INTERNATIONAL COURT OF JUSTICE

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

(Request for Advisory Opinion)

WRITTEN COMMENTS BY THE REPUBLIC OF SERBIA

MAY 2018

I.

1. In accordance with the Order of the International Court of Justice of 14 July 2017 and the Order of 17 January 2018, the Republic of Serbia hereby submits its Written Comments. Written statements by a number of States and of the African Union support position that the International Court of Justice has an important role in rendering advisory opinion in this particular case and that this case is of great importance for strengthening the rule of law at the international level.

2. The Republic of Serbia finds appropriate to provide certain written comments concerning propriety for the Court to exercise its jurisdiction to give advisory opinion, and on the substantial questions asked by the General Assembly.

II.

3. The Republic of Serbia reiterates its opinion that in this case there are compelling reasons for the Court to participate in activities of the United Nations by providing legal opinion. In other words, there is not a single reason for the Court to decline to exercise its advisory jurisdiction.

4. It is indisputable that there exists a longstanding dispute between the United Kingdom and Mauritius about sovereignty over the Chagos Archipelago. However, that dispute is only one part of the process of decolonisation of Mauritius, and having in mind the very nature of the advisory opinion of the International Court of Justice, by providing advisory opinion this longstanding bilateral dispute would not be resolved. Rather, the advisory opinion will only provide an appropriate legal guidance to the General Assembly. It was the incomplete process of decolonisation, namely separation of the Chagos Archipelago from Mauritius and depopulation of the Chagos Archipelago, that raised many legal questions that relate to the decolonisation and many disputes, including those concerning the right to self-determination of the people of Mauritius (including the people of the Chagos Archipelago), territorial integrity of Mauritius and responsibilities of the administrating Power (in this case the United Kingdom) in the process of decolonisation. If the current situation is perceived as a purely bilateral issue between the United Kingdom and Mauritius that would lead to ignorance of a number of principles and legal norms that regulate the process of decolonisation and legal interests of the international community as a whole, and particularly the General Assembly of the United Nations. From the facts of the case

that seem to be undisputable, it appears that the requested advisory opinion does not concern bilateral dispute, but rather a long-lasting situation in which key actors, including the General Assembly of the United Nations and administering Power (the United Kingdom), hold divergent legal positions.

5. The General Assembly on a few occasions called upon the United Kingdom as an administering Power to act in accordance with certain rules, particularly with the Declaration on the Granting of Independence to Colonial Countries and Peoples.

6. For example, immediately after the separation of the Chagos Archipelago from Mauritius, the General Assembly adopted resolution 2066 (XX), stating that: "any steps taken by the administrating Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of" the Declaration on the Granting of Independence to Colonial Countries and Peoples, and that the General Assembly "invites the Government of the United Kingdom of Great Britain and Northern Island to take effective measures with the view to the immediate and full implementation of resolution 1514 (XV)" . The General Assembly invited "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

7. The situation created by the separation of the Chagos Archipelago was and still is of great concern for the General Assembly. The fact that those questions were rarely discussed during a certain period of time does not mean that the General Assembly ignored its own resolution concerning decolonisation of Mauritius or that the issue concerning legality of decolonisation of Mauritius simply disappeared. It is still actual and the General Assembly, in order to take further steps, needs appropriate advice from the International Court of Justice.

8. Obligations of an administering Power (colonial Power, in this case the UK and its allies, particularly the USA) are not only obligations towards the territory and the people under administration, but towards international community as a whole. The General Assembly in accordance with the UN Charter and well-established practice, as well as the positions clarified through a number of resolutions and declarations, has a clear and unequivocal role in the process of decolonisation. Each particular case of decolonisation is of concern of the General Assembly.

9. The situation at hand (separation and depopulation of the Chagos Archipelago) concerns the very authority of the General Assembly of the United Nations. If the General Assembly invited the administering Power "to take no action which would dismember the

Territory of Mauritius and violate its territorial integrity" on the basis of the applicable law briefly elaborated in resolution 1514 (XV) (as well as in subsequent resolutions), and the administering Power (the United Kingdom) and certain other members of the United Nations hold a different position clearly expressed in their written submissions and in appearances before the General Assembly, the General Assembly has a strong interest to ask the principal judicial organ of the United Nations – the International Court of Justice for appropriate legal guidance.

10. In the present request for an advisory opinion, bilateral aspects of the dispute are just an echo (or side effect) of the main issues. The International Court of Justice should answer the questions asked by the General Assembly. It might also call the parties in dispute to act in conformity with international law having in mind that the United Nations were created in order "to be a centre for harmonising the actions of nations in the attainment of ... common ends", as defined in Article 1 of the UN Charter.

11. In this case, legal guidance is asked on two issues. The first concerns the legality of decolonisation, and the second concerns the legal consequences. Both questions are of particular importance for the General Assembly. The first one focuses, inter alia, on whether the content of various resolutions concerning decolonisation is a manifestation of international law that existed at the time of their issuance or at the time of decolonisation of Mauritius. The second one is of particular importance since the General Assembly is in a position to deal with the situation created by an unlawful act (incomplete decolonisation of Mauritius by separation of the Chagos Archipelago from Mauritius and its depopulation).

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12. The position of the United Kingdom that reveals the substance of this situation is expressed by various representatives of the United Kingdom, and reiterated in its written statement filed before the International Court of Justice. In paragraph 5.10 of the UK submission it is stated as follows:

> "The United Kingdom Representative has, wherever appropriate, replied firmly to such claims, rejecting them and restating its own sovereignty. For instance, on 30 September 1999, the United Kingdom Representative replied to Mauritius' statement in the following terms:

The British Government maintains that the British Indian Ocean Territory is British and has been since 1814. It does not recognize the sovereignty claim of the Mauritian Government. However, the British Government has recognized Mauritius as the only State which has the right to assert a claim to sovereignty when the United Kingdom relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes.

The British Government remains open to discussions regarding arrangements governing the British Indian Ocean Territory or the future of the Territory. The British Government has stated that when the time comes for the Territory to be ceded it will liaise closely with the Government of Mauritius."[1]

13. Moreover, it is notorious that the UK, for the purpose of the establishment of the British Indian Territory and a military base depopulated the whole Chagos Archipelago, in another words forcibly displaced all residents of the Chagos Archipelago mainly to Mauritius.

14. The administering Power (in this case the United Kingdom) was obliged to respect the territorial integrity of Mauritius and the interests of its inhabitants. This is clear from the UN Charter (Chapter XI) and various UN General Assembly resolutions. It seems indisputable that at the time of separation of the Chagos Archipelago, or in any other later moment, there were no imperative military reasons or reasons concerning safety of population of Mauritius (including the Chagos Archipelago) to be separated from Mauritius and for depopulation of the Chagos Archipelago in order to establish a military base.

15. One of the core functions of the International Court of Justice is to determine the law (legal principles and legal norms) applicable in the concrete case. In this concrete case, the International Court of Justice is asked to answer the questions by application of international law, "including obligations reflected in the General Assembly resolutions" 1514, 2066, 2232 and 2355.

16. It is inevitable that in order to establish rules and principles applicable in the concrete case, the International Court of Justice has to determine whether the obligations reflected in the above mentioned resolutions of the General Assembly are of legal nature. The position of the Republic of Serbia is that they are of a legal nature. However, in determining the applicable

[1] Written Statement of the United Kingdom of Great Britain and Northern Ireland, , para. 5.10. quoting General Assembly, verbatim record, 54th Session, 19th Plenary Meeting.

law, the International Court of Justice should not disregard the basic law of the United Nations, the UN Charter, and the accordance of the obligations reflected in the General Assembly resolutions with the provisions of the Charter of the United Nations.

17. The UN Charter is clear on this matter. The administration of certain territory is a part of "responsibilities" of an administering Power which, in complying with this responsibility, cannot act on its own. As prescribed by Article 73 of the UN Charter:

> "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories..."

18. In other words, the UK was obliged to fully respect the interests of the inhabitants of Mauritius, including the inhabitants of the Chagos Archipelago. By separation of Chagos from Mauritius, the administering Power (in this case the UK) acted contrary to the well being of the inhabitants of Mauritius. Instead of "to ensure", as provided in Article 73 (1) (a) of the Charter "with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses", the United Kingdom separated Chagos from Mauritius and conducted forcible transfer of its population. By those acts the administering Power prevented any possibility for development of self-government and preservation of the interests of the Chagossians. Furthermore, by those acts the United Kingdom as an administering Power totally disregarded "political aspirations of the peoples" and its obligation as an administering Power to "assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement", which is contrary to Article 73 (1) (b) of the United Nations Charter.

19. In this context it should be noted that it was not the colonial Power who granted independence to the people under colonial rule, but international law, created, *inter alia*, by the Charter of the United Nations. The Charter of the United Nations confers primary responsibility on administering Powers and they are obliged, in exercise of their responsibilities, to act in accordance with international law. In order to achieve the goals of the UN (enumerated in Article

1 of the UN Charter), great powers (as well as administering Powers) need to act in accordance with their legal commitments in the establishment of which their full participation was inevitable. Their influence at the time of drafting the UN Charter was of so great importance that they could evade obligations concerning decolonisation. Without their consent, the UN Charter would never come into being.

20. Subsequent resolutions of the UN General Assembly are no more than clarifications of the obligations already established by Articles 73 and 74 of the UN Charter and other articles of the UN Charter, particularly Articles 1 and 2.

21. The first question posed by the General Assembly:

(*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?

22. Wording "having regard to international law" includes, by necessity, the Charter of the United Nations. Resolutions of the General Assembly should be interpreted in accordance and with special regard to the relevant provisions of the UN Charter.

23. The question whether the decolonization of Mauritius *was complete* as of its independence on 12 March 1968[2] is not the same as the question put by the General Assembly "whether the process of decolonization of Mauritius *lawfully completed* when Mauritius was granted independence in 1968, following separation of the Chagos Archipelago from Mauritius…"

24. As noted in the USA submission, "the Court would need to determine whether any international legal obligations existed at the time that would have applied to the United Kingdom and would have regulated that process."[3]

25. Decolonization is a long lasting political process. But that process was and still is regulated by international law. Specific legal obligations towards administering States are contained not only in the resolutions of the General Assembly, but primarily in the UN Charter. While the Republic of Serbia considers that the above mentioned resolutions are part of international law applicable in this particular case (in other words they reflect international law

[2] Written Statement of the United States of America, para. 4.10.
[3] Ibidem, para. 4.11

that was in force then and now), the question and concerns raised, for example by the USA deserves attention. Namely, in paragraph 4.14 of its Written Submission the USA expressed its opinion that "so by suggesting that the General Assembly resolutions referenced therein reflected international legal obligations binding on the United Kingdom that would have constrained its establishment of the BIOT. Yet as the Court explained in *Kosovo*, where a matter is capable of affecting the answer to the question posed, "[i]t would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly."

26. The first question asked by the General Assembly is, in substance, a request to confirm its position on certain legal issues. In substance, the resolution 2066 (XX) qualified the acts of the United Kingdom as an administering power as the acts in violation of the UN authority. Asking the International Court of Justice a verification of qualifications and demands, particularly concerning violation of territorial integrity of Mauritius by separation of the Chagos Archipelago, is a proper question on which the International Court of Justice should answer. The first question, for that reason, is a textbook example of the proper question that should be under the scrutiny of the judicial function of the Court – to assert legal qualifications of the main political organs of the United Nations.

27. In the political process, such as the process of decolonization, the activities of various UN organs, and other international organizations, need to be assessed from the legal standpoint. The resolutions of the General Assembly involve more than a legal opinion. They were adopted not for academic reasons, but in order to guide further political activities. Based on serious legal considerations, they provided directions that cannot be ignored.

28. There is a specific situation concerning the British Indian Ocean Territory. This territory was created in the context of decolonization from the part of Mauritius and by forcible displacement of the inhabitants of the Chagos Archipelago.

29. In 1965 when the British Indian Ocean Territory was proclaimed, contrary to the argument of the USA and UK, [4] the UN Charter regulated the obligations that administering States owed towards non-self-governing territories. The USA and the United Kingdom in their statement did not elaborate, or ignored, at least Articles 1, 2, 73 and 74 of the UN Charter.

[4] See: Ibidem, paragraph 4.25 etc

30. General Assembly resolutions concerning decolonisation, are based on the UN Charter provisions, practice, *opinio iuris* of states. Particularly[5], resolution 1514 (Declaration on the Granting of Independence to Colonial Countries and Peoples New York, 14 December 1960) reflects then existing rules of international law. That was as a part of the mandate of the General Assembly under Article 13 of the UN Charter to promote international cooperation and to encourage "the progressive development of international law and its codification". Resolution 1514, as well as some other resolutions, represents then existing rules of international law, or proper interpretation of the relevant articles of the UN Charter.

31. The right of self-determination was largely elaborated in the context of decolonization. When introduced in the Article 1 of the Charter of the United Nations it was not a meaningless formula, but the rule of international law. The USA argues that the Charter in Chapters XI, XII and XIII – "do not mention self-determination and … do not contain requirements related to the independence of non-self-governing territories…"[6] However, Chapter XI contains main elements of the right of self-determination in colonial context, including, but not limited to, that the interests of inhabitants … are paramount, well-being of inhabitants, just treatment and protection against abuse, the culture of the people, political, economic, social and educational achievements, development of self-government with due account of the political aspirations of the peoples, progressive developments of their free political institutions….All of these are part of the right of self-determination subsequently codified in the International Covenants on human rights. Namely, the very substance of Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights and of the Article 73 of the UN Charter is the same.

32. Article 1 of the Covenants and Article 73 of the UN Charter concern the same issues, political status and economic, social and cultural development. In accordance with paragraph 3 of the Article 1 of the Covenants:

> "The States Parties to the present Covenant, including those having respon-sibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations"

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[5] Contrary to the argument in para. 4.29 etc of the Written Statement of the United States of America.
[6] Written Statement of the United States of America, paragraph 4.34.

This provision does not create a new legal obligation, but represents a codification of then existing international law already in force and based on the UN Charter.

33. Resolution 1514 (1960) contains the principles of international law based on the Charter of the United Nations and applied in the context of decolonization. Political and moral support (as the US claims universal political and moral support for the resolution's underlying ideals)[7] has its legal background in the Charter of the UN and previous decolonization practice. While certain aspects of self-determination remain a matter of discussion and problematic for normative formulation, and they are still of that nature, resolution 1514 seems to introduce common legal opinion on the decolonization.

34. However, while it is more than clear that depopulation is prohibited under international law, it is also clear that the principle of territorial integrity is of universal character. The USA in its submission stated:

35. "Paragraph 6 proved problematic. The paragraph states that "[a]ny attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." States expressed a variety of views on the meaning of this language, and on the relevance of territorial integrity to the process of decolonization. Some States saw paragraph 6 as a reaffirmation of Article 2, paragraph 4 of the Charter, and others emphasized that newly independent states were entitled to territorial integrity.[8]"

36. The principle of territorial integrity (even though not infrequently violated) is an *ius cogens* of international law since the adoption of the Charter of the United Nations. It does not mean that the borders could not be a subject of change, but that territorial integrity is a basic value of contemporary international law.

37. In this particular case, it is clear that by separation of the Chagos Archipelago and its depopulation, the United Kingdom, as an administering Power, violated territorial integrity and national unity of Mauritius. The principle of territorial integrity and the principle of prohibition of disruption of the national unity are not isolated principles of international law. They need to be considered in the context of other fundamental principles of international law, particularly those contained in Articles 1 and 2 of the UN Charter as well as in Articles 73 and 74 of the UN Charter.

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[7] Ibidem, paragraph 4.34.
[8] Ibidem, paragraph 4.47.

38. National unity and territorial integrity of Mauritius was clearly violated by the administering Power. Namely, it was clear, then and now, that putting people under subjugation, domination and exploitation is illegal under international law. The people that inhabited the Chagos Archipelago was not simply denied the right to determine their political status, they were forcibly displaced and deprived of all of their rights by the administering Power. Depopulation of a certain territory is the worst expression of a denial of rights of the people. This is not only a violation of the rules of international law, it is a crime under international law of a very high gravity (persecution as a crime against humanity).

39. Territorial integrity is a basic value of the contemporary international law, and also the law that existed at the time of decolonization of Mauritius. The violation of territorial integrity is of particular gravity in cases where it results in the total or partial disruption of national unity.

40. The establishment of the British Indian Ocean Territory was contrary to international law (violation of territorial integrity of Mauritius and forcible displacement of the population of the Chagos Archipelago). Contrary to the USA and the United Kingdom assertions[9] resolution 2066 that states that "any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in controversy of (Resolution 1514) and in particular of paragraph 6 thereof" represent clear application of then binding rules of international law on a particular situation (separation of the Chagos Archipelago).

41. In all cases of territorial change, the issue is always how and for what purpose the territorial change occurred. In this concrete case, the purpose is well established, it was not for the well-being of inhabitants of the Chagos Archipelago, or to resolve political, economic, cultural or social issues between population of the Chagos Archipelago and the rest of Mauritius, it was for the purpose of establishment of a military base for the benefit of the United Kingdom and the United States of America.

42. The position of the United Kingdom that it "have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes" describes wrong understanding of international legal framework and position of the great power entrusted with the responsibilities of the administering Power. In this and similar statements, the UK tacitly recognizes the title of Mauritius to a territory of the Chagos Archipelago.

[9]Ibidem, paragraph 4.55.

In the simplified form, those arguments sound like – you have a right over this territory but I need that territory for a certain time and I will give you back your territory when I no longer need it. In the process of decolonisation the administering Power has no unlimited authority, but it must act in respect of the responsibilities laid down by Article 73 of the UN Charter.

43. The case of decolonisation of Mauritius is unique. While there are some explanations in the cases in which several territories changed their boundaries before or upon independence[10], (whether in accordance or not in accordance with international law) in the case of the Chagos Archipelago the situation is clear – the separation of the Chagos Archipelago from Mauritius and its depopulation are unlawful acts. [11]

III

44. The second question asked by the General Assembly is:

"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 Chagos origin?"

45. While separation of the Chagos Archipelago from Mauritius is a historic fact, the General Assembly is now confronted with the consequences of that separation and particularly with the depopulation of the Chagos Archipelago. It is well established that "the purpose of the advisory jurisdiction is to enable the organs of the United Nations and other authorized bodies to obtain from the Court an opinion which will assist them in the exercise of their functions"[12] (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, para. 421)

46. The International Court of Justice should provide legal guidance as to how the General Assembly (or its Special Committee on the Situation with regard to the Implementation

[10] Ibidem, paragraph 4.67

[11] Situation concerning Cayman Islands, Turks and Caicos Islands, Alaska (1959), Hawaii (1959), and Puerto Rico (1952), British Togoland (1956) and the Northern Mariana Islands (1976) cannot serve as an explanation or as precedents applicable in the case of decolonization of Mauritius.

[12] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, para. 421

of the Declaration on the Granting Independence to Colonial Countries and Peoples) should deal with the prevailing situation.[13] In order to fulfill its functions in accordance with international law, the General Assembly, by asking the second questions, asked for guidance. That guidance needed for the General Assembly, is concerned with the acts of States, and it is of particular importance to answer what legal consequences might arise for States.[14] That is needed in order to direct the Members of the United Nations to behave in accordance with international law.

47. The United Nations are intended to be, as provided in Article 1 of the UN Charter "a centre for harmonizing the actions of nations in the attainment of … common ends". The General Assembly, thus, legitimately asked the International Court of Justice to determine all "consequences under international law…. arising from continued administration by the United Kingdom … of the Chagos Archipelago." If the International Court of Justice declines to answer the second question, instead of the role of law, the role of political interests contrary to international law might prevail.

48. If violation of international law occurred, the United Nations should act in an appropriate manner and, if necessary, call individual states to act in appropriate manner. The consideration of the consequences "for the United Nations generally and for the General Assembly"[15] cannot be separated from consequences for the administering Power, the territory under considerations, or third states.

49. In reality, the General Assembly, in fulfillment of its functions, may call the Member States to act in appropriate manner. In order to do that, the General Assembly, in this particular case, obviously, needs a clear guidance from the International Court of Justice. In order to direct the actions of Mauritius and the United Kingdom and the United States in particular, the General Assembly needs to be advised on their rights and responsibilities.[16]

50. The Court should answer in particular, what remedies follow from violation of international law that concerns depopulation of the Chagos Archipelago. This is not only a matter of a bilateral dispute between the UK and Mauritius. That is a question for concern of international community as a whole. Whether Mauritius is entitled to "implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagos origin" is a

[13] Written Statement of Germany, paragraph 144.
[14] Contrary, Ibidem, paragraph 144.
[15] Ibidem, para. 143.
[16] Contrary, *Ibidem*, para. 146.

question specifically addressed in the General Assembly request for an advisory opinion, and it seems unquestionable that it is willing to deal with the issue once the International Court of Justice provides an advisory opinion.

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