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

(Request for advisory opinion)

Written comments in response to prior submissions

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 Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a program 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 15 May 2018 as the time-limit within which further written comments on the question, in response to prior submissions, may be presented to the Court in accordance with Article 66, paragraph 2, of the Statute.

4. Having presented its written statement on 01 March 2018, the Republic of the Marshall Islands wishes to avail itself of the possibility of furnishing written comments and, in respecting the time limit fixed, submits the following considerations to the Court.

II. PRELIMINARY CONSIDERATIONS

a) Questions presented are regarding decolonization, and not about sovereignty

5. The written statement offered by the United Kingdom introduces the argument that the questions presented to the International Court of Justice which would resolve sovereignty and thus are bilateral in nature, which therefore should not be decided in a multilateral process by means of an Advisory Opinion.

6. The Marshall Islands has another view. The purpose of the request for an advisory opinion on questions 'a' and 'b' is not to conclude or fully resolve questions of sovereignty, which is neither within the powers of the General Assembly's majority vote, nor the function of an advisory opinion. Such a complete conclusion of the issue of sovereignty would have essential bilateral actions. The nature and function of a non-binding advisory opinion requested by a multilateral entity, relating to applicable principles under its consideration, is readily distinguishable from a bilateral agreement to bring to the court a case in need of binding resolution, and one in which such judgment would be binding as to a mutual agreement on sovereignty.

7. Clarifying relevant principles of international law, including in regards to decolonization and the

Chagos situation, regarding decolonization, is directly relevant to and may inform discourse within the General Assembly regarding both Chagos, which remains under its purview of the basis of both Chagos specifically, regarding prior resolutions, and decolonization generally, regarding active agenda items.

8. It is important to note that if international law was clear about decolonization, there would be no need for an advisory opinion. That 31 states and one organization filed written statements, with a range of diverse viewpoints regarding international law, proves the point that the questions presented to the court are not restricted only to the interests of Mauritius and the United Kingdom, and that such an advisory opinion is relevant to multilateral discourse within the General Assembly.

b) The non-binding language of Resolution 1514 and Resolution 2066

9. The United Kingdom posits that General Assembly Resolution 1514 and General Assembly Resolution 2066 do not provide binding language that would sustain the argument that Mauritius' decolonization process was unlawful. The Marshall Islands believes that the problem with such a construction is that, although with non-binding language, the resolutions should not be read as dead letter law or without legal effect, or the whole purpose of the General Assembly would be questioned.

10. According to Article 13 of the Charter of the United Nations,

> [t]he General Assembly shall initiate studies and make recommendations for the purpose of:
> a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
> b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

11. Therefore, in that the General Assembly resolution does not provide binding language, it should be accepted as a soft law, which carries persuasive political effects, and is the nexus of early and emerging law, even as differing views and perspectives admittedly remain. "The resolutions passed by the GA can then be successfully presented as crystallizing, formulating and expressing the view or opinion of the international community of states."[1]

12. General Assembly Resolution 2066 was a tool used to express the deep concern the international community had with the apparent inequity of the decolonization process of Mauritius. Although not a binding resolution, it symbolizes that a higher scrutiny by the UN General Assembly was - and is - necessary on the detachment of Chagos and the entire process of decolonization of Mauritius.

13. Even if one argues that no formal approval was necessary, it is unquestionable that the existence of a formal rejection should be enough reason to impede the continuation of an unfair agreement.

14. General Assembly Resolution 2066 was the formal rejection to the detachment agreement as of Operative Paragraph 4:

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[1] VAN DEN RUL, Celine. Why Have Resolutions of the UN General Assembly If They Are Not Legally Binding? Available at < http://www.e-ir.info/2016/06/16/why-have-resolutions-of-the-un-general-assembly-if-they-are-not-legally-binding/#_ftn20>

> *Invites* the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity.

15. The fact that detachment of Chagos was so scrutinized by the General Assembly corrupts the decolonization process of Mauritius. For this reason, heightened scrutiny should be applied in evaluating the issue of decolonization in the context of Mauritius - and elsewhere, and in evaluating agreements reached therein.

c) Vitiated consent in the agreement of 1965

16. The United Kingdom states there are two occasions designated by the Vienna Convention in which consent would be vitiated hence invalidating an international agreement:

> *Article 51.* COERCION OF A REPRESENTATIVE OF A STATE
> The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.
> *Article 52.* COERCION OF A STATE BY THE THREAT OR USE OF FORCE
> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

17. Therefore, according to the United Kingdom's argument, consent to detachment of Chagos by means of the agreement of 1965 must be considered valid since none of the abovementioned theories are applicable.

18. This argument should not be accepted by the court because the Vienna Convention is not applicable to the agreement of 1965.

19. According to Article 4 of the Vienna Convention,

> [w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, **the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.**

20. Not only Mauritius was not an independent state at the time of celebration of the agreement that resulted in Chagos' detachment, but also the Vienna Convention was adopted only in 1969 what prevents the application of such law to prior agreements.

21. In view of the abovementioned article, the principle of non-retroactivity was recognized by the Vienna Convention, precluding the application of the convention to the present case. Moreover, the colonial government of Mauritius was in the germination of statehood, and not yet a full State. The Convention is not the correct lens, but rather the decolonization process as defined within the General Assembly must be used to evaluate the context and nature wherein an administering authority was dealing with self-benefit with a people dependent upon it, and seeking independence. There is an obvious and inescapable context which demands closer scrutiny.

d)The need of a plebiscite prior to detachment

22. As provided in Mauritius' written statement, the free and voluntary choice of the peoples of Chagos was a necessary step to validate the detachment of Chagos from Mauritius, on the basis of the right of self-determination. This could only be achieved by means of a referendum or a plebiscite, which did not occur in Chagos' detachment. And, even with such plebiscites, heightened scrutiny is still to be applied wherein the administering authority has both self-benefit as well a higher international expectation of responsibility and sacred trust.

23. Obtaining the free and voluntary choice of the peoples involved in a merger or division of territory was vastly used by the United Kingdom by organizing plebiscites in several of its colonies. The fact that these plebiscites occurred before and after the detachment of Chagos, nullifies the point that referendums were a new policy of the administrating power. On the contrary, the absence of plebiscite in Chagos and Mauritius only proves the point of an organized action, with the objective of attaining the intended results, which were the dismemberment of Mauritius' territory.

24. The Marshall Islands, on the basis of a plebiscite organized during the eventual process of UN Trusteeship termination, has agreed to host an ongoing military installation of the United States at Kwajalein Atoll. Although not without challenges or controversy, the agreement was achieved as part of the democratic approval of a Compact with the United States, and includes a long-term lease agreement, a joint management committee framework between the two nations to raise and resolve mutual differences, and jointly-adopted environmental standards. Indeed, it is certainly possible that a small island and Atoll nation has the free will and capacity to enter a host country arrangement, best expressed in deliberate sovereign state-to-state frameworks. While the Marshall Islands maintains that heightened scrutiny should be applied in the context wherein there is self-benefit of the administering authority, it is also nonetheless possible to evidence freewill when expressed in joint or equal state-to-state frameworks.

III. CONCLUSIONS

25. The advisory opinion of the Court should not be focused on concluding an essential question of sovereignty - as to whether Chagos should remain with the United Kingdom or be returned to Mauritius, - but rather to those principles of international law should apply in order to reassure equity to processes that were guided by power imbalances (a process not exclusive to Mauritius) and relevant to discussions within the General Assembly. The fact that 31 states and one organization filed written statements supports the argument that a multilateral debate is necessary and relevant.

26. The principle of non-retroactivity recognized by in Article 4 of the Vienna Convention precludes the application of the rules for vitiated consent defined by Article 51 and 52 of the Vienna Convention to the agreement that resulted in Chagos' detachment. The lens of decolonization must be applied in evaluating such agreements and in considering the need for heightened scrutiny of situations where an administering authority deals in self-benefit with a dependent people.

27. Not only a referendum or plebiscite was a necessary step to validate the detachment of Chagos, this was the procedure the United Kingdom used in several other cases, proving that it was feasible recognizing the free and voluntary choice of the peoples involved. Although heightened scrutiny should still be applied when the administering authority has self-benefit from a dependent people, one can distinguish between sovereign frameworks and detachment.

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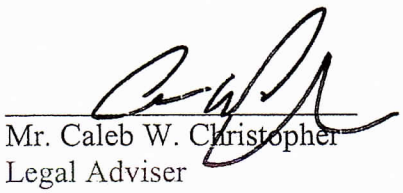

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