

DECLARATION OF JUDGE IWASAWA

Right of peoples to self-determination — Free and genuine expression of the will of the people concerned — Principle of territorial integrity — Discretion to give an advisory opinion — Principle of consent in judicial settlement.

1. I agree with the conclusions drawn by the Court in the operative part of the present Advisory Opinion. As certain aspects of the Court's reasoning in reaching those conclusions may not be sufficiently clear, I offer my understanding of the reasoning. At the same time, I wish to elaborate upon my reasons for supporting the conclusions.

2. The Court is the principal judicial organ of the United Nations. According to its consistent jurisprudence, "[t]he Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court . . . represents its participation in the activities of the Organization, and, in principle, [a request] should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71), and "only 'compelling reasons' could lead it to such a refusal . . . There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 235, para. 14.)

3. In the present proceedings, the Court observes that

"the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The 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).

The Court thus concludes that to give the opinion requested would not have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State (paragraph 90).

4. The dynamic of decolonization is the right of peoples to self-determination, a cardinal element of which is the free and genuine expression of the will of the people concerned. The Court stressed this point in 1975, stating that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 55).

5. In response to Question (a), the Court concludes that the process of decolonization of Mauritius was not lawfully completed in 1968 (Advisory Opinion, paragraph 174). In my understanding, the Court draws this conclusion on two grounds: first, that the detachment of the Chagos Archipelago was not based on the free and genuine expression of the will of the people concerned (paragraph 172); and, second, that the detachment was contrary to the principle of territorial integrity (see paragraph 173).

6. While the lack of the free and genuine expression of the will of the people is in itself a reason for the Court's conclusion (paragraph 172), it also forms the basis of the Court's finding concerning the principle of territorial integrity. The Court confirms that any detachment by the administering Power of part of a non-self-governing territory, "unless based on the freely expressed and genuine will of the people of the territory concerned", is contrary to the principle of territorial integrity (paragraph 160). The principle of territorial integrity applies to a non-self-governing territory forming one territorial unit. In these proceedings, the Court finds that at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was an integral part of that non-self-governing territory (paragraph 170). There have been cases in which either a part of a non-self-governing territory was separated or a non-self-governing territory was split into more than one State. A separation or split of a non-self-governing territory is not contrary to the principle of territorial integrity as long as it is based on the free and genuine will of the people concerned. Paragraph 173 of the Opinion suggests that, in the case of Mauritius, the detachment of the Chagos Archipelago was contrary to the principle of territorial integrity because it was not based on the free and genuine will of the people concerned.

7. In response to Question (b), the Court highlights the obligations of the United Kingdom and all Member States under international law relating to decolonization.

8. As a result of its detachment from Mauritius, the Chagos Archipelago was incorporated into a new colony of the United Kingdom known as the BIOT. Thus, the Chagos Archipelago is to be regarded as a non-self-governing territory in accordance with Chapter XI (Declaration regarding Non-Self-Governing Territories) of the Charter of the United Nations, even though the United Kingdom has not submitted information under Article 73 (e) of the Charter. As the administering Power, the United Kingdom has international obligations with respect to the Chagos Archipelago, including an obligation to respect the right of peoples to self-determination and obligations arising from Chapter XI of the Charter. In the present proceedings, it follows from these obligations that the United Kingdom has an obligation to bring to an end its continued administration of the Chagos Archipelago as rapidly as possible.

9. As the right of peoples to self-determination has an *erga omnes* character (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion*, I.C.J. Reports 2004 (I), p. 172, para. 88), all States have the duty to promote its realization and to render assistance to the United Nations in carrying out its responsibilities to implement that right (Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly resolution 2625 (XXV)). In the present proceedings, it follows from this duty that all Member States have an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius (Advisory Opinion, paragraph 180).

10. In its Advisory Opinion, the Court states that the decolonization of Mauritius should be completed "in a manner consistent with the right of peoples to self-determination" without elaboration (paragraph 178). It emphasizes that "[t]he modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization" (paragraph 179). Thus, the Court neither determines the eventual legal status of the Chagos Archipelago, nor indicates detailed modalities by which the right to self-determination should be implemented in

respect of the Chagos Archipelago. The Court gives an opinion on the questions requested by the General Assembly to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization. Giving the opinion in this way does not amount to adjudication of a territorial dispute between the United Kingdom and Mauritius. For these reasons, I agree that to give the opinion requested does not have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State (paragraph 90).

(Signed) Yuji IWASAWA.
