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

(Request for advisory opinion)

Written comments

addressed to the

International Court of Justice

by the

Republic of the Marshall Islands

in accordance with
the order of the Court
of 17 January 2018

I. INTRODUCTION

1. On 22 June 2017, the General Assembly of the United Nations adopted resolution A/RES/71/292 in which, referring to Article 65 of the Statute of the Court of International Justice, it requested the Court to give an advisory opinion on the following conclusions:

(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 Britan 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 Request for an Advisory Opinion was transmitted to the Court by the Secretary-General of the United Nations in a letter dated 23 June 2017 which was filed with the Registry on 28 June 2017.

3. The Court fixed 1 March 2018 as the time-limit within which written statements on the question may be presented to the Court in accordance with Article 66, paragraph 2, of the Statute.

4. The Republic of the Marshall Islands wishes to avail itself of the possibility of furnishing a written statement and, in respecting the time limit fixed, submits the following considerations to the Court.

II. BRIEF REMINDER OF THE POSITION OF THE REPUBLIC OF THE MARSHALL ISLANDS

5. In the interest of transparency, the Republic of the Marshall Islands would like to recall briefly its position with regard to the Chagos Archipelago, prior to addressing the questions of the Court's competence, the appropriateness of the Court exercising it's jurisdiction, and, finally, the actual substance of the question submitted to the Court.

6. The Republic of the Marshall Islands has recognized and established diplomatic relations with the United Kingdom, as well as Mauritius.

7. On 22 June 2017, at the time of the vote of the General Assembly on Resolution 71/292, which is the origin of the request for an advisory opinion, the Republic of the Marshall Islands decided to vote yes.

8. As is known, Resolution 71/292 was adopted by the General Assembly with a vote of 95 member states voting yes, 15 member states voting no, and 65 member states abstaining.

9. The Republic of the Marshall Islands attaches the highest importance to public international law and the role of the International Court of Justice. The Republic of the Marshall Islands therefore wishes, to

the extent of its abilities, to help furnish elements needed to answer the question submitted to the Court. While not directly referenced by the Request of the General Assembly, the Republic of Marshall Islands recalls its own historical experiences, including as a subject of the League of Nations Class C mandate system, and as a UN Trust Territory, as the basis for the potential relevance and particular interest in this Opinion request.

10. The Republic of the Marshall Islands hopes that if the Court were to decide to provide the advisory opinion, that this would help further the multilateral understanding and discourse on decolonization, including within the General Assembly of the United Nations. The Republic of the Marshall Islands recognizes that there are both multilateral and bilateral aspects to the situation of Chagos, and does not view an Advisory Opinion as requested by the General Assembly as necessarily inconsistent with a continued foreign security presence at Chagos (which the Republic of the Marshall Islands supports).

III. PRELIMINARY CONSIDERATIONS

a) Competence of the Court

11. Article 65 of the Statute states that the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the UN Charter to make such a request. The request of the General Assembly in resolution 71/292 has been formulated to apply Article 96, paragraph 1 of the UN Charter, in which the General Assembly may request the Court to given an advisory opinion on any legal question.

12. The question has been put to the Court in legal terms, and the fact that this question also has political aspects does not deprive it of its legal nature, nor should the political implications be used to establish competence.[1]

13. In the opinion of the Republic of the Marshall Islands, the Court is competent to respond to the request.

b) Appropriateness of exercising its competence

14. The constant case law of the Court would reveal that only compelling reasons could prompt it to refuse a to reply to a request from the General Assembly.[2] The Court has never refused a request from the Assembly.

15. The question which the General Assembly put to the Court is not only limited to a purely bilateral dimension – even as the overall political issue of the Chagos situation has important (if not key) bilateral aspects. Rather, the precise question posed to the Court also has a much wider framework, and is of more general interest to the United Nations, and in particular to relevant issues and agenda items within the UN General Assembly, in particular relating to multilateral aspects of decolonization. As in the Namibia case, it is worth recalling the Court's statement in it's Advisory Opinion on

1 *Advisory Opinion on the Threat or Use of Nuclear Weapons* I.C.J. Reports 1996 pp 233, para 13*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* I.C.J. Reports 2004, pp 155f, para 41

2 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) not withstanding Resolution 276 (1970) of the Security Council Advisory Opinion* I.C.J. Reports 1971 pp 27, para 40

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, that "the object of this request for an Opinion is to guide the United Nations in respect of its own action."[3] As detailed further in this statement, there are important aspects of the questions which are of multilateral character; that is, they are directly relevant to a wider multilateral process which was historically, and which is still, the subject of dialogue within the General Assembly, even as the actual resolution of specific territorial disputes does not, and could not, take place through binding majority votes of the Assembly.

16. The Court may respond to the General Assembly's request without prejudice to the ultimate treatment of those aspects of the wider Chagos situation which are bilateral in nature, and which cannot be conclusively resolved with binding effect through an advisory opinion of the Court. There is a clear distinction between a contentious bilateral dispute brought before the Court by mutual consent for it's direct application of law, and an advisory opinion (which is not strictly binding) requested by a UN organ, wherein multiple States have differences in legal interpretation; for as the Court has observed "differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise."[4] The Republic of the Marshall Islands believes that an Advisory Opinion does not necessarily prejudge or predetermine any particular political outcome, either in bilateral or multilateral engagement. Such an Opinion is a tool for respective parties to consider closely in their deliberations, in his instance within the UN General Assembly, and it's subsequent treatment or utilization is readily distinguished from the treatment of the Court's engagement in contentious cases.

IV. PRINCIPLES OF DECOLONIZATION

a) Decolonization was not complete when territory was artificially or allegedly segmented during the decolonization process

17. The request from the General Assembly seeks an advisory opinion in reference to the process of decolonization, including in reference to specific General Assembly resolutions.

18. On 14 December 1960, Resolution 1514 was adopted by consensus by the General Assembly of the United Nations with a view to accelerate the decolonization process. This process was defined in the context of international law through "ordering principles", as described by Professor Edward McWhinney, to which all countries should follow in order to observe and respect the human rights of colonized peoples.[5]

19. The resolution stated in it's preambular section "that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[6] This issue was also addressed in Operative Paragraph 5 of the resolution, which stated that:

---

3 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion* I.C.J. Reports 1951 pp 19

4 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) not withstanding Resolution 276 (1970) of the Security Council Advisory Opinion* I.C.J. Reports 1971 pp 24 para 34

5 See, Introductory Note to the Declaration on the Granting of Independence to Colonial Countries and Peoples, at <http://legal.un.org/avl/ha/dicc/dicc.html>

6 A/RES/1514(XV)

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction to race, creed or colour, in order to enable them to enjoy complete independence and freedom.[7]

20. The phrase "freely expressed will and desire" can be interpreted in the context of the following operative paragraph 6, in which it is determined 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."[8] One may understand that the phrase "any attempt" addressed actions undertaken by administering authorities in the context of the decolonization process, which exploited an imbalanced relationship with colonized peoples and entities. This was further addressed in the subsequent Resolution 1654 was approved by the General Assembly in 1961. One preambular paragraph of the resolution stands out, in expressing concern over certain practices undertaken by administering authorities, contrary to the earlier Declaration, in which the General Assembly was:

> Deeply concerned that, contrary to the provisions of paragraph 6 of the Declaration, acts aimed at the partial or total disruption of national unity and territorial integrity are still being carried out in certain countries in the process of decolonization.[9]

21. It was clear that, in the view of the General Assembly, the process of decolonization was colored by certain actions of some administering authorities which generally advanced some degree or general measure of decolonization, but also shaped the terms of such outcomes to their own self-benefit in a manner which was contrary to the Declaration and the free expression of territorial integrity referenced therein.

22. The segmentation of Chagos, immediately prior (and in the course of) independence, would appear to rely on a rigid interpretation of uti possidetis, in which the boundaries fixed at the time of independence would be thereafter fixed, in the absence of any agreement otherwise, regardless of the circumstances in which that segmentation occurred. The Republic of the Marshall Islands poses that, when an administering authority or colonial entity was acting for it's own self-benefit (and not the responsibility of a "sacred trust" of such authorities referenced in the Declaration, in which the interests of colonial inhabitants were to be paramount), in undertaking such segmentation, decolonization was and is not necessarily complete.

23. The Court has previously addressed the principle of uti possidetis juris, generally defined as ensuring that newly created states followed the original boundaries of territorial entities.[10] The Court has referred to uti possidetis as "the 'photograph of the territory' at the critical date of independence"[11],

---

7 *Ibid.*

8 *Ibid.*

9 A/RES/1654

10 Shaw: "The principle of uti possedetis juris developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at their moment of independence and converting existing lines into internationally recognized borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions. It is also closely related to the principle of stability of boundaries and both draws upon and informs a variety of other principles of international law, ranging from consent and acquiescence to territorial integrity and the prohibition of the use of force against States." Malcom N. Shaw *The Heritage of States: principle of Uti Possidetis Juris today* in British Yearbook of International Law v. 67 Oxford University Press (1997) p.76

11 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* I.C.J. Reports 1986 pp 568 para 30

noting further that such establishment of a boundary depends closely on the consent of relevant States.[12]

24. However, it is important to place the principle of uti possidetis in context, that is, one which would preserve order and stability between and within newly established or recently decolonized states, and indeed the Court has noted that "its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing borders of frontiers following the withdrawal of the administering powers."[13] One commentator has noted that this principle was applied specifically to eliminate the clearly colonial concept of terra nullius (where a "land without owner" could be occupied and seized) where it was applied as legal justification for seizure of land occupied by less developed or so-called primitive peoples.[14] The application of uti possidetis cannot be read to justify seizure, or suspect allocation otherwise, to the inherent advantage of an administering authority. Indeed, such an application would appear to be wholly inconsistent with the expectations stated of the UN General Assembly, including within Resolution 1514, and with roots in the both the UN Trusteeship Process and League of Nations mandate system, wherein the written letter set forward eventual independence and development, as a distinct and obvious counterance of earlier colonial eras which primarily served to benefit and justify expansive empires. Even if, as is often the situation within the General Assembly, there remains disagreement or differing interpretations of outcomes, there is clear consensus that the new multilateral machinery of the 20th century was supposed to have advanced the interests of colonized communities in an unprecedented manner (even where these aspirations may have not always been met by actions).

25. Thus, if the application of uti possidetis is indeed anchored in a particular place and time, the context was to ensure stability between recently decolonized nations (including on common borders) and specifically to prevent – rather than further – the perpetuation of self-benefit of the colonizing entity. It was to be applied after the withdrawal of administering powers, and not before, nor as part of the process of the pre-independence alteration or segmentation of such territorial entities, when the administering power realized it's own self-benefit.

26. In a situation where portions of colonized territories were segmented before recognized independence, with portions conveniently falling into the pocket of the administering authority, international law would seek to not apply the principle of uti possidetis as a technical trap undertaken in a vacuum, but rather to examine the context of it's application as measured against the fulfillment of it's goals. A direct test would examine the application of this principle to see if it was intended to advance political stability between new or recently decolonized states, to prevent terra nullius seizure in instances of claims by existing indigenous peoples, or to perpetuate self-benefit of an administering authority? If indeed uti possidetis is considered to be a photograph at the time of independence, then examination of the photograph must reveal not only fixed geographic coordinates, but also the other subject matter of the portrait - the political context or circumstances in which the photograph was taken, or for whose benefit the photograph was intended. To read this any other way would be to simply perpetuate the extension of the very colonialism which this principle was intended to counter.

b) Heightened scrutiny should be afforded to apparent consent obtained in the process of decolonization

---

12 *Case Concerning the Territorial Dispute(Libyan Arab Jamahiriya/Chad)* I.C.J. Reports 1994, pp 25 para 51

13 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* I.C.J. Reports 1986 pp 565 para 20

14 Alan Frost "Chapter 11: Old Colonisations and Modern Discourse: Legacies and Concerns" (1992) Proceedings of the Inaugural Conference of the Samuel Griffiths Society

27. If uti possidetis indeed rests upon the free will of the sovereign states concerned at the time of its agreement, than more careful scrutiny is needed to examine the nature of consent granted during the process of achievement of independence. In particular to the process of decolonization with the involvement of an administering authority, while there may be documentation – which varies in specific situations – of apparent or alleged agreement between governments (or forms of governments) – the application of international law should not only consider the strict words of the agreement, but the context in which alleged consent was obtained.

28. Some of the historical roots of Resolution 1514 are found in the Mandate system established by the League of Nations, and gave eventual rise to the expectation that the process of decolonization was for the interest and benefit of the colonized, not the colonizer, and what was considered to be the "sacred trust" by the international community.[15] However, despite the progressive evolution of a multilateral character, and with it international law, such systems often served to prolong – rather than facilitate the end – of colonialism. Accordingly, the wider process of decolonization was fraught with actions by both multilateral institutions and administering powers which contradicted or overstretched the sacred trust of or benefit for all of humankind. These multilateral principles were extended more widely in Resolution 1514, to apply to decolonization generally.

29. As the Court recognized in the Namibia Advisory Opinion, even though South Africa's rights originated as a mandate power under the League of Nations (and by extension the UN Trusteeship system), the time was well over in which the allegedly benevolent civilized world stood as a paternal power to advance native interests; internationalized colonialism was ultimately colonialism nonetheless. As the Court stated in Namibia, "it is self evident that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own...".[16] In this regard, heightened scrutiny should be afforded apparent agreements in which this trust was - with obvious effect - not applied to fully benefit colonized peoples. "It cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose."[17] Consistent with the Namibia opinion, an construction or alleged agreement relating to the decolonization process would bear caution in it's subsequent examination, when the facts and circumstances indicate to an objective observer a moment of pause.

30. The dissenting and concurring opinion of Judges Kateka and Wolfram in the Chagos Marine Protected Area Arbitration noted that "there was a clear situation of inequality between the two sides" and that "Mauritius was economically dependent upon the United Kingdom"[18] which calls into question alleged consent obtained under duress. International law may seek to cast a wary eye, or apply heightened scrutiny or caution, in considering the validity of alleged consent obtained in the context of a decolonization process in which the administering authority acted for its own self-benefit, but was also charged with a "sacred trust" as addressed in the Declaration. In Burkina Faso, the Court relied on equity infra legem – equity used as a "method of interpret[ing] ...the law in force" or to adapt the law to the circumstances of individual cases.[19] As applied to the context of an administering authority

15 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) not withstanding Resolution 276 (1970) of the Security Council Advisory Opinion* I.C.J. Reports 1971 pp 31 para 54

16 *Ibid*. pp 28 para 46

17 *Ibid*. pp 30 para 50

18 *Dissenting and Concurring Opinion Judges James Kateka and Judge Rudiger Wolfram Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* Permanent Court of Arbitration 2015 p 19-20 paras 77-78

19 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* I.C.J. Reports 1986 pp 567-8 para 28

obtaining alleged consent to an agreement during the context of decolonization, including an agreement for territorial segmentation or compensation of any manner, one should closely examine the disparity between the colonized entity government and the administering authority, even when considered to be "full and final," both in relation to territorial integrity, and other issues addressed in the process of decolonization. This "wary eye" in the context of evaluating decolonization-era agreements relates to an understanding of international law which is not only contemporary, but was well known even at the time of the segmentation of Chagos. "Base values are pertinent to the task of interpretation since the relative equality or inequality of power, wealth, and other values is highly suggestive in evaluating the credibility of assertions about the expectations with which the parties concluded an agreement. Hence the proposed principle of assessing the value position of the parties."[20] In the case of Chagos, and in the case of wider decolonization – including it's rooting in multilateral trusteeship – the administering powers had both a higher responsibility entrusted in them, but also their own direct benefit. Uti possidetis was intended to reduce "fratricide" or ensure stability of newly independent nations – not to serve as a cover for pre-independence self-dealing by administering powers. Situations in which bargaining chips were dangled in the peaceful pursuit of independence, in extreme examples of disparity, point to inherent suspicion that such accompanying outcomes could be founded on desperation rather than a valid meeting of mutual expectations.

V. CONCLUSIONS

31. The Court has competence to answer the request, which has been framed in legal terms, and it is appropriate to do so as the question is relevant to the work of the General Assembly.

32. A situation wherein a territory was allegedly segmented - by or otherwise for the primary self-benefit of the administering authority, would be one in which decolonization is incomplete, as this would not address the concerns of the UN General Assembly and is contrary to the nature and reason for uti posseditus as preserving the stability of new states.

33. Heightened scrutiny should be afforded to certain outcomes achieved during the decolonization process, including those where there is a clear situation of inequality between the administering authority and colonized peoples.

20 Myres Smith McDougal. The interpretation of International Agreements and World Public Order principles of content and procedure. Yale University Press (1967) Pg. 387

Submitted 1 March 2018

_____
Mr. Caleb W. Christopher
Legal Adviser
Permanent Mission of the Republic of the Marshall Islands to the United Nations