INTERNATIONAL COURT OF JUSTICE

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

(Request for Advisory Opinion)

WRITTEN STATEMENT BY THE REPUBLIC OF SERBIA

27 February 2018

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INTRODUCTION

1. In accordance with the Order of the International Court of Justice (The Court) of 14 July 2017 the Republic of Serbia submits this Written Statement on the General Assembly's request for an advisory opinion of 22 June 2017 on the following questions:

a) "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 and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"

b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

2. The Republic of Serbia voted in favor of the General Assembly resolution 71/292 of 22 June 2017, driven by its deep and sincere commitment to the principles of the rule of law in international relations, of peaceful settlement of international disputes and by the principles of decolonization firmly established in the United Nation's law and practice.

3. The Republic of Serbia believes that it is fundamental for the stability of international relations, development of friendly relations and preservation of international peace and security that any political settlement is achieved in accordance with international law.

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4. The present case concerns some of the key principles of contemporary international law. In order for the process of decolonization of Mauritius to be fully and viably settled, it seems necessary for the Court to give an opinion on the questions posed by the General Assembly and thus provide legal guidelines not only to the General Assembly but to the other UN organs and Member States.

5. The opinion of the Court in this case would be highly desirable particularly in light of the fact that on the fiftieth anniversary of the Declaration on the Granting Independence to Colonial Countries and Peoples the General Assembly adopted resolution 65/119 by which it declared the period 2010-2020 the Third International Decade for the Eradication of Colonialism. The opinion of the Court would help clarifying certain very important legal aspects of decolonization and significantly contribute to long-lasting efforts of the United Nations to eliminate colonialism. The interest of stability of international relations is that all disputes and each and every case of decolonization, as well any other territorial dispute, bring its end in a solution that is in line with international law.

6. In this particular case the Court could play an important role, not only as a forum for expression of different views on some of the most fundamental international legal issues, but to resolve them and to provide legal guidelines for any current and further political process. As the jurisprudence of the Court serves as a guideline in many previous occasions, it seems firmly established that it will have a great impact on bringing decolonization to an end, and to provide legal guidelines that might have impact on other cases, not only in the context of decolonization.

Chapter 1: JURISDICTION AND PROPRIETY

7. The Republic of Serbia respectfully submits that the Court has jurisdiction to issue requested advisory opinion and that there is no reason to decline to exercise its jurisdiction.

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8. It is the Court's uniform jurisprudence that:

> "When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it."[1]

9. According to the applicable law and jurisprudence of the Court, there are three requirements that must be met in order for the Court to be in a position to exercise its advisory jurisdiction. The first requirement concerns that only competent organ or organization might request the Court to exercise its advisory jurisdiction, the second is that the question(s) must be of a legal nature, and the third one is that it is proper for the Court to exercise its jurisdiction.

2.1. The request for advisory opinion was submitted by the organ expressly authorized by the United Nation Charter

10. In accordance with Article 65, paragraph 1, of the Statute of the Court: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." In

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[1] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010,* para. 17; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13.

accordance with Article 96, paragraph 1 of the United Nations Charter: "The General Assembly … may request the International Court of Justice to give an advisory opinion on any legal question".

11. In this particular case the General Assembly of the United Nations requested the Court to give advisory opinion, in other words, an organ of the United Nations that is expressly authorized by the United Nations Charter to make such a request.

2.2. The questions are of legal nature

12. The second requirement is that the question must be of a legal nature.

13. In the recent Advisory Opinion the Court concluded as follows:

"It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. … A question which expressly asks the Court whether or not a particular action is compatible with international law should certainly be characterized as a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I. C. J. Reports 2010,* p. 16., para. 25.)

14. In the present case the Court is asked to provide advisory opinion on two legal questions.

15. The first question is:

"Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General

Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967."

16. Lawfulness of a process of decolonization of particular territorial entity is, beyond any dispute, question of a legal nature. The main questions, in the context of this broader question are the issue of legality of an act of separation of Chagos Archipelago from Mauritius and its depopulation by the United Kingdom of Great Britain and Northern Ireland (the United Kingdom). Also, there is a question whether continued administration by the United Kingdom of the Chagos Archipelago is in accordance with international law. Those are, certainly, very important legal questions.

17. The second questions concerns legal consequences of an unlawful act framed in precise and concrete terms:

"b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

18. It seems undisputable that determination of legal consequences of a continuing[2] unlawful act is a question of a legal nature.

2.3. Discretionary nature of the Court's power to give an advisory opinion

19. The power of the Court to give advisory opinion is of discretionary nature. In accordance with the well established jurisprudence of the Court: "the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.) However,

[2] In this particular case , in our opinion, there exists the breach of obligations by acts having continuing character in the meaning of Article 14 (2) of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).*

"The discretion whether or not to respond to a request for an advisory opinion 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 (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45). However, the Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only "compelling reasons" should lead the Court to refuse its opinion in response to a request falling within its jurisdiction" (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I. C. J. Reports 2010,* pp. 16-17., para. 29).

20. In the present case there are no reasons for the Court to refuse to give the requested advisory opinion. On the contrary, there are compelling reasons for the Court to participate in the activities of the United Nations and to provide legal opinion on very sensitive issues. Integrity of the Court would be seriously damaged if the Court declined to exercise its jurisdiction in this particular case.

21. In determination of the issue, as put in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*," once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling

reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16, see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I. C. J. Reports 2010,* p.18 para. 33).

22. However in this particular case, the Court should be mindful that the question refers to a long-standing situation that concerns the process of decolonization, the process that is a prerequisite for achievements of the very purposes of the United Nations as defined in Article 1 of the Charter, and involves a set of very important legal principles, not only for decolonization, but of general applicability (such as the issue of territorial integrity).

23. By providing advisory opinion in this particular case the Court will fulfill its mandate as a principal judicial organ of the United Nations, and provide legal guidance for the General Assembly, other UN organs and agencies, as well as to the Members of the United Nations, to conduct their activities in accordance with the international law.

24. Providing advisory opinion in the concrete case would be of utmost importance, as provided in Article 1 of the United Nations Charter, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and to achieve the Member's common goal, at the United Nations "to be a center for harmonizing the actions of nations in the attainment of … common ends."

25. Even if there exists a dispute of bilateral nature (between the United Kingdom and the Republic Mauritius), the process of decolonization cannot be treated as a strictly bilateral issue. Process of decolonization is a long standing issue on the UN agenda and involves significant legal issues on which many states holds different views. The issues connected with decolonization could not be treated as of a bilateral concern, but as of concern for the whole international community.

26. All disputes of this kind have a bilateral dimension. This bilateral dimension is reflected in the relation between administrating power (in this case the United Kingdom) and an entity that undergoes the process of decolonization (in this case Mauritius). However, this is not a purely bilateral dispute. It concerns international obligations of administrating Power to respect international law and to respect "the interests of inhabitants" of territories whose peoples have not yet attained a full measure of self-government. These are not obligations only *vis-à-vis* particular territory, but *vis-à-vis* international community as a whole.

27. Acts of the State that assumed responsibility for the administration of non-self governmental territories cannot be considered only in bilateral context in relation to administrated territory or a country that was under its administration. The basis of this consideration lays in the Charter of the United Nations[3] as well as in a number of General Assembly resolutions.

28. In the case where the General Assembly invited the Government of the United Kingdom "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity" (UN General Assembly resolution 2066 (XX) of 16 December 1965 reaffirmed by other resolutions, including resolution 71/292 of 22 June 2017), providing advisory opinion on the issues that arose at the time of separation of Chagos Archipelago in 1965 and that are still pending, and the involvement of the principal judicial organ of the United Nations seem to be of paramount importance.

[3] Particularly in Article 73 that provides: "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories..."

Chapter 2: PROCES OD DECOLONISATION OF MAURITIUS WAS NOT LAWFULLY COMPLETED BECAUSE OF SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS AND BECAUSE OF DISPOPULATION OF THE CHAGOS ARCHIPELAGO

29. The Republic of Serbia strongly supports the efforts to bring colonialism in all its forms and manifestations to a speedy and unconditional end in accordance with principles of international law reaffirmed in a number of General Assembly resolutions.

30. "Rules and principles of decolonization" are well established in the UN law, particularly in the generally accepted *Declaration on the Granting of Independence to Colonial Countries and Peoples* adopted by General Assembly resolution 1514 (XV) of 14 December 1960. The Republic of Serbia strongly urges full implementation of the peremptory norm of international law that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

31. The aforementioned Declaration is based on the recognition that "the peoples of the world ardently desire the end of colonialism in all its manifestations". As provided in the preamble of the Declaration, "the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace".

3.1. Violation of the territorial integrity of Mauritius

32. Territorial integrity of a country is one of the basic values of contemporary international legal and political order and a peremptory norm of general international law.

33. Violation of territorial integrity of Mauritius was brought to the attention of the United Nations in 1965 when the General Assembly adopted resolution 2066 (XX). Namely, on 16

December 1965 the General Assembly adopted resolution 2066 (XX) (Question of Mauritius) in which it is stated, inter alia:

> "*Noting with deep concern* that any step taken by the administrating Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration /on the Granting independence to Colonial Countries and Peoples/, and in particular of paragraph 6 thereof"[4],
>
> The General Assembly invited "the administrating Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

34. This position was confirmed, inter alia, on 20 December 1966, when General Assembly adopted resolution 2232 (XXI) reiterating "its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)". The General Assembly called upon "the administrating Powers to implement without delay the relevant resolutions of the General Assembly."

35. On 19 December 1966, the General Assembly adopted resolution 2357 reiterating its position concerning territorial integrity and called once again administrating powers to implement without delay any applicable resolution.

36. On 10 December 2010, on the occasion of Fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly adopted resolution 65/118 expressed its deep concern "about the fact that that, fifty years after adoption of the Declaration, colonialism has not yet been totally eradicated" and reaffirmed all principles of the Declaration, and, inter alia, urged "member States to ensure the full and speedy implementation of the Declaration and other relevant resolutions of the United Nations" (para. 10). On 6 December 2016 the General Assembly adopted resolution 71/122 (Implementation of the Declaration on the Granting Independence to Colonial Countries and Peoples) affirming all previous resolutions on decolonization.

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[4] Paragraph 6 of the Declaration on Decolonization reads "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

37. Relevant resolutions of the General Assembly declared the dismemberment of the Chagos Archipelago contrary to the Charter of the United Nations, particularly because of violation of the territorial integrity of Mauritius.

38. Those resolutions were ignored by the administrating power (the United Kingdom), and the territory of Chagos Archipelago is still under colonial rule of the United Kingdom.

39. Excision of the Chagos Archipelago from Mauritius by the former colonial Power (the United Kingdom) prior to the independence of Mauritius was in violation of international law, particularly in violation of its territorial integrity and the right to self-determination.

3.2. Depopulation of the Chagos Archipelago as an unlawful act and a crime under international law (forcible displacement)

40. General Assembly debate clearly shows that there is no meaningful dispute of the fact that population of the part of Mauritius (Chagos Archipelago) was forcibly expelled by the United Kingdom following the separation of Chagos Archipelago from Mauritius. This was affirmed also by the United Kingdom, inter alia, at the plenary meeting held on 22 June 2017, when the delegate of the United Kingdom stated as follows:

> "Like successive Governments before it, the present United Kingdom Government has expressed sincere regret about the manner in which Chagossians were removed from the British Indian Ocean Territory in the late 1960s and early 1970s." [5]

41. Removal of the population from the Chagos Archipelago represent an act of "forcible displacement" in terms of international (criminal) law that encompass deportation and forcible transfer.[6] The *actus reus* of forcible displacement, as established in the jurisprudence of international criminal tribunals, "is a) the displacement of persons by expulsion or other coercive acts, b) from an area in which they are lawfully present, c) without grounds permitted under international law". That means "involuntary and unlawful and unlawful evacuation of individuals

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[5] A/71/PV.88, 22/06/2017, p.12/21

[6] International Criminal Tribunal for the former Yugoslavia, Case No. IT-05-87-T, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić,* Judgment of 26 February 2009 (Milutinović et al), para. 163.

from the territory in which they reside... Deportation presumes transfer beyond State borders, whereas forcible transfer relates to involuntary displacement within a State"[7]

42. In the jurisprudence of international criminal tribunals it is well established that "an essential element of the involuntary nature of the displacement" is "the absence of genuine choice" that makes a given act of displacement unlawful". Also, it is well established that "genuine choice cannot be inferred from the fact that consent was expressed where the circumstances deprive the consent of any value."[8]

43. In this particular case, there is no ground under international law which could justify the displacement of persons from the Chagos Archipelago. There are no grounds under international law according to which displacement of persons is legitimate. Forcible displacement was not conducted either for security of civilian population or because of imperative military reasons.[9]

3.4. Decolonization of Mauritius was not lawfully completed

44. Decolonization of Mauritius was not lawfully completed because separation of the Chagos Archipelago from Mauritius was conducted contrary to international law, particularly in violation of territorial integrity and self-determination of Mauritius. Upon the dismemberment of Mauritius, the United Kingdom, as an administrating power, seriously violated international law by forcibly displacing population of the Chagos Archipelago.

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[7] *Milutionović et al*,165.
[8] *Ibidem.*
[9] For criteria under which displacement is lawful see: *Milutinović et al*, para. 166.

Chapter 3: LEGAL CONSEQUENCES

45. Any internationally wrongful act involves legal consequences. The first and the most important consequence is that illegal act must be ceased. Continuing violation of Mauritius' sovereignty, territorial integrity and self-determination must be brought to an end.[10] In the concrete case, it needs to be established sovereignty of Mauritius over Chagos Archipelago, in other words Chagos Archipelago must be recognized to belong to Mauritius, and there is an urgent need to be allowed for those who were expelled from Chagos Archipelago to return.

46. In the concrete case, it is irrelevant that the United Kingdom concluded a treaty with the United States, for long term, and established military installations at the Chagos Archipelago.[11] Obligations under the Charter of the United Nations, in accordance with Article 103, have prevalence over obligations under any other international agreement. The Court here does not need to consider, at least not in details, the contractual relations between United Kingdom and the United States. Those relations could not be relied upon as a justification for failure to comply with obligations arising in the concrete situation. Violation of territorial integrity of Mauritius should cease and the process of decolonization of Mauritius should be completed in accordance with international law despite of contractual relations between United Kingdom and United States of America.

47. Obligations arising out of the internationally wrongful acts concerning decolonization of Mauritius are obligations towards international community as a whole and should be fulfilled as soon as practicable. Particularly resettlement of Chagos Archipelago should be allowed immediately.

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[10] See Article 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Act (ILC 2001)

[11] "Our current agreement with the United States lasts until 2036. We cannot, 19 years away, predict exactly what our defence purposes will require beyond that date. We should not and will not make arbitrary, ill informed or premature decisions. We cannot gamble with the future of regional and global security. Mauritius's attempted assurances on the base's future lack credibility. In contrast, the United Kingdom stands by its commitment. When we no longer need the territory for defence purposes, sovereignty will pass. That, by the way, is exactly what we did in relation to the very similar agreement reached with Seychelles in 1965. We ceded sovereignty of islands to Seychelles when we no longer needed them for defence purposes." A/71/PV.88, 22/06/2017, p.12

CONCLUSION

48. The Republic of Serbia respectfully submits that the Court has jurisdiction to give requested advisory opinion and that there is no reason to decline to exercise its jurisdiction. There are compelling reasons for the Court to participate in the activities of the United Nations and to provide legal opinion on very sensitive issues. Integrity of the Court's would be seriously damaged if the Court declines to exercise its jurisdiction in this particular case.

49. The Republic of Serbia is of the opinion that the Court should give advisory opinion declaring that the process of decolonization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, because the separation of the Chagos Archipelago from Mauritius was conducted in violation of international law and particularly of principles of territorial integrity and self-determination of peoples.

50. Continuing violation of territorial integrity of Mauritius and self-determination of the people of Mauritius must cease as soon as practicable, particularly by recognizing that Chagos Archipelago is a part of Mauritius and by enabling Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin.