable under the [Law of the Sea] Convention, including *ius cogens* principles concerning decolonisation and the right to self-determination" (UK, CR 2018/21, p. 28, para. 8 *(a)* (Wordsworth), quoting *Chagos Arbitration*, Memorial of Mauritius, para. 1.6). The United Kingdom countered that the Tribunal did not have jurisdiction over the sovereignty issue. The Tribunal concluded that "[t]he Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention" (*Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA No. 2011-03, Award of 18 March 2015, para. 221) and thus that it did not have jurisdiction over the sovereignty dispute.

9. The events summarized above demonstrate that there is a bilateral dispute about sovereignty over the Chagos Archipelago, that Mauritius has repeatedly sought adjudication or arbitration of that dispute and that the United Kingdom has consistently refused its consent thereto.

10. To determine whether the request would circumvent the lack of consent to adjudication of the sovereignty dispute, it is necessary to compare the subject-matter of this bilateral dispute with the issues presented by the request.

11. To be sure, there is no reference to "sovereignty" in the request. However, Mauritius' own statements make clear that the dispute over sovereignty is at the heart of the request. In its May 2017 aide-memoire regarding the draft request, Mauritius stated that the proposal to request an advisory opinion related to "the completion of the process of decolonization of Mauritius, thereby enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago" (Written Statement of the United Kingdom, Ann. 3: Republic of Mauritius, Aide Memoire, May 2017).

12. In the present proceedings, Mauritius concludes its Written Statement with the submission that

> "international law requires that . . . [t]he process of decolonisation of Mauritius be completed immediately, including by the termination of the administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, so that Mauritius is able to exercise sovereignty over the totality of its territory" (Written Statement of Mauritius, Conclusions, p. 285).

13. Mauritius also states in its Written Comments:

> "sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonisation issue. There is no basis for a separate consideration or determination of any question of territorial sovereignty." (Written Comments of Mauritius, para. 2.47.)

14. The centrality of the dispute over sovereignty is confirmed by observations of States other than Mauritius, as well as the Assembly of the African Union, in connection with the request. When Congo introduced the proposed request on behalf of African States Members of the United Nations, it stated that the request was made

> "in pursuit of the effort of all African States, including Mauritius, to complete the decolonization of Africa and to allow a State member of both the African Union and the United Nations to exercise its full sovereignty over the Chagos archipelago in accordance with international law and the right of self-determination". (United Nations, *General Assembly, Seventy-first Session*, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88, dossier No. 6, p. 5 (Congo). See also p. 9 (Venezuela, speaking on behalf of the Non-Aligned Movement), p. 14 (India), p. 15 (Kenya), p. 18 (Uruguay), p. 19 (El Salvador) and p. 21 (Indonesia).)

15. A 2017 resolution of the Assembly of the African Union stated that the Assembly:

> "RESOLVES to fully support the action initiated by the Government of the Republic of Mauritius at the level of the United Nations General Assembly with a view to ensuring the completion of the decolonization of the Republic of Mauritius and enabling the Republic of Mauritius to effectively exercise its sovereignty over the Chagos Archipelago, including Diego Garcia" (African Union, 28th Session, Resolution on Chagos Archipelago, Assembly/AU/Res.1 (XXVIII) (30-31 Jan. 2017), doc. EX.CL/994 (XXX), Written Statement of Mauritius, Ann. 190).

16. These statements must inform an understanding of the meaning and purpose of the request. As Mauritius itself told the Court, "plainly any ongoing unlawful colonisation will give rise to a sovereignty dispute between the State whose territory is colonised and the administering power" (Written Statement Mauritius, para. 1.38). The questions of decolonization and sovereignty cannot be separated.

17. The request differs in important respects from the request in *Western Sahara*, which the Court found no compelling reason to decline to answer. In *Western Sahara*, there was a "legal controversy" between Morocco and Spain (*Advisory Opinion*, p. 25, para. 34). However, the Court observed in that Advisory Opinion that "[t]he issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization". The Court therefore concluded that "[t]he settlement of this issue will not affect the rights of Spain today as the administering Power" (*ibid.*, p. 27, para. 42). The Court also found that "the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory" (*ibid.*, pp. 27-28, para. 43).

18. By contrast, the present request places before the Court the lawfulness of past United Kingdom conduct, the present-day consequences of that conduct for the rights of that State and the adjudication of sovereignty over territory. The Court gives a comprehensive answer. It declares that "the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago" (Advisory Opinion, paragraph 183, subparagraph (3)). It also concludes that "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State" that has a "continuing character" (Advisory Opinion, paragraph 177) and thus that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible" (Advisory Opinion, paragraph 183, subparagraph (4)).

19. The Advisory Opinion, like the request, avoids references to sovereignty. Yet the Court's pronouncements can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius. The Court has decided the very issues that Mauritius has sought to adjudicate, as to which the United Kingdom has refused to give its consent.

20. The Court has exercised its discretion to render the Advisory Opinion on the basis that the issues presented by the request are located in "a broader frame of reference" (Advisory Opinion, paragraph 88). Surely any bilateral dispute that attracts sufficient support in the General Assembly so as to lead that organ to request an advisory opinion could be described as falling within a "broader frame of reference". Were that not the case, the General Assembly would not vote to put the matter forward to the Court.

21. Today the Court recites once again that there would be "compelling reasons" to decline to give an advisory opinion when such 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" (Advisory Opinion, paragraph 85, quoting *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, p. 25, para. 33). However, the decision to render today's Advisory Opinion demonstrates that this incantation is hollow. It is difficult to imagine any dispute that is more quintessentially bilateral than a dispute over territorial sovereignty. The absence of United Kingdom consent to adjudication of that bilateral dispute has been steadfast and deliberate. Mauritius was thwarted by this absence of consent, so took another route, pursuing the present request and thereby fulfilling the affirmation of its Foreign Minister in 2004 (see paragraph 6 above) that the State would use "all avenues open to us in order to exercise our full sovereign rights over the Chagos Archipelago". The delivery of this Advisory Opinion is a circumvention of the absence of consent.

22. The Court could have chosen, in the exercise of its discretion, to provide a more limited response to the request (possibly reformulating the request in order to do so). For example, the lack of United Kingdom consent to adjudication of the bilateral dispute would not stand in the way of an opinion limited to the questions of law presented by Question *(a)*, i.e. whether there was, as of 1965-1968, a customary international law right of self-determination of peoples; the content of any such right and the obligations of colonial States that were a consequence of the right to self-determination. Such a response would have provided legal guidance to the General Assembly without undermining the integrity of the Court's judicial function. I regret that the Court has not taken such an approach.

23. The Charter of the United Nations and the Statute of the Court give the Court the functions of settling legal disputes in contentious cases and of responding to requests for advisory opinions. To preserve the integrity of both functions, the distinctions between them must be respected. I consider that the Advisory Opinion fails to do so and instead signals that the advisory opinion procedure is available as a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases. Some may find this to be a welcome development, but I consider that it undermines the integrity of the Court's judicial function. For this reason, I dissent.

(Signed) Joan E. DONOGHUE.