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INTERNATIONAL COURT OF JUSTICE

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

REQUEST FOR AN ADVISORY OPINION

WRITTEN STATEMENT OF THE FRENCH REPUBLIC

[Translation by the Registry]

1. On 28 June 2017, the International Court of Justice was seised of a request for an advisory opinion by the United Nations General Assembly on the *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*.

2. The following two questions were submitted to the Court for its opinion:

> "*(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?"[1]

3. By letters dated 28 June 2017, notice of the request for an advisory opinion was given to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Statute. In its Order of 14 July 2017, the Court decided that "the United Nations and its Member States, which are likely to be able to furnish information on the question submitted to the Court for an advisory opinion, may do so within the time-limits fixed in this Order", and fixed 30 January 2018 as the time-limit within which written statements on the question could be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute. This written statement is submitted by the French Republic by virtue of that Order.

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4. In its most recent Advisory Opinion rendered on 1 February 2012, the Court clearly recalled the limits of its power in advisory proceedings:

> "Article 65 of the Statute of the Court makes it clear that it has a discretion whether to reply to a request for an advisory opinion: 'The Court may give an advisory opinion on any legal question . . .' That discretion exists for good reasons. In exercising that discretion, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body . . . The Court and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies. The Permanent Court of International Justice as long ago as 1923, in recognizing that it had discretion to refuse a request, made an important statement of principle: 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court.' (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5*, p. 29; for the most recent statement on this matter see *Accordance with International*

[1] Request for an advisory opinion (questions submitted by United Nations General Assembly resolution 71/292 of 22 June 2017).

Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II), pp. 415-416, para. 29, and the authorities referred to there.)[2]"

5. Thus, the Court has a "duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function", by ensuring that there are no "compelling reasons" which would prevent it from exercising that function[3].

6. In June 2017, France set out the reasons why it felt it necessary to abstain from voting on the resolution submitting the request for an advisory opinion to the Court. According to France,

> "The situation at the heart of the draft resolution A/71/L.73, submitted by the Group of African States, is a bilateral dispute, for which we can only hope for a solution. For some months now we have called on our Mauritian and British friends to reach such a solution through negotiation. We regret that they have not yet reached a settlement, but we believe that the possibilities offered by negotiation have certainly not been completely exhausted.
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> In that context, we are not convinced that the adoption of a request for an advisory opinion of the International Court of Justice would facilitate such a settlement. A sovereign dispute between States, which is the case here, should be resolved in accordance with the principle of the concerned States' consent to court adjudication. We must all be attentive to respecting a principle that the International Court of Justice has considered to be fundamental.
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> That is why the French delegation is unable to vote in favour of the draft resolution before us. However, we wish to express our hope that the parties to the dispute will continue to make efforts to reach a negotiated solution. We therefore hope that in the near future the parties will be able to reach a[n] agreed solution that is in their interests and in the interests of their partners and friends, of which France is one."[4]

7. The Court has on numerous occasions recalled the fundamental principle whereby "[i]t is well established in international law that no State can, without its consent, be compelled to . . . any . . . kind of pacific settlement"[5]. Accordingly, in advisory proceedings,

> "[i]n 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"[6].

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[2] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012 (I)*, pp. 24-25, paras. 33-34.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45.

[4] A/71/PV.88, 88th plenary meeting, 22 June 2017, pp. 17-18 (Mr. Delattre, France).

[5] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27.

[6] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 158, para. 47.

8. Application of this principle requires the true object of the request for an opinion to be determined. As the Court has observed in the past, it must reformulate the question put to it when it has "determined, on the basis of its examination of the background to the request, that the request did not reflect the 'legal questions really in issue' (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35)"[7]. Since the true object of the request for an opinion is a bilateral dispute, and since the legal questions really in issue concern the interpretation and application of bilateral commitments, the Court cannot reply to it without infringing the principle of consent to jurisdiction.

9. During the debate before the vote on the resolution requesting the opinion, several States expressed the view that to submit the request for an advisory opinion to the Court through a resolution is to circumvent the principle of consent to jurisdiction, since the request actually relates to a bilateral dispute[8]. In this regard, one State observed during the debate that:

> "In our view, the dispute between Mauritius and the United Kingdom is bilateral in character.
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> We welcome the fact that both parties are willing to settle the issue peacefully, as provided for in the Charter of the United Nations. We note, however, that one party to the dispute has expressly not agreed to involve the International Court of Justice in this matter, which is in conformity with the Court's Statute."[9]

10. It is true that the existence of a bilateral dispute is not in itself sufficient to prevent the Court from exercising its advisory jurisdiction. Thus, in the case concerning *Western Sahara*, the Court found that it could reply to the request for an opinion after establishing that there was "a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations"[10]. Likewise, in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court did not consider that responding to an opinion requested "on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute . . . would have the effect of circumventing the principle of consent to judicial settlement"[11].

11. In this case, although the question of Mauritius's decolonization certainly appeared on the agenda of the United Nations General Assembly in the past and was the subject of debate there for a number of years, the fact is that the General Assembly resolutions dealing specifically with the decolonization of Mauritius were adopted between 1965 and 1967, i.e. more than 50 years ago, as is stated in the explanatory memorandum accompanying the application seeking the inclusion of the request for an advisory opinion on the agenda of the General Assembly[12]. Moreover, those resolutions were adopted before Mauritius's accession to independence in 1968 and before its

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[7] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 423, para. 50.

[8] See A/71/PV.88, p. 12 (United Kingdom); p. 14 (United States); p. 21 (Canada).

[9] See A/71/PV.88, p. 19 (Germany). See, to the same effect, the positions expressed by Mexico, New Zealand and Sweden (*ibid*., p. 20).

[10] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 34.

[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 50.

[12] Annex to A/71/142, 14 July 2016, explanatory memorandum, para. 4.

admission to the United Nations the same year[13]. During the discussions held in both the Security Council and the General Assembly on Mauritius's application to join, no reservations were expressed regarding the independence process[14]. One of the States participating in the debate observed on that occasion that "Mauritius has become independent as a result of a democratic process and through an agreement freely negotiated between the representatives of the people of Mauritius and the Government of the United Kingdom"[15]. Since then, the General Assembly has not taken any position on the decolonization of Mauritius, as confirmed by the dossier of documents prepared by the Secretariat.

12. This explains why the request for an advisory opinion was added to the agenda of the General Assembly under a heading that specifically concerns neither Mauritius nor decolonization, namely "heading F, Promotion of justice and international law"[16].

13. In previous advisory proceedings, the Court has always taken care to ascertain, should there be any doubt, whether the organ submitting the request for an advisory opinion has exercised functions of its own in the situation under consideration, in the years preceding the request for an opinion[17]. In this case, no resolution has been adopted by the General Assembly regarding the decolonization of Mauritius since that State acceded to independence almost 50 years ago.

14. In the case concerning *Western Sahara*, the Court was also keen to emphasize that

> "[t]he object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."[18]

15. By contrast, in this case, the justification for the proposed request for an opinion focused on the objective of settling a bilateral dispute:

> "In furtherance of its active role in the process of decolonization, the General Assembly has a continuing responsibility to complete the process of the decolonization of Mauritius. The best means is for the General Assembly to engage with relevant States directly concerned with the Chagos Archipelago, through

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[13] Mauritius was admitted to the United Nations by General Assembly resolution 2371 (XXII) of 24 April 1968.

[14] See the dossier of documents prepared by the Secretariat, Part II, Section B, Dossier No. 261, Security Council, Official Records, 23rd year, 1414th meeting, 18 April 1968; and UN Dossier No. 264, General Assembly, verbatim record, 22nd Session, 1643rd Plenary Meeting, 24 April 1968.

[15] See the dossier of documents prepared by the Secretariat, Dossier No. 261, Security Council, Official Records, 23rd year, 1414th meeting, 18 April 1968, p. 3, para. 32 (Denmark).

[16] A/71/142, 14 July 2016, p. 1. This choice of agenda item does not appear to be compatible with Mauritius's statement that the opinion requested of the Court would enable the General Assembly to fulfil "its functions under Chapters XI to XIII of the Charter of the United Nations" (A/71/PV.88, p. 8).

[17] See thus *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 421-422, para. 45.

[18] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39.

consultations, negotiations and other measures, all towards a peaceful and orderly resolution of this matter."[19]

16. This wording confirms that the true object of the request for an opinion is the settlement of a dispute between the two parties concerned.

17. That dispute regards a series of bilateral agreements relating to the Chagos Archipelago, commitments which were confirmed recently by an arbitral award rendered on 18 March 2015[20] and by a decision of the European Court of Human Rights of 11 December 2012[21]. The question of the Chagos Archipelago is thus governed by specific commitments between the interested parties and by decisions with the force of *res judicata*.

19*[sic]*. In view of this, it would thus appear that the true object of the request for an opinion submitted to the Court is the settlement of a bilateral dispute between the States concerned regarding commitments they have made in respect of the Chagos Archipelago; it would also appear that the fact that the two States have not consented to refer that dispute to the Court by means of contentious proceedings should lead the Court to refuse the request for an advisory opinion. Respecting the "principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" is particularly necessary in order to avoid advisory proceedings being used, improperly, as an alternative means of bringing an action when one of the parties to the dispute does not consent to the Court's jurisdiction.

20*[sic]*. France reiterates its hope that the two parties will continue their efforts to reach a negotiated settlement of the questions pending between them. Moreover, France reserves its position with regard to any other question of jurisdiction, admissibility or substance which might emerge or arise during the course of these advisory proceedings.

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[19] Annex to A/71/142, 14 July 2016, explanatory memorandum, para. 7.

[20] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, www.pca-cpa.org.

[21] *Chagos Islanders against the United Kingdom*, Application No. 35622/04, Decision of 11 December 2012, paras. 77-83 in particular.