

DECLARATION OF JUDGE ABRAHAM

[Translation]

I have some reservations about how the Advisory Opinion deals with the principle of “territorial integrity” in the context of the decolonization process. This question is addressed in paragraphs 153 to 160 of the Advisory Opinion. The Court’s discussion of it is, in my view, somewhat ambiguous. For this reason, I wish to set out below my opinion on this subject.

I agree, in principle, with the idea that respect for the territorial integrity of a non-self-governing territory is “a corollary of the right to self-determination”, as asserted in paragraph 160 of the Opinion. However, this is only the case — at least indisputably and by reference to the relevant time, i.e. 1965-1968 — if the colonial Power’s obligation to respect the “territorial integrity” of the territory concerned is given the following scope. What this obligation seeks to prevent is amputation of part of the territory under colonial administration by a unilateral decision of the administering Power, at the time of or in the period immediately preceding that territory’s accession to independence, for the sake of convenience, for strategic or military interests, or, more generally, because of the political or economic interests of the colonial Power itself.

The Court should have stopped there, venturing no further than the above definition, which provides sufficient legal basis for it to respond to the questions before it in the present case, once it found that the detachment of the Chagos Archipelago “was not based on the free and genuine expression of the will” of the Mauritian people, as noted in paragraph 172. Indeed, it having been established that the people of Mauritius as a whole did not give their consent (since that consent was not given in due and proper form) and since the British authorities at no point sought to ascertain the will of the population of the Chagos Islands itself, the fact remains that the detachment of the Chagos Archipelago arose from a unilateral decision of the administering Power, motivated by the pursuit of political, strategic or military advantage.

The Advisory Opinion appears to go beyond that, however, by employing, in paragraph 160, general and abstract formulations which could be understood as giving the principle of “territorial integrity” a near absolute scope, which, in my view, at least under customary international law as it existed at the relevant time, would be highly questionable.

The issue is the following. We know that the boundaries of colonial territories (administrative boundaries separating entities subject to the

same sovereign) were defined, by the colonial Powers, somewhat arbitrarily in certain cases, sometimes for the sake of administrative convenience, sometimes for strategic or other such reasons. There was thus no guarantee that the population of a colonial entity was sufficiently homogenous to be animated by a clear common will when it came to deciding its future.

In the case of Mauritius, for example, while it is true that the Chagos Archipelago always formed part of the colony of Mauritius from the latter's cession to the United Kingdom in 1814 until 1965, the geographical boundaries of the colonial entity composed of "the island of Mauritius and its dependencies" varied over time, by decision of the British Government. The Seychelles Islands were detached from Mauritius to form a separate colony in 1903 and, in the years that followed, other islands were detached from the colony of Mauritius to be included in the new colony of Seychelles. Many other examples could be drawn from colonial history, and not only that of the United Kingdom, to illustrate the rather fluid character of colonial boundaries.

It could therefore happen — and in fact did happen in several cases — that the populations of various geographical subunits within a single colonial entity (according to the boundaries fixed by the administering Power) might express different preferences in the course of the decolonization process. I doubt that in such a circumstance the colonial Power had an obligation to accede to differing requests originating from the various geographical subunits concerned. But I also doubt, and even more so, that by acceding to them — by agreeing, for example, to partition a territory because the population of a subunit of that territory had clearly and freely expressed its will not to take the same path as the rest of the territory — the colonial Power could be regarded as having breached its obligations under customary international law, on the grounds that it had violated the principle of the "territorial integrity" of the territories under colonial administration. I believe this would be to give too broad a scope to that principle. As I said earlier, it undoubtedly aims to prevent the arbitrary break-up of a territory (i.e. dictated solely by the interests of the colonial Power). It cannot, in my view, preclude taking into account, when the particular circumstances so warrant, the freely expressed will of the different components of the population of that territory, even if that leads to partition as a solution. It would, moreover, be paradoxical for the principle of the right of peoples to self-determination enshrined in the Charter — the very foundation of the entire legal edifice relating to decolonization that has been constructed over decades — ultimately to be used as an argument against taking account of the genuine and freely expressed will of the populations concerned. This would be to regard territory as being sacred in some way, its indivisibility taking precedence over the will of the people.

An examination of State practice and the *opinio juris* at the relevant time confirms the foregoing conclusion under customary international law (the only law on which the Court may base its Advisory Opinion in these proceedings). In several cases, it has happened that various subunits of a single colonial entity — as delimited by the administering Power during the period preceding accession to independence — have taken different paths during the decolonization process without this being contested, sometimes (as in the case of the British colony of the Gilbert and Ellice Islands in 1974) even with the co-operation of the competent organs of the General Assembly. Moreover, following the adoption of resolution 1514 (XV) of 14 December 1960, which, as the Court rightly notes, represented a “defining moment” in the evolution of the customary international law on decolonization (para. 150), the General Assembly, in the series of resolutions it adopted on this question between 1966 and 1974, consistently referred to the “territorial integrity” of colonial entities. But it generally did so by tying “territorial integrity” to “national unity” and, frequently, to the condemnation of the establishment by administering Powers of military bases on the territories concerned (see, for example, resolution 2232 (XXI) of 20 December 1966, cited in paragraph 35 of the Advisory Opinion). The adoption of these resolutions does not, in my view, indicate that States espoused an absolutist conception of the principle of territorial integrity, which would preclude the partition of a colonial territory during the independence process when such a partition allows the freely expressed will of the populations concerned to be taken into account. This is the case even if the partition is not approved by the majority of the population of the colonial territory taken as a whole. We know that the British authorities at no point consulted or even, it would appear, contemplated consulting the inhabitants of the Chagos Archipelago. If such a consultation had taken place, and the Chagossian people had expressed their free and informed will not to be integrated into the new independent State of Mauritius, the parameters of the question submitted to the Court would, in my view, have been substantially different.

(Signed) Ronny ABRAHAM.
