INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT COMMENTING ON OTHER WRITTEN STATEMENTS

SUBMITTED BY

THE REPUBLIC OF CYPRUS

11 MAY 2018

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I. Introduction

1. The Republic of Cyprus considers the main points of principle applicable in the context of this request for an Advisory Opinion to be the following:

   (a) The principle of self-determination establishes continuing obligations for all Member States of the United Nations;

   (b) The principle of self-determination is applicable as it stands today;

   (c) The principle of self-determination had emerged as a rule of customary international law by 1960 at the latest;

   (d) The principle of self-determination contains a prohibition on excision of colonial territory prior to or at the time of independence.

II. Jurisdiction of the Court

2. The Republic of Cyprus reiterates its view that the Court has jurisdiction to render the Advisory Opinion requested by the General Assembly, and that there are no compelling reasons preventing the Court from exercising what essentially amounts to "its participation in the activities of the [United Nations] Organization", which "in principle, should not be refused".[1]

3. A number of Written Statements submitted to the Court, however, have taken the position that the question before the Court is actually a bilateral dispute, and therefore the Court should decline to exercise its advisory jurisdiction lest it circumvent the principle of consent to the judicial settlement of disputes.

4. As the Court's jurisprudence makes clear, the fact that a request for an Advisory Opinion refers to a legal question actually pending between States does not constitute a compelling reason for the Court to refuse to render the Advisory Opinion.[2] Further, matters of decolonisation are not of exclusively bilateral concern. As UN General Assembly Resolution 1514 (XV) (14 December 1960) indicates, these are matters which relate to the Purposes and Principles of the Charter of the United Nations, and which remain a continuing responsibility of the United Nations.

5. This is reflected in paragraph 6 of General Assembly Resolution 1514 (XV), which provides that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". The effect not only of that specific

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[1] *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania (Advisory Opinion, First Phase)* [1950] ICJ Rep 65 at 71. See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at 416; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 156.

[2] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 157–58; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at 24.

provision, and of that resolution in general, but of the General Assembly's competence over matters of decolonisation as a whole, is precisely to preclude the characterisation of those matters as being of 'purely bilateral' concern and to restore some semblance of balance of power between the administering power and the self-determination unit.

6. This is so even when discussing the question of validity of consent to detachment of part of the territory of a self-determination unit in an agreement between that self-determination unit and the administering power. Any consent in those circumstances, where one entity's independence is essentially, if implicitly, conditioned upon its simultaneous consent to whatever requirements the administering power establishes, is unlikely to be 'free', and at any rate is not a purely bilateral question. Moreover, any such ostensible consent cannot preclude the continuation of obligations relating to the lawful completion of the process of decolonisation, or deprive them of their universal character as a matter of importance and interest to the community of States as a whole, and as a matter falling within the scope of competences of the United Nations General Assembly.

7. There is thus no compelling reason for the Court to refuse to exercise the jurisdiction that it undoubtedly has to respond to the questions put to it by the General Assembly.

III. The Principle of Self-Determination

The Principle of Self-Determination is a Continuing Obligation

8. Certain Written Statements seek to separate the two questions addressed to the Court by the General Assembly, and portray the first question as one requiring the determination of the content of the principle of self-determination as it may have stood in the 1960s, or more specifically in 1968 and/or 1965. However, the question before the Court refers to the lawful completion of the *process* of decolonisation. Decolonisation is a process, not a single act; and until the process is entirely completed it generates continuing obligations for both the administering State and the international community of States as a whole, intertwined as it is with the principle of self-determination. This is also highlighted by the second question addressed to the Court by the General Assembly, which is not conditioned on any specific response to the first question. As such, the two questions are to be read together, each one informing the other.

9. As the Republic of Cyprus stated during the debates on General Assembly Resolution 1514 (XV), "[t]he principle of self-determination [is] ... the cornerstone of the United Nations and the master key of the Charter."[3] This undoubtedly continues to be so; and as such it is the content of the principle of self-determination as it stands today that

[3] Official Records of the United Nations General Assembly, 15th session, 945th plenary meeting, UN Doc A/PV.945 (1960), para 87.

ought to be determined and applied by the Court in responding to the questions put to it by the General Assembly.[4]

10. The principle of self-determination was enshrined in Article 1(2) of the UN Charter in 1945 as a "Purpose" of the United Nations, "giving the political principle that had been so disputed since the nineteenth century a clearly programmatic character for the new Organization", as the Simma *Commentary* on the Charter puts it.[5] That is, the principle was, and remains, a legal principle to which UN Member States are committed and by which their conduct is directed. The principle indisputably binds them legally as a treaty obligation, quite apart from its status as a principle of customary international law. Again, as the Simma *Commentary* puts it:

> "Although Art. 1(2), due to its programmatic character, cannot define in detail the content and scope of a right to self-determination, it sets forth beyond dispute that it forms part of the law of the Charter and is binding upon all members of the UN."[6]

11. The Republic of Cyprus takes the position that the first and most important point in answering the Request for the Advisory Opinion should be that self-determination is, and has been since 1945, an "elementary structuring principle of the legal world order created by the UN Charter."[7] It was and is binding upon the United Kingdom, as on all other UN Member States; and the United Kingdom, along with all other UN Member States, is under a continuing and—by virtue of Article 103 of the UN Charter—supreme obligation to act in accordance with that principle. It is recalled that, according to Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

12. The principle of self-determination creates enforceable legal obligations, irrespective of whether self-determination is (and was at different times) better characterised as a "principle" or as a "right"—a matter to which a number of Written Statements devoted significant attention. Self-determination is a principle with normative consequences: UN Member States must act in conformity with it.

13. The core principle of self-determination remains a "Purpose" of the United Nations and a basic Principle of the UN Charter. Its implementation is currently monitored by the UN Special Committee on the Situation with regard to the Implementation of the

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[4] On the duty to comply with international law as it evolves see the statement of Arbitrator Huber in *Island of Palmas Case (Netherlands v United States) (Award)* (1928) II UNRIAA 829 at 845: "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subje[c]ts the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law".

[5] B Simma et al, *The Charter of the United Nations: A Commentary* (3rd edn., 2012), p. 315.

[6] B Simma et al, *The Charter of the United Nations: A Commentary* (3rd edn., 2012), p. 316.

[7] B Simma et al, *The Charter of the United Nations. A Commentary* (3rd edn., 2012), p. 315.

Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the Special Committee on Decolonization, or Committee of 24).[8]

14. International law recognizes two situations where the right to self-determination clearly accrues: (a) where a people are subject to colonial rule and (b) where a people are subject to alien subjugation, domination or exploitation outside a colonial context. This is codified, *inter alia*, in paragraph 1 of General Assembly Resolution 1514 (XV), as well as in General Assembly Resolution 2625 (XXV), and also recognised and confirmed by, *inter alia,* the Supreme Court of Canada in the case of *Reference re Secession of Quebec* [1998] 2 SCR 217 (at paragraphs 132–133). The principle of self-determination includes the right to territorial integrity (on which see further paras 20–26 below). The principle of self-determination is widely regarded as having the status of *jus cogens* (on which see further para 19 below).

The Principle of Self-Determination Applies as it Stands Today

15. Member States of the United Nations are under a continuing and supreme duty under the UN Charter to pursue and implement the principle of self-determination. The essence of the principle of self-determination is that it persists until such time as it has been fully realised; and an administering State can be called upon to implement, or continue or complete the implementation of, the principle as it then stands, at any time.

16. The Republic of Cyprus accordingly considers that the questions put by the General Assembly require the Court to give an Opinion based on the law as it stands today, reflecting the continuing obligations in relation to self-determination and decolonisation under international law. Such determination does not require the retrospective application of 2018 law to conduct which occurred in the 1960s; rather it requires consideration of the present obligations of (current and former) administering States.[9] In the current advisory proceedings, that means that the absence of continuing consent to the excision and/or the administration of a parcel of territory from an area granted independence in the 1960s triggers the obligation today to give effect to the principle of self-determination in relation to that excised parcel of territory, including by entering into negotiations aimed at resolving its future status.

The Principle of Self-Determination is Established in Customary International Law

17. The Republic of Cyprus considers that the principle of self-determination has long been established as a principle of customary international law, in addition to its status

[8] See < https://www.un.org/en/decolonization/specialcommittee.shtml >.

[9] See, e.g., the Separate Opinion of Judge ad hoc Franck in *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v Malaysia) (Application by the Philippines for Permission to Intervene)* [2001] ICJ Rep 575 which stated at 655: "Under traditional international law, the right to territory was vested exclusively in rulers of States. Lands were the property of a sovereign to be defended or conveyed in accordance with the laws relevant to the recognition, exercise and transfer of sovereign domain. In order to judicially determine a claim to territorial title *erga omnes*, it was necessary to engage with the forms of international conveyancing, tracing historic title through to a critical date or dates to determine which State exercised territorial sovereignty at that point in time. Under modern international law, however, the enquiry must necessarily be broader, particularly in the context of decolonization. In particular, the infusion of the concept of the rights of a 'people' into this traditional legal scheme, notably the right of peoples to self-determination, fundamentally alters the significance of historic title to the determination of sovereign title."

as a Charter obligation of UN Member States. Substantial support for this view can be found in general terms in the State practice of the 1950s in moving towards decolonisation. Admittedly, the practice in relation to self-determination from 1945 to 1960 was essentially the practice of States that were anyway bound by their obligations under the Charter to pursue the principle of self-determination; and practically all administering States were UN Members throughout this period.[10] While compliance with a Charter obligation may not in itself reveal the *opinio juris* necessary to establish self-determination as a principle or rule of customary international law as distinct from its status as a principle binding under the UN Charter,[11] the language of many relevant General Assembly Resolutions during this period should be taken into account as a reflection of the relevant *opinio juris* of States.[12] In particular, UNGA Resolution 1514 (XV) of 1960, perhaps the most important in that line of Resolutions, was couched in clearly normative terms, declaratory of legal rules.

18. There is thus a body of practice and *opinio juris* that for practical purposes puts the legal validity and general acceptance of the principle of self-determination beyond doubt. The Republic of Cyprus considers that the principle of self-determination had emerged as a rule of customary international law by 1960 at the latest, in which year it was reflected in Resolution 1514 (XV) and 17 newly-independent States joined the UN.[13] By that year the legal potency of the principle had been irreversibly established.

19. It is widely accepted that the principle of self-determination has the status of a peremptory norm of international law,[14] with the consequences (among others) that no State can except itself from the obligation to implement the principle when called upon to do so by a 'people' duly invoking the right to self-determination, that no

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[10] Among administering States Italy, Portugal and Spain became UN Member States in 1955.

[11] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3 at 41, 43; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment (Merits))* [1986] ICJ Rep 14 at 96–97.

[12] The Court has stated that *opinio juris* for a customary rule may be derived from the language of General Assembly resolutions dealing with the principle of self-determination: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment (Merits))* [1986] ICJ Rep 14 at 100.On the significance of General Assembly resolutions in providing evidence of the existence of *opinio juris* see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 70.

[13] Cameroon, Central African Republic, Chad, Congo (Brazzaville) [now Congo], Congo (Leopoldville) [Now Democratic Republic of the Congo], Cyprus, Dahomey [now Republic of Benin], Gabon, Ivory Coast [now Côte d'Ivoire], Malagasy Republic [now Madagascar], Mali, Niger, Nigeria, Senegal, Somalia, Togo, Upper Volta [now Burkina Faso].

[14] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in "Report of the International Law Commission on the Work of its Fifty-third Session" in (2001) II(2) *YILC* 30, 85 (paragraph 5 of the Commentary to Draft Article 26): "The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."

'people' can permanently alienate its right to self-determination, and that no third State is entitled to condone a breach of the principle of self-determination.[15]

The Principle of Territorial Integrity is Part of the Principle of Self-Determination

20. Paragraph 6 of UNGA Resolution 1514 (XV) stipulates that:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

The United Kingdom has argued that this text was merely "aspirational" and did not set out binding legal obligations.[16] However, the Republic of Cyprus considers that the text of paragraph 6 represents an authoritative statement of the content of the principle of self-determination contained in the Charter. It is difficult to see how a provision describing conduct as "incompatible" with the Purposes and Principles of the UN Charter can be said to be "aspirational".

21. The natural corollary of the principle of territorial integrity is that an exercise in the implementation of the principle of self-determination that does involve the disruption of the national unity or the territorial integrity of a country would be contrary to the UN Charter, unlawful, and legally ineffective. For the community of States as a whole, any such exercise would attract a duty of non-recognition.[17]

22. A separate question arises as to how the territory of a colony or other non-self-governing territory is to be assessed. In particular, the United Kingdom has argued that the Chagos Archipelago did not form part of the territory of Mauritius as a colony and therefore, even if there were a relevant right to territorial integrity, it would not operate to prevent the perpetuation of the separateness of the Chagos Archipelago from Mauritius. Mauritius has taken the opposing position, that the Chagos Archipelago was integral to its territory during colonial times. The Republic of Cyprus considers the following principles to be directly relevant:

(a) The assessment of what territory is "integral" to a colony or other non-self-governing territory is highly fact-specific.

(b) Factors that may be relevant to that assessment in a given case are likely to include: (i) the legal and administrative arrangements in respect of the colony

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[15] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Article 53; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted through United Nations General Assembly Resolution 56/83, UN Doc A/RES/56/83 (2001) Article 41; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at 56.

[16] United Kingdom Written Statement, paras 8.33–8.36.

[17] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted through United Nations General Assembly Resolution 56/83, UN Doc A/RES/56/83 (2001) Article 41; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 at 56.

or other non-self-governing territory; (ii) the territory's geographical position in relation to the rest of the colony or other non-self-governing territory; and (iii) social, cultural, political and economic ties between the territory and the remainder of the colony or other non-self-governing territory.

(c) Further, there may be features in an agreement to excise the territory in question (such as the fact that the administering State paid compensation in exchange for the excision, or that it entered into undertakings regarding the use and/or potential future disposition of the territory) which support the view that, prior to the excision, the territory was integral to the colony or other non-self-governing territory.

23. The United Kingdom has asserted that the Republic of Cyprus (among other States) "did not interpret paragraph 6 [of General Assembly Resolution 1514 (XV)] as prohibiting the adjustment of boundaries in the period preceding independence"[18]. That is not an accurate characterisation of the Republic's position in relation to paragraph 6.

24. The Republic's statement in the paragraph to which the United Kingdom referred (but without quoting the text), said that paragraph 6 is "essential in order to counter the consequences of 'divide and rule', which often is the sad legacy of colonialism and carries evil effects further into the future"[19]. This statement, whilst inter alia also affirming the prohibition on the use of force in Article 2(4) of the Charter, indicated the Republic's position that matters regarding the territorial integrity of a colony or other non-self-governing territory are subject to a general prohibition on the excision of territory therefrom, and that any such excision of territory prior to or at the time of independence is inherently suspicious and in any case is not permissible without the free and continuing consent of those entitled to exercise the right of self-determination.

25. Belize, in its Written Statement, correctly refers to the Republic's statement in order to support the claim that paragraph 6 was "understood by States during the drafting of [Resolution 1514 (XV)] as an important prohibition on the dismemberment of non-self-governing territories by the administering power prior to independence".[20]

26. The Republic of Cyprus offers these observations on the issues of principle to which the present request for an Advisory Opinion gives rise. The observations should not be understood as defining the position of the Republic in relation to any specific situation.

[18] United Kingdom Written Statement, para 8.41.
[19] Official Records of the United Nations General Assembly, 15th session, 945th plenary meeting, UN Doc. A/PV.945 (1960), para 93.
[20] Belize Written Statement, para 3.4.