BEFORE THE

INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION ON THE LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

WRITTEN STATEMENT

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

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I. INTRODUCTION

1. On 22 June 2017 the United Nations General Assembly adopted, at the 88th meeting of its Seventy-first Session, Resolution 71/292, by which it decided, referring to Article 65 of the Statute of the Court, to request the International Court of Justice (the 'Court') to 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?'; and*

   (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 Secretary-General of the United Nations transmitted that Resolution to the Court under cover of a letter dated 23 June 2017, and it was received by the Court on 28 June 2017. Thereafter, the Registrar of the Court gave notice of the request for an advisory opinion to all States entitled to appear before the Court pursuant to Article 66, paragraph 1 of the Statute by letters dated 28 June 2017.

3. The Court, by order of 14 July 2017, decided that the United Nations and its Member States that are likely to be able to furnish information on the questions submitted to the Court for an advisory opinion, may present written statements on the questions before the Court, in accordance with Article 66, paragraph 2 of the Statute by 30 January 2018 and that States and organizations that have presented written statements may submit written comments on other written statements received by the Court, in accordance with Article 66, paragraph 4 of the Statute, by 16 April 2018.

4. The issue at the core of these proceedings is the question of decolonization, and more particularly, whether the process of decolonization of Mauritius has been completed. Colonialism is an archaic remnant of a previous world order that considered some peoples more worthy than others. The completion of decolonization is a most pressing and fundamental issue in the present international legal order.

5. The process of decolonization has been recognized by the United Nations as not having been completed, and it remains on the agenda of the General Assembly of the United Nations as a burning issue.[1] All States, in cooperation with the United Nations, must leave no stone unturned in permanently removing all vestiges of colonialism from amongst the family of nations.

6. The right to self-determination in international law is a fundamental human right and it is a right that has not yet been fully realized.[2] The right finds its roots in Articles 1, paragraph 2 and 55 of the Charter of the United Nations as well as various other leading international human rights instruments.[3] The right to self-determination is regarded as a *jus cogens* right, and the practice of States seen with the plethora of United Nations Resolutions reinforce its importance as a contemporary issue in international relations and international law.[4] The right to self-determination also lies within the core functions of the United Nations as evidenced by Chapter I, Article 2, as well as Chapters XI, XII and XIII of the United Nations Charter.

7. The continued existence of colonialism and its tragic consequences, both through the denial of peoples' right to self-determination and its effect on the basic human rights of each individual affected by colonialism, moves South Africa to strongly appeal to the

[1] See United Nations General Assembly Resolution A/RES/72/110 of 07 December 2017 and the work under the Special Political and Decolonization Committee (Fourth Committee).
[2] See United Nations General Assembly Resolution A/RES/72/110 of 07 December 2017; Dugard J *International Law, a South African Perspective* 4th ed 2011 Juta p.100 who indicates that self-determination has been acknowledged as a norm of international law, described as one of the essential principles of contemporary international law and enjoys an *erga omnes* character by the International Court of Justice.
[3] Such as the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966 and the African Charter on Human and People's Rights, 1981.
[4] See Part IV of this submission. Also see the United Nations Declaration on Principles of International law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in the United Nations General Assembly Resolution 2625 (XXV) of 1970.

Court to exercise its powers in a manner that will support the movement toward eradicating the remaining vestiges of colonialism and protecting those left without a voice due to the injustices of colonialism. The answers to the questions before the Court will, in South Africa's view, greatly assist the General Assembly of the United Nations specifically, but also to the United Nations as a whole, in dealing with the matter with increased certainty and purpose.

8. Where violations of human rights which appear to be of a continuing nature are detected, the Court may provide an essential impetus to eradicate such violations and to enable the international community to protect persons left vulnerable by colonialism.

9. The Republic of South Africa regards itself as an active and strong proponent of fully realizing the decolonization of all peoples, and having itself experienced the process of decolonization, the Government of the Republic of South Africa has decided to submit a written statement on this matter to the Court. South Africa, itself a former colony and a country whose population suffered human rights abuses both under colonialism and apartheid, has a vested interest in contributing towards the elimination of colonialism and all peoples' realization of their right to self-determination.

10. After the introduction, this written statement includes a recount of the historical facts relied on by South Africa and the relevant United Nations General Assembly Resolutions; an assessment of the jurisdiction of the Court; a limited statement of the law as understood by South Africa; and a conclusion.

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II. FACTUAL BACKGROUND

11. South Africa's statement is based on facts that are easily verifiable through reference to official United Nations publications and official documents, as well as through other reputable organizations, courts or tribunals.[5]

12. The Chagos Archipelago has been part of Mauritius since Mauritius came under the control of France in the 18th century. Following the conquest of Mauritius by the United Kingdom in 1810, Mauritius (including the Chagos Archipelago) was formally and validly ceded to the United Kingdom in 1814. Under British colonial rule, the Chagos Archipelago was administered as an integral part of Mauritius.

13. Constitutional conferences on the status of Mauritius were held in 1955, 1958, 1961 and 1965, in the run-up to independence in 1968. Coinciding with the 1965 conference, a meeting took place at Lancaster House in London on 23 September 1965 where the representatives of the United Kingdom and Mauritius allegedly agreed to the 'detachment' of the Chagos Archipelago, and where certain undertakings were made by the United Kingdom in relation to the detachment.

14. The undertakings of the United Kingdom included that compensation would be paid to Mauritius over and above compensation to be paid to landowners and the cost of resettlement of persons affected in the Chagos Archipelago; fishing rights would remain available to Mauritius; the islands would eventually be returned to Mauritius if the defence-related need for the facilities on the islands fall away; and that the benefit of any minerals or oil discovered should revert to Mauritius.

15. In 1965, the United Kingdom detached the Chagos Archipelago from Mauritius and created the 'British Indian Ocean Territory' (or BIOT) that included the Chagos Archipelago within the greater process of the granting of independence to Mauritius.

[5] The documents submitted by the Secretariat of the United Nations were accessed at http://www.icj-cij.org/en/case/169.

16. Mauritius obtained independence in 1968, but without its territorial integrity being maintained as it was before 1965. The Chagos Archipelago remained detached for the stated purposes of defence during and after independence, and the principal defence facilities have been leased to the United States of America by the United Kingdom, with a lease agreement that currently extends to 2036.

17. The entire civilian population of the Chagos Archipelago (referred to as 'Chagossians' or 'Ilois') was forcibly removed from the islands in the late 1960's and/or early 1970's, and there are presently no civilian permanent inhabitants due to the continued exclusion of such a possibility by the military presence of the United States and the United Kingdom.

18. On 14 December 1960 the United Nations General Assembly adopted Resolution 1514 (XV) that is known as the 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (the 'Declaration'), in accordance with its powers and functions under Chapter XI to XIII of the Charter of the United Nations. In the Declaration, the right to self-determination of all peoples and universal observance of human rights and fundamental freedoms are recognized. It also recognizes the important role of the United Nations in assisting the independence movement and the desire to end colonialism in all its manifestations. The Declaration confirms that the United Nations General Assembly is convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, while the subjection of peoples to domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. Respect for territorial integrity is reiterated various times in the Declaration and any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country in the context of decolonization is declared to be incompatible with the purposes and principles of the Charter of the United Nations.

19. On 16 December 1965, the United Nations General Assembly adopted Resolution 2066 (XX) on the question of Mauritius and other islands composing the territory of Mauritius (including the Chagos Archipelago) wherein the General Assembly recalled

the Declaration and noted its deep concern that any steps taken by the administering power to detach certain islands (Chagos Archipelago) from the territory of Mauritius for the purpose of establishing a military base, would be in contravention of the Declaration. It also specifically invited the administering powers to take no action which would dismember the territory of Mauritius and violate its territorial integrity.

20. Recalling that the United Kingdom detached the Chagos Archipelago from Mauritius in 1965, the United Nations General Assembly adopted Resolution 2232 (XXI) on 20 December 1966 wherein it voiced its deep concern at policies aimed at the disruption of the territorial integrity of territories that included Mauritius through the construction of military bases and installations in contravention of relevant Resolutions of the General Assembly. The General Assembly reaffirmed the inalienable right of peoples of these territories (including Mauritius) to self-determination and independence, and reiterated in 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 the Declaration.

21. On 19 December 1967, shortly before Mauritian independence in 1968, the United Nations General Assembly adopted Resolution 2357 (XXII) on the question of Mauritius (amongst others), and again recalled its previous Resolutions when noting its deep concern at information submitted to it on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some territories, and the creation by the administering powers of military bases and installations in contravention of relevant General Assembly Resolutions. The General Assembly, in following the text of Resolution 2232 (XXI) closely, reaffirmed the inalienable right of the peoples of the mentioned territories that include Mauritius, to self-determination and independence, and reiterates 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 therein are incompatible with the purposes and principles of the Charter of the United Nations and of the Declaration.

22. On 18 March 2015, a Tribunal established through the Permanent Court of Arbitration (the Tribunal) in the matter between the Republic of Mauritius and the United Kingdom

of Great Britain and Northern Ireland under Part XV and Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) found, in relation to the merits of the Parties' dispute, *'that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea*'; that *'the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding'*; and *'that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding'*.[6] In the Dissenting and Concurring Opinion in the same matter, and although not binding, it was found that *'[t]he 1965 excision of the Chagos Archipelago from Mauritius shows a complete disregard for the territorial integrity of Mauritius by the United Kingdom which was the colonial power.'*[7]

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[6] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* PCA Case No. 03/2011 p. 215.
[7] *Ibid. Dissenting and Concurring Opinion* par. 91 pp. 22 to 23.

III. JURISDICTION OF THE COURT

Requirements for Exercising Jurisdiction

23. The requirements for the Court to have jurisdiction in a request for an advisory opinion, and the factors to be considered when deciding on jurisdiction, are found in the following primary sources of international law:

    a. Article 36, paragraph 1 of the Statute of the International Court of Justice indicates that the jurisdiction of the Court includes all matters specially provided for in the Charter of the United Nations, while paragraph 6 empowers the Court to decide any disputes relating to its jurisdiction.

    b. Article 65, paragraph 1 of the Statute which requires the Court to consider only legal questions, and requires that the request must emanate from an organ or entity authorized to request an opinion under the Charter of the United Nations.

    c. Article 96 of the United Nations Charter provides that the General Assembly may request the International Court of Justice to give an advisory opinion on any legal question.

24. To summarize, the organ must be authorized to request the advisory opinion, and the request must concern a legal question (as opposed to a political question).

Meeting of the Requirements for Jurisdiction

25. On 22 June 2017, the General Assembly adopted Resolution 71/292 by a vote of 94 in favour, 15 against and 65 abstentions whereby the Court was requested to provide an advisory opinion in the present matter that relates to decoloniszation. The issue of decolonization falls squarely within the mandate of the General Assembly in accordance with Article 16 and Chapters VI to VIII of the Charter of the United Nations.

26. Both questions referred to the Court by the General Assembly (and that have been quoted above in Part I of the South African statement) are legal questions that must

be answered with reference to international law, notwithstanding the fact that there are factual or political questions that may have to be decided in the course of the consideration of the matter.

27. South Africa submits that the United Nations General Assembly is competent to request the advisory opinion from the Court in terms of the Charter of the United Nations on a matter that falls within its competence and responsibility; the questions raised are legal questions; and the Court, as the principal legal organ of the United Nations is competent to give an advisory opinion that will assist the United Nations General Assembly to deal with the issue.

Possible Challenges to Jurisdiction

28. It is likely that some States may challenge the jurisdiction of the Court on one or more of the following grounds:

a. The issue has a political nature and it is to be settled bilaterally between States concerned;

b. It is a domestic matter that falls outside the purview of the powers of the United Nations;

c. It is a contentious matter (that may include an argument that the questions referred to the Court in the present matter relates to a legal question or bilateral dispute actually pending between two or more States, or that an affected State did not consent to the settlement of a dispute it has with another State) and the request for an advisory opinion attempts to circumvent the jurisdictional hurdles relating to contentious proceedings; or

d. The underlying issues or dispute should be regarded as *res judicata*.

29. It is also possible that a State may argue that the present matter concerns a situation wherein the Court should exercise its discretion not to assume jurisdiction. However,

all of the possible challenges to the Court's jurisdiction have been dealt with extensively in the jurisprudence of the Court. It is South Africa's submission, based on the reasons advanced below, that none of the grounds find application in the present matter before the Court.

30. The predecessor of the Court, namely the Permanent Court of International Justice opined that it must refuse to give an opinion if the answering of the question put to it would amount to deciding a dispute between States, as this would undermine the requirement of consent to adjudication of disputes between States.[8] The Permanent Court of International Justice refused to give an advisory opinion in the *Eastern Carelia* Case because the question related to a dispute between Russia and Finland.[9] However, this was an isolated event as the Court very rarely declined to exercise jurisdiction with regard to requests for advisory opinions.

31. The Court previously considered issues that were potentially contentious, political or domestic-related on various occasions. However, in summary, the Court qualified the *Eastern Carelia* Case several times by distinguishing it from the Cases before the Court.[10] In the particular case of *Namibia (South West Africa)* involving South Africa, the Court noted that the State raising an objection to competence was a member of the United Nations and participated in the proceedings of the United Nations (unlike Russia in the *Eastern Carelia* Case) and the purpose of the request was not to settle a dispute, but to assist the United Nations to make decisions on the legal issues where the political organ requesting the opinion was concerned with its own function.[11]

32. It is submitted that the request for an advisory opinion in the present case has the same purpose, namely to assist the United Nations and not to settle a dispute. A more comprehensive survey of instances wherein the Court dealt with potential contentious issues in advisory opinions is embarked on in Part III, but it is pointed out that the Court consistently deviated from the *Eastern Carelia* Case. In fact, the Court reiterated the

[8] Dugard *Op. Cit.* p. 468.
[9] *Status of Eastern Carelia* PCIJ Reports Series B No. 5 (1923) p. 7.
[10] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* 1950 ICJ Reports 65 p. 71; *Western Sahara* Case 1975 ICJ Reports 12 pp. 23-9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports paras. 46-50.
[11] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* 1970 1971 ICJ Reports 16 pp. 23-24.

view that a request for an advisory opinion should not, in principle, be refused.[12]

Political Nature

33. In its advisory opinion of 28 May 1948 in the matter concerning the *Conditions of Membership*,[13] it was contended that the question before the Court was not legal, but political in nature. In that matter, the Court was unable to attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task[14] by entrusting it with the interpretation of a treaty provision. The Court indicated that it was not concerned with the motives which may have inspired the request, nor has it to deal with the views expressed in the Security Council on the various cases with which the Council dealt.[15] Consequently, the Court held itself to be competent. The Court also relied on the fact that there is no provision forbidding it to exercise jurisdiction in regard to Article 4 of the United Nations Charter. The Court's function was held to be an interpretative function which falls within the normal exercise of its judicial powers.[16]

34. In the advisory opinion in the *Nuclear Weapons* case of 08 July 1996,[17] the Court observed that it has already had occasion to indicate that 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 . . . [and] appear. . . to be questions of a legal character'*.[18] It found that the question put to the Court by the General Assembly was indeed a legal one, since the Court was asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court had to identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The fact that this question also had political aspects - as is the

[12] Peace Treaties Case *Op. Cit.*pp. 71-1; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ Reports p. 19; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* 1962 ICJ Reports p. 155.
[13] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the United Nations Charter)* ICJ Reports 1948 p. 57.
[14] *Ibid.* p. 61.
[15] *Ibid.* p. 61.
[16] *Ibid.* p. 61.
[17] *The Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996 p. 226.
[18] *Western Sahara* Case *Op. Cit.* pp. 233-37 paras. 13 to 15.

case with so many questions which arise in international life - did not suffice to deprive it of its character as a *'legal question'* and to *'deprive the Court of a competence expressly conferred on it by its Statute'*. Nor were the political nature of the motives which may have inspired the request, or the political implications that the opinion may have, of relevance in the establishment of the Court's jurisdiction to give such an opinion.[19]

35. In its advisory opinion in the *Construction of a Wall* case on 09 July 2004,[20] the Court found that it could not accept the view advanced that it has no jurisdiction because of the political character of the question posed.[21] As is clear from its long-standing jurisprudence on this point, the Court considered that the fact that a legal question also has political aspects, does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute, and the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task'.[22] The Court accordingly concluded that it has jurisdiction to give the advisory opinion requested by Resolution of the General Assembly.

36. In the Court's advisory opinion in the *Kosovo* case of 22 July 2010,[23] the Court recalled that it has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question.[24] The Court added that, whatever its political aspects, it could not refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law. The Court made it clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it was not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have.[25]

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[19] *Ibid.* p. 234 par. 13.
[20] The *Construction of a Wall* Case *Op. Cit.* p. 136.
[21] *Ibid.* p. 162 par. 58
[22] *Ibid.* p. 155 par. 41.
[23] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ICJ Reports 2010 p. 403.
[24] Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion ICJ Reports 1973 p. 172 par. 14.
[25] *Conditions of Membership* Case *Op. Cit.* p. 61; *Nuclear Weapons* Case *Op. Cit.* p. 234 par. 13.

37. South Africa submits that the fact that there may indeed be political implications in the present matter between the United Kingdom and Mauritius, or between any international organization and a State, or political implication of any other nature, does not prevent the Court from exercising its jurisdiction.

Domestic Matter

38. Again referring to the Court's advisory opinion of 30 March 1950 in the *Peace Treaties* Case,[26] the Court first considered whether Article 2, paragraph 7 of the United Nations Charter, which prevents the United Nations from intervening in matters which are essentially within the domestic jurisdiction of a State, barred it from delivering an Opinion in that case. The Court noted on the one hand, that the General Assembly justified the examination which it had undertaken by relying upon Article 55 of the United Nations Charter, which states that the United Nations shall promote universal respect for and observance of human rights and on the other, that the request for an Opinion did not call upon the Court to deal with the alleged violations of the provisions of the Treaties concerning human rights. The object of the request was held to be directed solely at obtaining certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes as provided for in the relevant Treaties.[27] The interpretation of the terms of a Treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State as it is a question of international law which, by its very nature, lies within the competence of the Court.

39. In light of the jurisprudence, South Africa submits that this matter cannot be classified as a domestic matter and therefore cannot be raised as a ground to prevent the Court from exercising jurisdiction.

[26] *Peace Treaties* Case *Op. Cit.* p. 65.
[27] *Ibid.* p. 72.

Contentious Matter

40. Staying with the Court's advisory opinion of 30 March 1950 in the *Peace Treaties* Case,[28] the Court considered whether the fact that Bulgaria, Hungary and Romania had expressed their opposition to the advisory proceedings should not move it, by the application of the principles which govern the functioning of a judicial organ, to decline to give an answer. The Court pointed out that a contentious procedure resulting in a judgment and an advisory procedure were different. It considered that it had the power to examine whether the circumstances of each case were of such a character as should lead it to decline to answer the Request. In that matter, the Court affirmed that States cannot prevent the giving of an advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take,[29] and the Court was not asked to pronounce on the merits of these disputes.

41. In the matter concerning *Namibia (South West Africa),*[30] objections were raised against the jurisdiction of the Court. In its advisory opinion on 21 June 1971 the Court dealt with these objections. The Court indicated that the Government of South Africa advanced a reason for the Court not to give the advisory opinion requested, namely that the question was in reality contentious because it related to an existing dispute between South Africa and other States. The Court considered that it was asked to deal with a request put forward by a United Nations organ with a view to seeking legal advice on the consequences of its own decisions. The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States.[31] Therefore the Court also found it unnecessary to apply Article 83 of the Rules of Court, according to which, if an advisory opinion is requested upon a legal question *'actually pending between two or more States'*, Article 31 of the Statute, dealing with judges *ad hoc*, would be applicable. The Court saw no reason to decline to answer the request for an advisory opinion in that matter.

[28] *Ibid.* p. 65.
[29] *Ibid*. pp. 71 and 77.
[30] *Namibia (South West Africa)* Case *Op. Cit.* p. 16.
[31] *Ibid.* p. 24 par. 34.

42. In its advisory opinion of 16 October 1975 in the *Western Sahara* case, the Court considered its competence:[32]

a. The Court relied on Article 65, paragraph 1 of the Statute to indicate that it may give an advisory opinion on any legal question at the request of any duly authorized body. The Court noted that the General Assembly of the United Nations is suitably authorized by Article 96, paragraph 1 of the United Nations Charter and that the two questions submitted are framed in terms of law and raise problems of international law. The questions were held to be principle questions of a legal character, even if they also embody questions of fact, and even if they do not call upon the Court to pronounce on existing rights and obligations. The Court ruled that it was competent to entertain the request.

b. In the same matter, and on the propriety of giving an advisory opinion it was noted that Spain put forward objections which, in its view render the giving of an opinion incompatible with the Court's judicial character.[33] Spain referred in the first place to the fact that it had not given its consent to the Court's adjudicating upon the questions submitted and maintained that the subject of the questions was substantially identical to that of a dispute concerning Western Sahara which Morocco, in September 1974, had invited it to submit jointly to the Court, a proposal which it had refused. Spain argued that the advisory jurisdiction was therefore being used to circumvent the principle that the Court has no jurisdiction to settle a dispute without the consent of the parties. Spain also argued that the case involved a dispute concerning the attribution of territorial sovereignty over Western Sahara and that the consent of States was always necessary for the adjudication of such disputes.

c. In consideration, the Court indicated that the General Assembly, while noting that a legal controversy over the status of Western Sahara had arisen during its discussions, did not have the object of bringing before the Court a dispute or legal controversy with a view to its subsequent peaceful settlement, but sought an advisory opinion which would be of assistance in the exercise of its

[32] *Western Sahara* Case *Op. Cit.* p. 12, but also see paras. 14-22.
[33] *Ibid.* paras. 23-74.

functions concerning the decolonization of the territory,[34] hence the legal position of Spain could not be compromised by the Court's answers to the questions submitted. The Court also held that those questions do not call upon the Court to adjudicate on existing territorial rights.

d. The Court also examined the Resolutions adopted by the General Assembly on the subject, from Resolution 1514 (XV) of 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, to the Resolution embodying the request for advisory opinion. It concluded that the decolonization process envisaged by the General Assembly is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for an advisory opinion and constitutes a basic assumption of the questions put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realized.[35]

e. Consequently, the Advisory Opinion would thus furnish the Assembly with elements of a legal character relevant to that further discussion of the problem to which the Resolution requesting the advisory opinion alludes. Furthermore, the Court found no compelling reason for refusing to give a reply to the two questions submitted to it in the request for advisory opinion.

43. Returning to the advisory opinion of the Court on 09 July 2004 in the *Construction of a Wall* case,[36] it was argued before the Court that it should not exercise its jurisdiction in that case because the request concerned a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction.

a. According to that argument, the subject-matter of the question posed by the General Assembly *'is an integral part of the wider Israeli-Palestinian dispute*

[34] *Ibid.* p. 21 par. 23; pp. 26-7 par. 38; and p. 72 par 4.
[35] *Ibid.* p. 36 par. 71.
[36] The *Construction of a Wall* Case *Op. Cit.* p. 136.

concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters'. The Court observed that the lack of consent to the Court's contentious jurisdiction by interested States had no bearing on the Court's jurisdiction to give an advisory opinion,[37] but recalled its jurisprudence to the effect that the lack of consent of an interested State might render the giving of an advisory opinion incompatible with the Court's judicial character, e.g. if to give a reply would have the effect of circumventing the principle that a State is not obliged to submit its disputes to judicial settlement without its consent.

b. As regards the request for an advisory opinion before the Court in that matter, the Court acknowledged that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's conduct, on which the Court was asked to pronounce in the context of the opinion it would give. However, as the Court has itself noted before, *'Differences of views . . . on legal issues have existed in practically every advisory proceeding.'* Furthermore, the Court did not consider that the subject-matter of the General Assembly's request could be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it was the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations, in general, and the General Assembly, in particular. The responsibility of the United Nations in that matter also had its origin in the Mandate and the Partition Resolution concerning Palestine. This responsibility has been described by the General Assembly as *'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy'*. The object of the request before the Court was to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion was requested on a question which is of particularly acute concern to the United Nations, and one which was located in a much broader frame of reference than a bilateral dispute.[38] In the

[37] *Ibid.* p. 158.
[38] *Ibid.* p. 158 par. 50.

circumstances, the Court did not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly could not, in the exercise of its discretion, decline to give an opinion on that ground.

c. The Court then turned to another argument raised in support of the view that it should decline to exercise its jurisdiction: that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it was contended that such an opinion could undermine the scheme of the *'Roadmap'*, which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The Court observed that it was conscious that the 'Roadmap', which was endorsed by the Security Council, constituted a negotiating framework for the resolution of the Israeli-Palestinian conflict, but that it was not clear what influence its opinion might have on those negotiations. The Court found that it could not regard this factor as a compelling reason to decline to exercise its jurisdiction.

44. Returning to the Court's advisory opinion of 22 July 2010 in the *Kosovo* case,[39] the Court first addressed the question whether it possesses jurisdiction to give an advisory opinion as requested by the General Assembly. The Court referred to Article 65, paragraph 1 of its Statute and noted that the General Assembly is authorized to request an advisory opinion by Article 96 of the United Nations Charter. The Court also recalled Article 12, paragraph 1 of the United Nations Charter providing that, '*[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the . . . Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'* The Court observed, as it has done on an earlier occasion, that *'[a] request for an advisory opinion is not in itself a "recommendation" by the General Assembly "with regard to [a] dispute or situation" '.*[40] Accordingly, the Court pointed out that while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion, it does not in itself limit the

[39] *Kosovo* Case *Op. Cit.* p. 403 paras. 18-28.
[40] *Construction of a Wall* Case *Op. Cit.* p. 148 par. 25.

authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. The Court noted that the question put by the General Assembly asked whether the declaration of independence to which it refers is *'in accordance with international law'*. A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appeared to be a legal question. In that matter, the Court ruled that it had jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

45. South Africa submits that the fact that there may be contentious issues (including that the matters concern a legal question actually pending between States, or that no consent has been given by an affected State) does not prevent the Court from exercising its jurisdiction in light of the above.

Res Judicata

46. *Res judicata,*[41] means that a particular issue before the Court was disposed of finally and without possibility of revision in proceedings affecting the same general subject-matter. *Res judicata* may be contemplated in the present matter as there was a Tribunal award of 18 March 2015 in the matter between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[42]

47. The Tribunal decided unanimously that in establishing a Marine Protected Area surrounding the Chagos Archipelago the United Kingdom breached its obligations under certain Articles of UNCLOS based on undertaking made by the United Kingdom. The Tribunal further found that the commitment to return the Chagos Archipelago to Mauritius is binding under international law.[43]

48. Despite two arbitrators holding in their Dissenting and Concurring Opinion that the *'excision'* of the Chagos Archipelago from Mauritius in 1965 showed a *'complete disregard for the territorial integrity of Mauritius by the United Kingdom'*,[44] the majority

[41] Brownlie I *Principles of Public International Law* 7th ed 2008 Oxford p. 473.
[42] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* PCA Case No. 03/2011.
[43] *Ibid.* paras. 448 and 547.
[44] *Ibid.* See the *Dissenting and Concurring Opinion* of Judge Kateka and Judge Wolfrum at par. 91.

declined to exercise jurisdiction over this question that relates to the separation of the Chagos Archipelago and the legal consequences thereof.[45]

49. The Tribunal did not consider the question of the completion of decolonization of specifically issues relating to decolonization, self-determination and territorial integrity and the consequences of the separation in international law. Therefore, the Tribunal award cannot be raised in the context of *res judicata* to exclude the jurisdiction of the Court.

Discretion of the Court to Exercise Jurisdiction

50. Article 65, paragraph 1 of the Statute confers a discretion on the Court, namely that the Court may give an advisory opinion on any legal questions at the request of whatever body that may be authorized by or in accordance with the Charter of the United Nations to make such a request.[46]

51. Article 65 must be read with Article 68 of the Statute which notes that, in the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable, and also with Article 102, paragraph 2 of the Rules of Court which indicate that the Court shall, above all, consider whether the request for an advisory opinion relates to a legal question actually pending between two or more States in being guided by the Statute and the Rules.

52. If the advisory opinion is requested upon a legal question actually pending between two or more States, the rights contained in Article 31 of the Statute regarding judges *ad hoc* must be afforded to the affected State and the Rules relating to that Article will apply. In so doing, the Statute makes express provision for the possibility of advisory proceedings that may also be contentious, and includes safeguards to secure the interests of States that may potentially be affected.

[45] *Ibid.* par 221.
[46] On the discretionary nature of the Court's powers see the *Interpretation of Peace Treaties* Case *Op. Cit.* p. 72; *Reservations to the Genocide Convention* case ICJ Reports 1951 p. 19; *Certain Expenses* Case *Op. Cit.* p. 155.

53. The discretion that is afforded to the Court in Article 65 of the Statute implies that there are situations wherein the Court may decline to exercise jurisdiction. Instances where judgments would be devoid of object or purpose, or be remote from reality or incapable of effective application have been regarded as instances wherein the Court should not exercise its discretion, including in advisory opinions.[47] The Court has also indicated that reasons must be compelling for it not to exercise jurisdiction.[48]

54. In relation to the discretionary power of the Court to exercise its jurisdiction, the Court noted in the *Construction of a Wall* Case that it has been contended that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.[49] The Court first recalled that Article 65, paragraph 1 of its Statute, which provides that *'The Court may give an advisory opinion ...',* should be interpreted to mean that the Court retains a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met. The Court was 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'.* From this it followed that, given its responsibilities as the *'principal judicial organ of the United Nations'* (Article 92 of the United Nations Charter), the Court should in principle not decline to give an advisory opinion, and only 'compelling reasons' should lead the Court to do so.[50]

Conclusion on Jurisdiction

55. South Africa's submission is that the Court is empowered to exercise jurisdiction over legal questions submitted to it by the United Nations General Assembly. For the reasons stated above, the fact that there may be political implications, domestic matters or contentious issues does not, in South Africa's submission, prevent the Court from exercising its jurisdiction.

[47] *Nuclear Test Cases* ICJ Reports 1974 pp. 271 and 476-77; *Northern Cameroons* Case ICJ Reports 1963 p. 30.
[48] *Nuclear Weapons* Case *Op. Cit.* p. 235.
[49] *Ibid.* pp. 156 to 64 paras. 43-65.
[50] *Ibid.* p.156 par. 44.

56. In the event that the Court considers a contentious issue being present that may affect a State, it is for the Court to invoke Articles 65 and 68 of the Statute, and Article 102, paragraph 2 of the Rules of Court, and adapt the proceedings accordingly. Even if the Court were to find that advisory opinion concerns a legal question actually pending between two or more States, it is simply for the Court to invoke the Article 31 (of the Statute) rights regarding judges *ad hoc,* while the Court does not lose jurisdiction and is not faced with a bar to exercising jurisdiction.

57. The Tribunal award does not render the questions *res judicata* and there is no compelling reason for the Court to decline to give the advisory opinion as requested by the General Assembly. The Court has on several occasions stated that, although its power to give advisory opinions under Article 65 of its Statute is discretionary, only compelling reasons would justify refusal of such a request. It is South Africa's contention that the aforementioned request presents the Court with no such reasons.

58. For the reasons advanced above, South Africa submits that the Court should exercise its discretion in favour of providing an advisory opinion to the General Assembly.

- - - END SECTION III - - -

IV. STATEMENT OF LAW

General

59. While the main thrust of the questions referred to the Court by the General Assembly of the United Nations relate to the issue of decolonization and the legal effects of a failure to complete the process of decolonization, the underlying legal principles are of a cross-cutting nature that span across a number of areas of international law.

60. In the view of South Africa, the foundation of decolonization is giving effect to the *jus cogens* right of peoples to self-determination in accordance with the Declaration. Without self-determination, decolonization cannot be realized. In turn, self-determination is of little value without respect for the customary international law right to territorial integrity of the decolonized State. As a result of the failure to respect the territorial integrity of Mauritius, the Mauritian people have been prevented from fully exercising their right to self-determination in their own territory.

61. Although South Africa does not intend to make submissions on all the issues placed before the Court for consideration, South Africa will focus on the following:

a. With regard to Question 1, the legal position in respect of the issues of self-determination, independence, sovereignty and territorial integrity (as an aspect of decolonization) and the effects of the non-respect for territorial integrity will be highlighted.

b. With regard to Question 2, general comments about State responsibility and reparations in terms of international law will be made.

Question 1: Self-determination and Territorial Integrity

62. The right to self-determination is a basic right in international law. It is inextricably linked to the concepts of independence and sovereignty, and all these basic characteristics of a State can only be exercised on a territorial basis. Self-determination as a political concept appeared in the time after the First World War, in treaties for the

protection of minorities, in the mandates system[51] and in claims by nations for self-determination after the implosion of the Austrian-Hungarian and Ottoman Empires.[52] The concept of self-determination was included in the Charter of the United Nations. Article 1, paragraph 2 provides that one of the organisation's purposes is the development of friendly relations among nations based on the principle of equal rights and self-determination of peoples, while Article 55 deals with the ways in which the organization should create the conditions necessary for peaceful and friendly relations among states, based on the respect for the principle of equal rights and self-determination of peoples. The inclusion of the concept of self-determination in the Charter as a principle and not a legal right, however, marks the beginning of a process that led to the crystallization of a legally enforceable right: "Despite the fact that self-determination in the Charter is referred to 'only' as a "principle" and not as a legal right, its appearance in a conventional instrument establishing an international organization which would be open to universal membership was a very important step in the evolution of self-determination into a positive right under international law".[53] Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights confirms the right of peoples to self-determination. It has furthermore been confirmed in numerous Resolutions of the United Nations, most notably General Assembly Resolution 1514 (XV) on the Declaration of Granting of Independence to Colonial Countries and Peoples and General Assembly Resolution, 2625 (XXV) on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

63. Shaw notes that while there may be some uncertainty as to whether self-determination was a legal right when it was included in the Charter, subsequent practice within the United Nations since 1945 have established *"the legal standing of the right in international law"*,[54] and that such a right existed by the time of the adoption of Resolution 1514(XV)[55] in 1960 and the International Covenants in 1966. Consequently,

[51] Shaw MN *International Law* 7ed 2014 Cambridge University Press p. 183.
[52] Pedersen S *The Guardians: The League of Nations and the Crisis of Empire* 2017 Oxford University Press p. 400.
[53] Raic D *Statehood and the Law of Self-Determination* Doctoral Thesis, University of Leiden 2002 p. 200.
[54] Shaw 7ed *Op. Cit.* pp. 183 to 84.
[55] See *'The Magna Carta of Decolonization'* in Strydom H (ed) *International Law* 2016 Oxford University Press p. 50.

self-determination as a legal right which could be violated, clearly existed by the time of Mauritian independence in 1968. Furthermore, self- determination has been stated to be a *jus cogens* right both by this Court[56] and by the International Law Commission.[57]

64. It is further submitted to this Court that the right to self-determination goes hand in hand with the customary law principle of territorial integrity. In South Africa's view, obtaining the right to self-determination and consequently achieving independence, would be worthless without territory in which to realize that right. Within the context of decolonization such territory must necessarily be the whole territory that was under colonial rule and which includes the Chagos Archipelago in the present instance.[58]

65. It is submitted that when the territorial integrity of a State or territory is violated, it necessarily limits and thereby violates the right of the affected peoples to self-determination. Not only does it negatively affect a peoples' ability to realize their right to self-determination, both internally and externally, but furthermore results in independence and sovereignty being exercised on an incomplete territorial basis. International law is clear on this point: Shaw notes that *"…the outstanding characteristic of a state is its independence"* which in international law implies rights and duties, including the right of a state to exercise jurisdiction over its territory and permanent population.[59] Judge Huber, in the *Islands of Palmas* arbitration, held that *"independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of another state, the functions of a state."*[60] Mauritius cannot exercise jurisdiction and state functions over the Chagos Islands to the exclusion of another State; the detachment of the Chagos Islands therefore means that the independence of Mauritius and the exercise of sovereignty over its territory is incomplete and in clear violation of a basic international law rule relating to statehood. Furthermore, the

[56] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Reports 1970 p. 3, but see the separate opinion of Judge Ammoun on pp. 301 to 304 at par. 11.
[57] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law par. 33, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (accessed on 16 January 2018); Also see the *East Timor (Portugal v Australia)* case ICJ Reports1995) where the Court stated that 'Portugal's assertion that the right of people's to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable' at p. 90 and that the right of peoples to self-determination was 'one of the essential principles of contemporary international law' at p.102.
[58] United Nations Charter, Article 1(2) and Article 2(4).
[59] Shaw 7ed *Op. Cit.* pp.153 to 54.
[60] 2 RIAA p. 829 (1928) at p. 838.

illegality of the detachment of the Chagos Islands from Mauritius does not fall under any of the international law exceptions where a foreign State may maintain rights over the territory of another State (like leases, servitudes,[61] condominium, international administration); neither is the Chagos Islands a protectorate or a protected State.[62]

66. It should be emphasized that the principle of territorial integrity is also inextricably linked to the principle of decolonization. As stated in the Declaration: *'[…] all peoples have an inalienable right to […] the integrity of their national territory'* and further that *'the integrity of [the national territory of dependent peoples] shall be respected"* and that *'[a]ny 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'*.

67. The right to territorial integrity is a customary international law right. This has been acknowledged by numerous United Nations General Assembly resolutions, as well as by this Court and by several Member States of the United Nations in submissions to this Court.

a. Amongst other resolutions, General Assembly resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations that confirms the right of peoples to self-determination and, in this context, confirms the duty of States to refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. The principles enshrined in this resolution are then declared to be 'basic principles of international law',[63] and has been confirmed as forming part of customary international law by this Court in, *inter alia*, the *Kosovo* Case;[64]

b. This court, in the *Corfu Channel* Case stated that *'[b]etween independent States, respect for territorial sovereignty is an essential foundation of*

[61] O' Brien, J *International Law* 2001 Cavendish Publishing p.220.
[62] Shaw 7ed *Op. Cit.* pp. 157 – 167.
[63] General Assembly Resolution 2625 (XXV) of 24 October 1970 at par. 3.
[64] *Kosovo* Case *Op. Cit.* p. 403 par. 80.

international relations';[65] and

c. In proceedings regarding the request to this Court for an advisory opinion in the *Kosovo* Case, numerous Member States of the United Nations including Egypt, the People's Republic of China, Romania, Russia, the Swiss Confederation, the Slovak Republic, Spain and the United Kingdom expressed the view that the principle of territorial integrity forms part of customary international law.[66]

68. The United Nations declared the separation of the Chagos Archipelago from the remaining territory as a violation of the territorial integrity of Mauritius and a violation of the Declaration as early as 1965 in General Assembly resolution 2066 (XX) on the Question of Mauritius dated 16 December 1965. The United Nations General Assembly has also stated in both General Assembly resolution 2232 (XXI) and General Assembly resolution 2357 (XXII) 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)'*.

69. The intention of the colonizing authority to separate the Chagos Archipelago from Mauritius for the purpose of establishing a military base on Diego Garcia is clear from historical documents and have been accepted as a fact by the United Kingdom's domestic courts. In *Regina v Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*,[67] Justice Gibbs, in his concurring opinion states that '*[i]t is beyond argument that the purposes of the [British Indian Ocean Territory Order 1965 that separated the Chagos Archipelago from Mauritius] were to facilitate the use of Diego Garcia as a strategic military base and to restrict the use and occupation of that and other islands within that territory to the extent necessary to ensure the effectiveness and security of the base*'.[68]

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[65] *Corfu Channel*, *United Kingdom v Albania* Judgment 1949 ICJ Reports 4 (09 April 1949) p. 35.
[66] *Kosovo* Case *Op. Cit.* p. 403; See the written statements of Egypt (part 3 par. 51 and part 4 par. 64); the Swiss Confederation (par. 58); Romania (part 3 paras. 63 and 72); Slovak Republic (part B); People's Republic of China (part II par. (a)); Spain (part II); Russia (part III); and the United Kingdom (Chapter 5 par. 5.8).
[67] *Regina v Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult* [2001] Q.B. 1067.
[68] *Ibid.* p. 1106.

70. The Court, on the issue of the violation of the right to territorial integrity, described the principle underlying the maintenance of territorial integrity in the context of decolonization, namely the principle of *uti possidetis*, in the case concerning the *Frontier Dispute (Burkina Faso/Mali)* [69] as among the most important legal principles. *Uti possidetis juris* has been defined as follows by the Court: *'Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.'*[70] Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.

71. The principle of *uti possidetis* can be described as the concept that 'states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence'[71]. *Uti possidetis* was first described as a 'principle' of law in the dissenting opinions of Judges Armand-Ugon and Moreno Quintana as part of the judgment of this Court in the *Sovereignty over Certain Frontier Land (Belgium v Netherlands)* matter in 1959.[72]

72. Despite only first being acknowledged by this Court in 1959, the principle of *uti possidetis* has developed and has been consistently applied since the beginning of the 19th century.[73] The principle was first applied in Spanish America at the time of the decolonization of Spanish American States and was subsequently also applied in Africa during the African continent's process of decolonization.

73. The general and intertemporal nature of the principle of *uti possidetis* has been emphasized by this Court itself in the *Frontier Dispute* Case in emphasizing that the application of the principle in the African context cannot be seen as a practice

[69] *Case concerning the Frontier Dispute (Burkino Faso/Mali)* Judgment 1986 ICJ Reports p. 565.
[70] *Ibid.* p. 565 par. 20.
[71] Crawford *Brownlie's Principles of Public International Law* 8th ed at p. 238.
[72] *Sovereignty over Certain Frontier Land (Netherlands v Belgium)* 1959 ICJ Reports 209 at pp. 240 and 255 respectively; Also see the Dissenting Opinion of Judge Armand-Ugon p. 233.
[73] *Frontier Dispute* Case *Op. Cit.* p. 565 par. 20 - 21.

contributing to the gradual emergence of a principle of customary international law, but the application of an already established principle of general scope within the African context.[74]

74. Therefore, the principle of *uti possidetis* was already established as a general rule of international law at the time of the decolonization of Mauritius and of the separation of the Chagos Archipelago from Mauritius.

75. Consequently, regardless of where boundaries existed before colonization, at the time of decolonization, boundaries should remain as they were. In this case, it would be the submission of South Africa that Mauritius was administered by both France and the United Kingdom as a territorial unit that included the Chagos Archipelago. At the time of decolonization, the legitimate territory of the newly independent Mauritius included the Chagos Archipelago.

76. International law does make provision for one exception to the principle of *uti possidetis*, namely where there is an agreement between States to deviate from the principle. The Arbitration Commission established by the Conference on Yugoslavia, in its opinion No. 2 of 1992 held that *'whatever the circumstances, the right to self-determination must not involve changes to existing frontier[s] at the time of independence* ***except where the States concerned agree otherwise****'* (own emphasis).[75]

77. It is understood that there may be factual disputes about the validity under international law of the agreement reached between the United Kingdom and Mauritius in 1965 regarding the separation of the Chagos Archipelago from Mauritius. South Africa does not have any first-hand information on how that agreement was concluded and can therefore not assist the Court in determining whether or not the exception to the principle of *uti possidetis* would find application *in casu*. In the view of South Africa, this question should be addressed by States that have access to information that would assist the Court in making this assessment.

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[74] *Ibid.* 565 par. 21.
[75] *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia* 31 I.L.M 1488 (1992), Opinion No. 2 at par. 1.

78. Therefore, South Africa submits that the detachment of the Chagos Archipelago from Mauritius was done in violation of the principle of *uti possidetis* and violates the rights of Mauritius to self-determination.

Question 1: Human Rights Effects of the Violation of Territorial Integrity

79. Over and above the impact that the failure to decolonize the Chagos Archipelago has had on the right to self-determination of Mauritius, the human rights impact on individuals can most clearly be seen in the forced displacement of the entire civilian Chagossian population from 1965 – 1973 by the United Kingdom.[76]

80. The situation of the Chagossian population is unique in that the forced removal of the population from the Chagos Archipelago to, largely, Mauritius, started in 1965 when Mauritius was still a colony of the United Kingdom and only ended in 1973, but the Chagos Archipelago had been detached and was still under the rule of the United Kingdom after the independence of Mauritius in 1968. The forced removals therefore started as being from one part of a territory to another part within the same territory and ended as forced removals across an international border (even if the legitimacy of that border may be contested in these proceedings).

81. International human rights law is very clear in its condemnation of forced removals of people. Article 13, paragraph 1 of the Universal Declaration of Human Rights guarantees the right to freedom of movement and residence within the borders of a State, while Article 12 provides that no one shall be subjected to arbitrary interference with their privacy, family, home or correspondence. Article 12, paragraph 1 of the International Covenant on Civil and Political Rights declares that everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose their residence within that territory, while Article 12, paragraph 4 provides that no one shall be arbitrarily deprived of the right to enter their own country.

[76] Nauvel C *A Return from Exile in Sight – The Chagossians and their Struggle* 5 Northwestern University Journal of International Human Rights 2006 at pp. 96-100.

82. The European Court of Human Rights, in the case of *Cyprus v Turkey*[77], which shares similarities with the matter currently before the Court, found *inter alia* that the forced displacement of Greek-Cypriot nationals resulting from the Turkish military operations in northern Cyprus in July and August 1974 and the refusal of Turkey to allow the displaced to return to their homes, only allowing visits on very strictly regulated conditions, constitutes a violation of Article 8 (Right to Respect for Private and Family Life) of the European Convention on Human Rights.[78] It should be noted that, on the same facts, the European Commission on Human Rights did not make a distinction between whether or not persons were displaced within the same territory or displaced across different territories in finding the refusal to allow the displaced persons to return to their homes to be a violation of the European Convention on Human Rights.[79]

83. South Africa, too, faced strong international criticism and condemnation of its Apartheid policy of forcibly removing black people from one part of South Africa to another to further its racially discriminatory goals.[80] Learning from our past experience, South Africa cannot but agree with those courts and organisations that have found that forced removals of persons, whether within one territory or across international borders, constitutes a continuing violation of international human rights law.

84. South Africa submits that such a violation of the human rights of persons of Chagossian descent who suffered from the effects of the forced displacement policy of the United Kingdom *vis-à-vis* the Chagos Archipelago constitutes a continuing injury and may open the door for a claim for further reparations in the context, as addressed below.

Question 2: Consequences under International Law

85. The consequences under international law arising from the continued administration of the United Kingdom of the Chagos Archipelago is that the process of decolonization has not been completed. Such continued administration has a 'knock-on' effect in the

[77] *Cyprus v Turkey* ECHR Application number 25781/94, Judgment dated 10 May 2001, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-59454"]} (accessed on 15 January 2018).
[78] *Ibid.* at par. 175.
[79] *Cyprus v Turkey*, App. Nos. 6780/74 and 6950/75, 4 Eur H.R. Rep 482 pp. 519 to 20.
[80] See, *inter alia*, General Assembly Resolution 2775(XXVI) dated 29 November 1971 at Part E; General Assembly Resolution A/RES/38/39 dated 5 December 1983 at par. 11 and General Assembly Resolution A/RES/39/72 dated 13 December 1984 at par. 4

sphere of human rights as indicated above, and in the sphere of State responsibility as indicated below. However, as a separate consequence, the foremost is that there is an obligation on the United Kingdom to complete the decolonization of Mauritius, and a concomitant right on the part of Mauritius to see its right to self-determination and territorial integrity fulfilled and respected.

86. Although the present matter concerns an advisory opinion and is not a contested matter between States, a finding of a violation of human rights by the United Kingdom may still give rise to State responsibility for that violation. It is not necessary for the Court to make a specific finding in a contested matter for State responsibility to arise or to be declared in an advisory opinion. In international law, whenever a State commits an internationally unlawful act against another State as may be present in this case, international responsibility may arise.[81]

87. The existence of State responsibility is dependent upon the presence of an international legal obligation existing between two States; an act or omission by a State that violates the international legal obligation and that is imputable to the responsible State; and loss or damage resulting from such act or omission. In the event that an international obligation is breached, reparations may be required.[82]

88. Reparations may take the form of restitution, compensation and satisfaction, either separately or in combination to the injured State by the responsible State.[83] In instances where the injury entails the serious breach of a peremptory norm of international law (*jus cogens*), such as the maintenance of colonialism by force in violation of the *jus cogens* right to self-determination, may be regarded as extraordinarily injurious.[84]

89. It is South Africa's submission that the clear consequence of the violation of the right

[81] Shaw MN *International Law* 6ed 2008 Cambridge University Press p. 778; Yearbook of the ILC, 1972, vol. II, 169-70.
[82] *Spanish Zone of Morocco Claims* 2 United Nations Reports of International Arbitral Awards at 615 (1923); *Chorzów Factory* case PCIJ Series A No. 17 1928 at 29, 47 -8; *Corfu Channel* Case *Op. Cit.* pp. 4 and 23; Articles 1 and 2 of the International Law Commission's Articles on State Responsibility; *Gabčkovo-Nagymaros Project* case ICJ Reports 1997 pp. 7 and 80; *Genocide Convention (Bosnia v Serbia)* Case 2007 ICJ Reports par. 460; *M/V Saiga (No. 2)* 120 ILR pp. 143 and 199.
[83] Article 3 of the International Law Commission's Articles on State Responsibility.
[84] Shaw 6ed *Op. Cit.* p. 807.

to self-determination and the principle of territorial integrity is that the decolonization of Mauritius must be completed.

90. With respect to violations of international human rights norms, South Africa refers the Court to the concluding observations of the United Nations Human Rights Committee on the reports submitted by the United Kingdom dated 29 October 2001 which indicated that the United Kingdom accepted that its prohibition of the return of the Chagossians who had left or been removed from the territory was unlawful. The Human Rights Committee also encouraged the United Kingdom to seek to make the exercise of the Chagossians' right to return to their territory practicable by considering compensation for the denial of this right over an extended period.[85]

91. Further, on 30 July 2008, the concluding observations of the United Nations Human Rights Committee on the reports submitted by the United Kingdom again noted that the United Kingdom should ensure that the Chagossians can exercise their right to return to their territory, and should consider compensation for the denial of this right over an extended period, but with due consideration of compensation already paid.[86]

92. It is therefore South Africa's submission that the first consequence of the non-completion of the decolonization of Mauritius is the obligation on the administrating authority to complete the decolonization of Mauritius. It is South Africa's further submission to the Court that appropriate reparations in terms of international law should be considered for the violations of international law suffered both by Mauritius and the Chagossian people.

- - - END SECTION IV - - -

[85] Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/CO/73/UK (2001) at par. 38.
[86] Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/CO/GBR/6 (2008) at par. 22.

V. CONCLUSION

93. The advisory opinion of the Court in the present matter will be delivered at the intersection of decolonization, self-determination, independence, sovereignty, territorial integrity, human rights and an international community trying to overcome a tragic history in order to realize the hopes and aspirations of a future where all States are truly equal and all the vestiges of colonialism have been permanently removed and addressed.

94. In moving toward that hopeful future, it is South Africa's submission to the Court that the process of decolonisation of the former colony of Mauritius has not been completed, resulting in a violation of the rights to self-determination and territorial integrity. The United Nations has rightly devoted much energy and attention to the issue over many years, and with the Court being the principal judicial organ of the United Nations, it cannot but do its utmost – within the parameters of the law – to assist the United Nations to deal with the issue decisively.

95. What makes the present matter even more important is that the violation of rights of States and the human rights of persons are of a continuing nature, and the international community is dependent on the Court exercising its powers in a manner that will support the movement toward eradicating the remaining vestiges of colonialism and protecting those left without a voice due to the injustices of colonialism.

96. The United Nations General Assembly has a continuing obligation to complete the process of decolonization of Mauritius, and to fulfil this function, it would benefit from an advisory opinion from the Court. The Court will, by giving the opinion and notwithstanding the outcome, also contribute to the legal understanding of a very important international law issue that the international community is obliged to advance, and contribute to the eradication of tragic consequences of colonialism and advancement of human rights.

97. The United Nations General Assembly is competent to refer the matter to the Court, while the Court is competent to exercise jurisdiction over the matter. Political implications, domestic matters or contentious issues do not, prevent the Court from

exercising its jurisdiction, and there are no compelling reasons for the Court to decline to give an advisory opinion on the legal questions posed on issues that cannot be regarded as being *res judicata.* It is therefore submitted that the Court should exercise jurisdiction in the present matter.

98. For the reasons stated in Part IV above, South Africa submits that the Court should find that –

a. the process of decolonization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius; and

b. the consequences arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago include that the continued unlawful colonization of the Chagos Archipelago (notwithstanding the right of Mauritius to completely attain self-determination in a territorial sense as well) and the continuing denial of the right of return to their homes of Chagossians constitutes an international wrongful act for which responsibility and liability exists, which must be reversed, and for which reparations may be required.

ON BEHALF OF THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA

DATE: