DECLARATION OF JUDGE GEVORGIAN

The present Opinion makes an important contribution to the law of decolonization and to the Court's advisory function — The unnecessary statement of responsibility made in paragraph 177 blurs the distinction between the Court's advisory and contentious jurisdiction.

1. In my view the present Opinion makes an important contribution both to the law of decolonization and to the Court's advisory function. Being in agreement with the Court's reasoning, I voted in favour of its findings on both jurisdiction and admissibility, and the answers given to the questions referred to it by the General Assembly. However, I would like to record my disagreement with the Court's statement of responsibility made in paragraph 177 of the Opinion. In this declaration, I shall set the reasons why.

2. In order to consider this question, it is important to recall the distinction between the Court's contentious and advisory jurisdiction. This distinction, already drawn by the PCIJ in *Eastern Carelia*, was formulated as follows in the *Western Sahara* Advisory Opinion:

> "In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. 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. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction."[1]

3. In the present case, the Court has been requested to determine whether Mauritius' decolonization process was "lawfully completed" (first question of the General Assembly). If not, the Court is asked to ascertain the legal consequences arising from the "continued administration" by the United Kingdom of the Chagos Archipelago (second question). In my opinion, this Request, more than any other before, sits on the borderline between, on the one hand, the provision of legal assistance to the General Assembly in relation to decolonization (a matter in relation to which the Court's advisory function is fully appropriate), and on the other, the settlement of a bilateral dispute by way of contentious proceedings without the required consent of the Parties. One cannot deny that the Request concerns a situation in which two States claim sovereignty over a territory; indeed, Mauritius has repeatedly attempted to bring the matter of Chagos to the attention of this Court, but the United Kingdom has not consented to the Court's jurisdiction —a decision that it is free to make in accordance with Article 36 of the Statute.

4. In such circumstances, the Court's task in the present Opinion is limited to considering the lawfulness of Mauritius' decolonization process (and to stating any legal consequences arising therefrom) without dealing with the bilateral aspects of the pending dispute. For this purpose, the Court must rely on the law of decolonization as developed by the United Nations Charter and subsequent resolutions and practice, leaving aside any determination of State responsibility.

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[1] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33. See also *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, pp. 27-28.

5. For the most part, the present Opinion adequately focuses on such questions in a manner that I find persuasive. In particular, I agree with the reasoning in paragraph 136, where the Court rightly points out that the

> "General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius."

However, in paragraph 177 the present Opinion goes beyond this statement in ruling that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State. I do not disagree with the substance of this conclusion, but in my view such a statement crosses the thin line separating the Court's advisory and contentious jurisdiction.

6. One may argue that the Court has already made similar determinations in the *Namibia* and *Wall* Advisory Opinions. However, the circumstances in both cases were different. In the first, the United Nations Security Council had already declared in resolution 276 (1970) that "the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid"[2]. Such a finding is missing in the present case. Similarly, in *Wall* the Court was able to rely on the United Nations Security Council's determination that the occupation of Palestinian territory was illegal, notably in resolution 242 (1967)[3].

7. It follows that the above-mentioned statement of responsibility is not only pointless — it is not reflected in the *dispositif*, and should not be so — but also unsupported by the Court's case law. This is without prejudice to my agreement with the Court's answer to the second question, as reflected in the *dispositif*.

(Signed) Kirill GEVORGIAN.

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[2] Resolution 276 (1970) of 30 January, para. 2 (see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* p. 58, para. 1 of the *dispositif*).

[3] Resolution 242 (1967) of 22 November, para. 1 (see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, p. 201, para. (3) A of the *dispositif*). The resolution was mentioned not only in the Court's Opinion (*ibid*., p. 166, para. 74 and p. 201, para. 162), but also in the preamble to resolution A/RES/ES-10/14, which requested an advisory opinion from the Court (adopted by the General Assembly on 8 December 2003 at its Tenth Emergency Special Session).