INTERNATIONAL COURT OF JUSTICE

REQUEST FOR ADVISORY OPINION

Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965

Written Statement of the Federative Republic of Brazil

1st March 2018

INTRODUCTION

1. Pursuant to the International Court of Justice's Orders of 14 July 2017 and 17 January 2018, the Federative Republic of Brazil has the honor to present this Written Statement so as to furnish information regarding the advisory proceedings entitled "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965".

2. On 22 June 2017, at the 88th meeting of its seventy-first session, the United Nations General Assembly adopted Resolution 71/292, requesting that the Court render an advisory opinion 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?"

3. Brazil voted in favor of the aforementioned resolution and delivered the following statement after its adoption:

> "Brazil voted in favour of resolution 71/292. We continue to encourage all of the parties involved to remain genuinely engaged in dialogue and committed to the peaceful settlement of this issue.
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> Decolonization constitutes one of the unfinished tasks of the United Nations and is therefore an issue of interest to the international community as a whole. The General Assembly has a crucial role to play in advancing the process of decolonization. One of the tools at its disposal, as set out in the Charter of the United Nations, is to request that the International Court of Justice provide clarification on legal issues through its advisory jurisdiction.
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> A vote in favour of this resolution does not mean a commitment to any particular interpretation of the underlying issue. It means a request for the principal legal body of the United Nations to provide, through a non-binding opinion, legal elements that may guide all parties to definitively settle this question" (A/71/PV.88)".

4. Brazil decided to submit this Written Statement based on its long-term tradition of promoting international law and its full commitment to multilateralism. By

participating in this Advisory Opinion, Brazil reaffirms its confidence in the International Court of Justice as the main judicial organ of the United Nations. It also seeks to contribute to the clarification of international law on matters related to decolonization and self-determination, which are at the core of the questions submitted by the General Assembly. Brazil does not perceive this procedure as a bilateral dispute, nor does it approach the present statement as being adversarial to any State.

5. This statement is structured in five parts, as follows:

(i) considerations on jurisdiction and judicial propriety; (ii) the right of peoples to self-determination; (iii) territorial integrity; (iv) the forcible removal of the Chagossians; and (v) conclusion.

I. CONSIDERATIONS ON JURISDICTION AND JUDICIAL PROPRIETY

6. The Court may "give an advisory opinion on any legal question at the request of whatever body authorized by or in accordance with the Charter of the United Nations to make such a request".[1] The General Assembly clearly has the authority to request the Court to give advisory opinions "on any legal questions", as established in Article 96 of the Charter of the United Nations.[2]

7. In order to determine whether the question submitted is of legal character, the Court has explained that "a question which expressly asks whether or not a particular action is compatible with international law certainly appears to be a legal question".[3] The present request has such a character, since it asks the Court to assess whether a decolonization process was "lawfully completed" and to clarify the "consequences under international law" that stem from the current situation. The issues raised by the General Assembly are "framed in terms of law", "raise problems of international law", and are "by their very nature susceptible of a reply based on law", [4] thus fulfilling the requirements of a legal question.

8. Based on the above, Brazil considers that all criteria for the Court to have advisory jurisdiction according to Article 65(1) of the Statute have been met.

9. In advisory proceedings, once the Court has established its jurisdiction, it still has discretion to exercise it or not. It has clarified, however, that "it should not, in principle,

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[1] Article 65(1) of the Statute of the International Court of Justice.

[2] According to Article 96 of the UN Charter, "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question". *See also Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.

[3] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, pp. 414-415, para. 25.

[4] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

refuse to give an advisory opinion",[5] unless there are "compelling reasons" for such a refusal.[6] This is because the "reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the Organization".[7] Here, General Assembly Resolution 71/292 was adopted by the required – and overwhelming – majority of States present and voting. In replying to this request, the Court will thus participate in a key activity of the United Nations, whose role in decolonization processes has long been recognized.[8]

10. Furthermore, Brazil considers that there are no compelling reasons for the Court not to reply both questions formulated through Resolution 71/292. It is important to stress that the Court has never declined to exercise its advisory jurisdiction based on judicial propriety. As it has previously clarified,[9] only the Permanent Court of International Justice took on one occasion the view that it would not exercise its advisory jurisdiction. However, such a decision was only considered because the question put to it concerned a State that was not a party to the Statute of the Permanent Court neither a Member of the League of Nations, and that also refused to take part in the proceedings.[10] This precedent finds no possible application here, since all States that might be concerned are parties to the Charter and to the Statute and, therefore, they had "in general given [their] consent to the exercise by the Court of its advisory jurisdiction".[11]

11. During the adoption of Resolution 71/292, some Members States argued in their statements that the proposed questions were of a bilateral nature, and thus an advisory opinion would circumvent the principle of consent to the Court's contentious jurisdiction. Arguably, as this Court has cautioned, "the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court´s judicial character".[12] This is particularly relevant on matters strictly of a bilateral character, with no bearing on the powers and responsibilities of the United Nations. In Brazil's view, that is not the case here. The issues raised by the General Assembly reflect a broad concern of the international community regarding the need for legal clarity with regard to the scope and application of a set of norms of international law

[5] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 234-235, para. 14. *See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19.

[6] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956*, p. 86 ("Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude").

[7] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J Reports 1950*, p. 72.

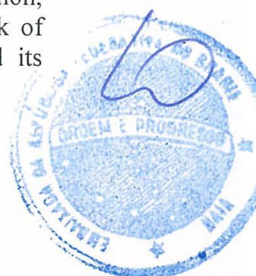
[8] General Assembly resolution 1514 (XV), 14 December 1960; General Assembly Resolution establishing the Special Committee on Decolonization General Assembly resolution 1654 (XVI), 27 November 1961.

[9] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 234-235, para 14.

[10] *Status of Eastern Carelia, Permanent Court of International Justice, Series B, No 5.*

[11] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 23-24, para 30. In this Advisory Opinion, this Court made a similar distinction to the case on the *Status of Eastern Carelia* (*id*): "the lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer".

[12] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 24-25, paras. 32-33.



– such as territorial integrity and the right of peoples to self-determination – in the context of decolonization.

12. The Court asserted in the past that the right of peoples to self-determination in colonial contexts creates *erga omnes* obligations,[13] which are owed to all, and to the international community as a whole. The right to self-determination in the context of decolonization has been recognized in United Nations resolutions,[14] in multilateral declarations,[15] and even in this Court's own decisions.[16] It is therefore clear that the present request transcends the realm of any bilateral relationship, as it deals with matters that are "directly of concern to the United Nations".[17]

13. As acknowledged by the Court in the "Wall" proceedings, exercising advisory jurisdiction under these circumstances does not "have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground".[18] As the principal judicial organ of the United Nations, the Court has been diligently complying with requests for advisory opinion, providing clarity and support to the United Nations in legal matters. Here, it has again the opportunity to give a valuable contribution in a matter that has been of concern to the General Assembly,[19] and that has stayed alive ever since.[20]

14. Based on the above, Brazil understands that the Court has and should exercise its advisory jurisdiction.

II. THE RIGHT OF PEOPLES TO SELF-DETERMINATION

15. When approaching the questions asked by the General Assembly and assessing which norms of international law are applicable, the right of colonial peoples to self-determination emerges as a central element. Brazil considers it a peremptory norm of international law.

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[13] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

[14] See, e.g., UNGA Resolutions 1514 (XV) and 2625 (XXV).

[15] See, e.g., Vienna Declaration and Programme of Action (2003), I, 2.

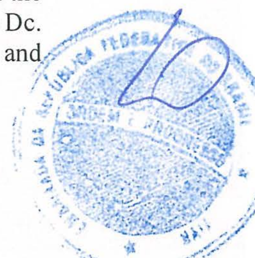
[16] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*; *Sovereignty over Pulau Ligitan und Pulau Sipadan (Indonesia/Malaysia), Application ,for. Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 655, para. 9.

[17] *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I.C.J. Reports 2004*, pp. 158-159, para. 49.

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

[19] General Assembly Resolutions 2066 (XX), 2232 (XXI) and 2357 (XXII).

[20] See, *e.g.,* Ministerial Declaration of the Group of 77 and China to UNCTAD XIV (TD/507), 22 July 2016; Declaration adopted by the Thirty-Seventh Annual Meetings of Ministers for Foreign Affairs of the Member States of the Group of 77, New York, 26 September 2013; Resolution on Chagos Archipelago Dc. EX.CL/901(XXVII) (AU/Res.1(XXV)), 14-15 June 2015; African Union Assembly of Heads of State and Government, 50th Anniversary Solemn Declaration, Addis Ababa, 26 May 2013, p. 3.



16. The self-determination principle has been explicitly included as one of the "purposes" of the United Nations, according to Article 1(2) of the Charter. It should be stressed that the (also authoritative) French version of Article 1(2) of the Charter refers to self-determination as a "right" ("droit à disposer d'eux-mêmes").

17. The General Assembly recognized the normative nature of self-determination on several occasions, most importantly through Resolution 1514(XV) – the Declaration on the Granting of Independence to Colonial Countries and Peoples (henceforth the "1960 Declaration") –, that was adopted without dissenting votes. It made clear that "all peoples have the right to self-determination" (paragraph 2). This Court has also recognized the normative nature of self-determination in a number of cases,[21] considering it "one of the essential principles of contemporary international law".[22]

18. There is no question, therefore, that the right to self-determination in colonial contexts forms part of customary international law today. Moreover, for Brazil, the right of colonial peoples to self-determination was already established in international law by the time of the excision by the administrative power of the Chagos Archipelago from Mauritius (8 November 1965). Much of the history of international law during that period dealt with the law of self-determination and decolonization, as the independence of a number of states in the 1960s clearly demonstrates. The independence of new colonies did not derive from comity or courtesy of the former colonial powers. It was rather the due exercise of a right, whose application should lead to "bringing all colonial situations to a speedy end".[23]

19. Self-determination is a collective right and, as such, the identification of its holders – the "peoples" – might, in some cases, become a challenging exercise; less so in the context of decolonization, where the "uti possidetis" principle generated a consistent practice of distinguishing "peoples" according to the borders of former colonies. The Chagos Archipelago has been a part of Mauritius at least since the 18th century, when Mauritius was under French colonial rule. At the time of the decolonization process, therefore, the inhabitants of the archipelago (henceforth the "Chagossians") were an integral part of the Mauritian people, constituting a single holder of the right to self-determination.

III. TERRITORIAL INTEGRITY

[21] *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,* pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* pp. 31-33, paras. 54-59; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, para. 29; *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I.C.J. Reports 2004*, p. 171-172, para 88.

[22] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, para. 29.

[23] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 31, para. 55.

20. The right of peoples to self-determination has a territorial projection: the people must be able to exercise their rights over the entire territory. Territorial integrity is therefore not only a corollary of sovereignty but also a corollary of self-determination. The General Assembly acknowledged this when detailing some of the contents of self-determination through the 1960 Declaration:

> (i) "all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected" (paragraph 4);
>
> (ii) "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" (paragraph 6).

21. The 1960 Declaration states that the "transfer of all powers to the peoples of those territories" - decolonization itself – is to be implemented, among others, "without any conditions or reservations" and "in accordance with their freely expressed will and desire". It follows that any modification in relation to the boundaries of a non-self-governing territory can only be legally implemented following the free and genuine consent of the people concerned. In the words of Judge Hardy Dillard, "it is for the people to determine the destiny of the territory and not for the territory to determine the destiny of the people".[24]

22. On 16 December 1965, the General Assembly adopted Resolution 2066(XX), which "note[d] with deep concern that any step taken by the administering 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, and in particular of paragraph 6 thereof" (preambular paragraph 5). The General Assembly also "invite[d] the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity". It was adopted with 89 votes in favor - including Brazil -, 18 abstentions and without any votes against it. Resolution 2066(XX) indicates the clear understanding of the most representative organ of the UN on the legality of the detachment of the Chagos Archipelago.

23. The relationship between self-determination and territorial integrity is established in a specific moment in time: before any illicit interference to the territory or to the population. The dismemberment of the Chagos Archipelago from Chagos was not in conformity with international law and the passing of time does not correct such a wrongdoing. It cannot be deemed to create a "*fait accompli*" by virtue of the general principle "*ex iniuria ius non oritur*". The principle of self-determination entitled the Mauritian people to freely exercise their rights in their entire territory before the dismemberment – that is, including the Chagos Archipelago.

[24] Separate opinion of Judge Dillard, p. 122, in *Western Sahara*.

24. Based on the above, Brazil considers that the decolonization of Mauritius was not lawfully completed – and remains incomplete to this day.

IV. THE FORCIBLE REMOVAL OF THE CHAGOSSIANS

25. International law applicable to decolonization prohibits administrative powers to "disrupt the demographic composition" of the territories under colonial rule, since it "may constitute a major obstacle to the genuine exercise of self-determination and independence by the people of those territories" (excerpts from paragraph 8 of General Assembly Resolution 35/118, which reflects customary international law). Brazil understands that this prohibition covers not only the influx of outside migrants and settlers, but also depopulation. The treatment granted to the inhabitants of the Chagos Archipelago after its excision from Mauritius is therefore a relevant topic when approaching the second question formulated to the Court.

26. Following the dismemberment of the Chagos Archipelago from Mauritius and the establishment of the "British Indian Ocean Territory" (BIOT), a depopulation process was carried out from 1968 to 1973. Its inhabitants were forcibly removed to other countries. Chagossians were not allowed to resettle in the archipelago, neither were they properly compensated. Moreover, the administering power established a marine protected area surrounding the archipelago, impairing the feasibility of a possible return of the indigenous population.[25]

27. Article 13(2) of the Universal Declaration of Human Rights determines that "everyone has the right to leave any country, including his own, and to return to his country". The fact that the administering power has been preventing the resettlement of Chagossians in the archipelago constitutes a violation of that right.

V. CONCLUSION

28. For the reasons presented above, Brazil submits that:

(a) the Court has and should exercise advisory jurisdiction;

(b) the right of peoples to self-determination was established in international law by the time of the excision of the Chagos Archipelago from Mauritius;

(c) the exercise of self-determination by the Mauritian people was prevented to be completed, since a portion of their territory remained under control of the administering power;

[25] *Chagos Marine Protected Area (Mauritius v. United Kingdom), Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award*, 18 March 2015.