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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Thursday 6 September 2018, at 10.40 a.m., at the Peace Palace,

President Yusuf presiding,

***on the* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le jeudi 6 septembre 2018, à 10 h 40, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***sur les* Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

Présents :	M.	Yusuf, président
	Mme	Xue, vice-présidente
	MM.	Tomka
		Abraham
		Bennouna
		Cançado Trindade
	M.	Gaja
	Mme	Sebutinde
	MM.	Bhandari
		Robinson
		Gevorgian
		Salam
		Iwasawa, juges
	M.	Couvreur, greffier

The Republic of Serbia is represented by:

Professor Aleksandar Gajić, Ph.D., Chief Legal Counsel at the Ministry of Foreign Affairs,

as Head of Delegation;

Mr. Marko Jovanović, Ph.D., Assistant Chief Legal Counsel at the Ministry of Foreign Affairs,

H.E. M. Petar Vico, Ambassador of the Republic of Serbia to the Kingdom of the Netherlands,

Ms Marija Stajić-Radivojša, First Counsellor at the Embassy of the Republic of Serbia in the Kingdom of the Netherlands.

The Kingdom of Thailand is represented by:

H.E. Mr. Virachai Plasai, Ambassador of the Kingdom of Thailand to the United States of America,

as Head of Delegation;

H.E. Ms Eksiri Pintaruchi, Ambassador of the Kingdom of Thailand to the Kingdom of the Netherlands,

Ms Tanyarat Mungkalarungsi, Minister-Counsellor, Royal Thai Embassy, The Hague,

Ms Prim Masrinuan, Counsellor, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand,

Ms Anisong Soralump, First Secretary, Royal Thai Embassy, The Hague

Ms Alina Miron, Professor, Université d'Angers, France.

The Republic of Vanuatu is represented by:

Mr. Robert McCorquodale, Brick Court Chambers, member of the Bar of England and Wales,

Ms Jennifer Robinson, Doughty Street Chambers, member of the Bar of England and Wales,

Ms Nicola Peart, Three Crowns LLP, member of the Bar of England and Wales,

Mr. Noah Patrick Kouback, Minister Counsellor and Deputy Permanent Representative, Chargé d'affaires, Permanent Mission of Vanuatu in Geneva.

La République de Serbie est représentée par :

M. Aleksandar Gajić, conseiller juridique principal du ministère des affaires étrangères,

comme chef de délégation ;

M. Marko Jovanović, conseiller juridique principal adjoint du ministère des affaires étrangères,

S. Exc. M. Petar Vico, ambassadeur de la République de Serbie auprès du Royaume des Pays-Bas,

Mme Marija Stajić-Radivojša, première conseillère de l'ambassade de la République de Serbie au Royaume des Pays-Bas.

Le Royaume de Thaïlande est représenté par :

S. Exc. M. Virachai Plasai, ambassadeur du Royaume de Thaïlande auprès des Etats-Unis d'Amérique,

comme chef de délégation ;

S. Exc. Mme Eksiri Pintaruchi, ambassadeur du Royaume de Thaïlande auprès du Royaume des Pays-Bas,

Mme Tanyarat Mungkalarungsi, ministre-conseillère, ambassade royale de Thaïlande, La Haye,

Mme Prim Masrinuan, conseillère, département des traités et affaires juridiques, ministère des affaires étrangères de la Thaïlande,

Mme Anisong Soralump, première secrétaire, ambassade royale de Thaïlande, La Haye,

Mme Alina Miron, professeur, Université d'Angers, France.

La République du Vanuatu est représentée par :

M. Robert McCorquodale, Brick Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

Mme Jennifer Robinson, Doughty Street Chambers, membre du barreau d'Angleterre et du pays de Galles,

Mme Nicola Peart, Three Crowns LLP, membre du barreau d'Angleterre et du pays de Galles,

M. Noah Patrick Kouback, ministre-conseiller et représentant permanent adjoint, chargé d'affaires, mission permanente du Vanuatu à Genève.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

Pour des raisons qu'elle m'a dûment fait connaître, Mme la juge Donoghue n'est pas en mesure de siéger avec nous ce matin.

La Cour se réunit ce matin pour entendre la République de Serbie, le Royaume de Thaïlande et la République de Vanuatu sur la demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies. Chaque délégation dispose de 40 minutes pour présenter son exposé oral et ne devrait pas excéder le temps qu'il lui est alloué. Comme je l'ai déjà indiqué hier, lorsqu'il y a plusieurs orateurs dans la même délégation, je laisserai au premier intervenant le soin d'inviter les autres membres de la délégation, de sorte que chaque délégation puisse faire toute sa présentation sans interruption. J'aimerais inviter tous les participants à la présente procédure de s'abstenir de parler trop vite, afin de permettre aux interprètes de pouvoir suivre leur intervention et d'en assurer une traduction fidèle dans l'autre langue de travail de la Cour.

J'invite à présent M. le professeur Gajić, qui s'exprime au nom de la République de Serbie. Vous avez la parole, Monsieur.

Mr. GAJIĆ:

1. Your honours, Mr. President, honourable Judges of the International Court of Justice, Mr. Registrar.

2. I have the honour to appear before the International Court of Justice as a representative of the Republic of Serbia and to present arguments on this — I think — very important case for international judiciary.

3. At the outset, I would like to say a few words concerning the importance of the Court's jurisprudence. The Republic of Serbia was a party to many proceedings before this Court, and quite recently it was particularly interested in the outcome of one of the advisory proceedings. Serbia has a particular sensibility with respect to the Court, and it has full understanding of the role of this Court and impact that its orders, judgments and advisory opinions, its consistent or inconsistent jurisprudence, might have. Based on this experience, I would like to urge the Court to understand the impact of its decisions and opinions and not only how they could be understood by professional lawyers, but also by those who make political decisions.

4. The refusal of the Court to provide an opinion on an important issue of international law would go in favour of those whose interests are not in conformity with international law. In formulation of the *dispositif*, Serbia urges all Judges to be precise and clear, because even though the Court undoubtedly acts in a good faith and with high professionalism, operative parts of its opinions are sometimes constructed without reference to the main arguments.

5. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* will certainly be one of the landmark cases in international law. Issues involved in this case concern principles and rules of decolonization, territorial integrity, self-determination. It is certain that avoiding a response to those issues would be equal to denial of justice.

6. If the International Court of Justice declined to exercise its advisory jurisdiction in this case, if it refused to shine a light on the part of international law that, for a long time, has been under the shadow of the power politics, that would serve as a proof of the weakness of the international justice system created by the Charter of the United Nations. Refusal to provide advisory opinion would mean that the United Nations and its principal judicial organ are unable to act in accordance with the proposition of the Preamble of the Charter of the United Nations. In other words, that would mark their inability "to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained". One of those conditions is certainly connected with the appropriate role of the International Court of Justice as a principal judicial organ of the United Nations.

7. The jurisprudence of this Court served as a guideline on many previous occasions. It seems undisputable that advisory opinion in this particular case will have a great impact on bringing decolonization to a speedy end, and provide legal guidance that might have (or certainly will have) impact on other situations, not only in the context of decolonization.

8. Unfortunately, colonialism is still alive. Decolonization is not completed. The Republic of Serbia strongly supports efforts of the United Nations and the African Union States in bringing colonialism to a speedy end.

9. Mr. President, I would like to address the issue of the jurisdiction and propriety in the first place. The Republic of Serbia respectfully submits that the Court *has* jurisdiction to issue requested

the advisory opinion and that there is *no* single reason to decline to exercise its advisory jurisdiction in this case.

10. Applicable law concerning jurisdiction and propriety in the jurisprudence of the Court is consistent and well established. There are three requirements that need to be met to place the Court in the position to provide an advisory opinion, and all of them are satisfied in this case.

11. *First*, only a competent organ or organization may request the Court to exercise its advisory jurisdiction. In this particular case, the advisory opinion has been requested by the General Assembly of the United Nations, as an organ authorized to request an advisory opinion by Article 96, paragraph 1, of Charter of the United Nations.

12. In this context it should be noted that the General Assembly may request an advisory opinion from the Court *"on any legal question"*.

13. The Court has in previous jurisprudence "given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly"[1]. In this case it is beyond dispute that all questions relate to the competences and activities of the General Assembly. Decolonization is highly positioned on the General Assembly agenda, and the answer to the questions, posed by resolution 292 of 22 June 2017 is therefore highly desirable.

14. *Second*, the question must be of legal nature. In this particular case, I think there is no doubt that both questions are of a legal nature.

15. *Third*, the requirement concerns propriety, namely the power of the Court to give an advisory opinion is of a discretionary nature. However, that discretion is not unlimited or of an arbitrary nature. As the Court has stated on many previous occasions "the consistent jurisprudence of the Court has determined that only 'compelling reasons' should lead the Court to refuse its opinion in response to a request falling within its jurisdiction"[2].

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[1] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 413, para. 21.

[2] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.

16. In this particular case, there is not a single reason (not to speak about compelling reasons) for the Court to decline to exercise its jurisdiction.

17. Mr. President, in the written submissions and in paragraph 25 of its oral statement, the United Kingdom stated, as a reason for the Court to decline to exercise its advisory jurisdiction, that "it was only from the early 1980s that the dispute arose in bilateral relations of the United Kingdom and Mauritius". This seems to be incorrect as a matter of fact. But, more importantly, it is completely irrelevant as a matter of law. These are not contentious proceedings. The moment when the dispute arose might be relevant in contentious proceedings (for example in order to establish jurisdiction of the Court). However, *when* an underlying bilateral issue connected with the advisory proceedings arose is an irrelevant fact in the advisory proceedings. Advisory jurisdiction is designed not to resolve bilateral disputes, but to provide an opinion on legal questions. What is relevant for the proceedings is the fact that in 1965 General Assembly adopted resolution 2066 (XX), which provided 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. The timing of the bilateral dispute is completely irrelevant.

18. Certain States submit that the Court should not provide an advisory opinion because the issue at hand is a bilateral dispute that concerns sovereignty over the territory of the Chagos Archipelago.

19. This advisory proceeding is about lawfulness and completeness of decolonization of Mauritius. The bilateral dimension is necessarily reflected in the relation between the administering Power (in this case the United Kingdom) and an entity that undergoes the process of decolonization (in this case Mauritius including its territory of the Chagos Archipelago). It concerns *inter alia* the duties and responsibilities of the administering Power under international law.

20. Obligations of an administering Power are not obligations only vis-à-vis a particular territory, but vis-à-vis the international community as a whole. Obligations of the administering Power (colonial Power, in this case the United Kingdom and its allies, particularly the United States of America) were not only obligations towards the territory and the people under their administration, but towards the international community as a whole represented by the

General Assembly of the United Nations, empowered to deal with the issues of decolonization. This case concerns clarification of those obligations, whether principles and rules of international law were violated and what are the consequences of those violations. This is a clear case for an advisory opinion.

21. In this context, it should be noted that the principle of consent is reserved for contentious proceedings, regardless of the nature of obligations in question. In advisory proceedings consent is irrelevant. With or without consent of some particular State, advisory proceedings cannot turn into contentious proceedings. However, the fact that undergoing advisory proceedings concerns some bilateral dispute is not, in itself, an issue that can properly lead the Court to decline to exercise its jurisdiction.

22. The General Assembly is empowered to call a particular State or States and international organizations to act in an appropriate manner. In order to do that, particularly in this case, it needs guidance from the Court. So, it can take a position on the legality of certain actions and its legal consequences, not only for the General Assembly, but also for particular States. This is particularly true when a certain State (in this case the United Kingdom) acted in the capacity of administering Power, conducted activities that need to be in the interest of the whole international community and in accordance with Chapter XI of the United Nations Charter and the relevant General Assembly resolutions.

23. In this particular case, where the General Assembly invited the Government of the United Kingdom "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity"[3], providing an advisory opinion on the issues that arose at the time of separation of the Chagos Archipelago in 1965 and that are still pending, the involvement of the principal judicial organ of the United Nations is of paramount importance.

24. If the argument of the United Kingdom and the United States of America that this is purely a bilateral dispute were to be accepted, that would have as a consequence that no one, including the General Assembly, could properly oversee the process of decolonization. The International Court of Justice should answer the questions asked by the General Assembly.

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[3] UNGA res. 2066 (XX), 16 Dec. 1965, reaffirmed by other resolutions, including res. 71/292, 22 June 2017.

25. The process of decolonization invariably entails putting an end to the exercise of sovereignty by colonial Powers and ensures that such sovereignty is devoted to the people formerly subject to colonial rule. The process of decolonization is the process of the creation of new sovereign States. In other words, the question of sovereignty over a certain territory is not detachable from the question of decolonization. In this particular case, the first question is clear and involves whether the United Kingdom, as an administering Power, acted in a lawful manner when it separated the Chagos Archipelago from Mauritius.

26. If the General Assembly invited the administering Power "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity" and the administering Power (the United Kingdom) and certain other Members of the United Nations hold a different position clearly expressed in its 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 legal guidance, and the International Court of Justice is obliged to participate in the activities of the United Nations as an independent and principal judicial organ of the United Nations.

27. Finally, the United Kingdom claims that the facts relating to this advisory opinion are too complex and that "only through procedure of a contentious case could the Court be in a position, as a court of law, to reach the necessary factual determinations"[4]. This argument is without merit.

28. Many of the prior advisory opinions included complex facts. However, in advisory proceedings there is no place for classical institutes of contentious proceedings, such as the burden of proof. However, the Court needs to establish facts necessary to provide an advisory opinion, and it can do that on the basis of "materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact". Unlike in the *Eastern Carelia* advisory proceedings, where the Permanent Court of International Justice declined to exercise its jurisdiction because it had no sufficient materials to draw necessary findings, in this case, the Court has before it more than sufficient materials that enable it to establish facts necessary to provide an advisory opinion. It has before it extensive written statements and comments in which a number of States presented on key

[4] CR 2018/21, para. 3.

factual and legal issues. This is certainly a benefit that goes in favour of exercising the advisory jurisdiction.

29. The Republic of Serbia is of the opinion that there are compelling reasons for the Court to participate in the activities of the United Nations and provide an advisory opinion on the very sensitive issues of international law. Integrity of the Court would be seriously damaged if the Court declines to exercise its jurisdiction in this particular case.

30. Mr. President, I would now turn to the substantive issues, namely on the first question posed by the General Assembly. The time at my disposal does not permit full elaboration of the legal and factual issues, and I will concentrate on some of the key points.

31. The Republic of Serbia respectfully submits that on the first question posed by the General Assembly, the Court should answer that *decolonization of Mauritius was not lawfully completed because separation of the Chagos Archipelago from Mauritius and its depopulation was conducted contrary to international law, particularly in violation of territorial integrity and self-determination of Mauritius*. Mr. President, upon the dismemberment of Mauritius, the United Kingdom, as an administering Power, seriously violated international law by forcibly displacing the population of the Chagos Archipelago.

32. Decolonization is a political process. However, that process is, at least since the United Nations Charter entered into force, based on certain legal norms. One of the core functions of the International Court of Justice is to determine the law applicable in the concrete case.

33. Principles and rules of decolonization are well established in the international law, particularly in the generally accepted Declaration on Granting Independence to Colonial Countries and Peoples adopted on 14 December 1960. Even in a form of resolution, this document has legal significance. Together with the Charter of the United Nations, it presents a cornerstone of the law on decolonization.

34. The two legal principles are of paramount importance in the law of decolonization: principle of territorial integrity of States and countries, and the principle of self-determination.

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

contemporary international law and any deviation from the principle must be done also in accordance with international law.

36. The right to self-determination is hard to express in a classical one-sentence definition. However, this principle is now recognized as a *jus cogens* of contemporary international law creating obligations *erga omnes*. I will address later some of the aspects of the right to self-determination.

37. One of the key issues in international law which had been debated since the adoption of the United Nations Charter is the question of relationship between *territorial integrity and self-determination*.

38. Self-determination and territorial integrity are frequently observed as conflicting rules of international law. On the contrary, they are part of the same normative system. I would like to emphasize the *system*. There is no *normative* conflict among them.

39. Controversies may appear, appeared and appear, in their understanding and in political practice, not infrequently followed by serious violations of international law.

40. The right to self-determination is a right exercised inside States or non-self-governing territories; it has its territorial dimension determined by the principle of territorial integrity. This view has its strong support, *inter alia*, in the Human Rights Committee General Comment No. 12.

41. It is beyond doubt that the Chagos Archipelago forms a part of Mauritius. Mauritius and the Chagos Archipelago form a single national, social and economic unit. Separation of the Chagos Archipelago from Mauritius was in clear violation of the territorial integrity of Mauritius, as a separate subject undergoing a process of decolonization.

42. This situation was recognized by the General Assembly of the United Nations: on 16 December 1965 in resolution 2066 (XX), it is stated, *inter alia*:

> "Noting with deep concern 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 contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples], and in particular of paragraph 6 thereof".

The General Assembly invited "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

43. However, it is not only the separation of the Chagos Archipelago from Mauritius that needs to be considered in order to answer the question of completeness and legality of decolonization of Mauritius. It is notorious that the United Kingdom forcibly expelled the Chagossian people. This was in sharp contradiction to the responsibilities of the United Kingdom as an administering Power. The United Kingdom did not only separate a part of the territory of Mauritius, it conducted a serious violation of international law that can only be characterized as a crime against humanity. Removal of the population from the Chagos Archipelago represents, at minimum, an act of "forcible displacement" in terms of the international criminal law. The *actus reus* of forcible displacement, as established in the jurisprudence of international criminal tribunals, is: *(a)* the displacement of persons by expulsion or other coercive acts; *(b)* from an area in which they are lawfully present; *(c)* and without grounds permitted under international law. It seems indisputable that at the time of the separation of the Chagos Archipelago, or in any other later moment, there were no imperative military reasons or reasons concerning safety of the population of Mauritius to be separated from Mauritius and for depopulation of the Chagos Archipelago.

44. Mr. President, depopulation of the Chagos Archipelago was an inseparable part in the history of the process of decolonization of Mauritius.

45. The administering Power, the United Kingdom, was obliged to respect the territorial integrity of Mauritius and the interests of its inhabitants, and to enable and support them to exercise its right to self-determination. This is clear from the United Nations Charter (it is Chapter XI) and various United Nations General Assembly resolutions.

46. The United Nations Charter is clear on this matter. The administration of a certain territory is a part of the "responsibilities" of an administering Power which, in complying with this responsibility, cannot act on its own. Article 73 of the United Nations Charter provides:

> "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 . . ."

47. In the concrete case, the United Kingdom was obliged to fully respect the interests of the inhabitants of Mauritius, including the inhabitants of the Chagos Archipelago. By excising Chagos from Mauritius, the administering Power acted contrary to the well-being of the inhabitants of Mauritius. The United Kingdom did not "ensure", as provided in Article 73 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 obligations 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.

48. Mr. President, in that context the alleged "consent" of Mauritius to the so-called 1965 Agreement must be seen. That consent was, as the record clearly shows, a product of "negotiations" between unequals: a colonial Power (the United Kingdom) and those who sought independence from that Power. These were not negotiations between independent States, but between the colonizing Power and those under colonial rule. General Assembly recognized the situation and called upon the United Kingdom to "take effective measures with a view to the immediate and full implementation of resolution 1514 (XV)" and "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity" (resolution 2066).

49. Consent to the detachment of Chagos Archipelago cannot be seen as a consent to some, for example, trade deal given on the basis of economic reasons or similar. The whole situation needs to be observed from the standpoint of the law governing decolonization and the responsibility of the administering Power to protect territorial integrity of Mauritius and to enable people of Mauritius to exercise their right of self-determination. Also, it is necessary to take into account the genuine will of the people of Mauritius that includes those who were living in the

Chagos Archipelago. It is clear that the administering Power acted in complete disregard of the *genuine will of the people* of Mauritius including those of the Chagos Archipelago.

50. In this context, it should be noted, as a rule, that it was not the colonial Power who grants 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. To achieve the goals of the United Nations (enumerated in Article 1 of the United Nations Charter), great Powers (as well as administering Powers) must act in accordance with their legal commitments in the establishment of which their full participation was inevitable. Their influence at the time of drafting of the United Nations Charter was of such great importance that they could evade obligations concerning decolonization. Without their consent, the United Nations Charter would never have come into being. In other words, those major powers created the rules that bind themselves.

51. Now, I would like to provide a comment on some of the arguments of the United Kingdom concerning so-called "1982 agreement" on compensation for the Chagossians. The United Kingdom claims that this agreement amounts to "a full and final settlement". This agreement concerns *private rights of individuals* and has no relevance for the question whether decolonization of Mauritius was lawfully completed or remains incomplete. Also the United Kingdom relies on the decisions of the European Court for Human Rights, however, the European Convention on Human Rights and Fundamental Freedoms does not mention the right to self-determination. The right to self-determination is not within the jurisdiction of the European Court of Human Rights.

52. Mr. President, regarding the second question, 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.

53. 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"[5].

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

Mr. President, I see that my time is expiring, thank you for your attention.

Le PRESIDENT : Je remercie la délégation de la République de Serbie. J'invite à présent S. Exc. M. Virachai Plasai afin qu'il fasse sa présentation au nom du Royaume de Thaïlande. Vous avez la parole.

Mr. PLASAI:

I. Introduction

1. Mr. President, distinguished Members of the Court, Mr. Registrar, the Kingdom of Thailand thanks the Court for this opportunity to present its views in these proceedings.

2. The questions before the Court relate to issues arising out of colonialism and decolonization, something on which the Kingdom of Thailand has had considerable experience. Although the Kingdom was not itself colonized in the nineteenth century, or at any other time, the price for maintaining its independence from colonial Powers was high, including having to relinquish part of its territory and to accept a drastic régime of commercial concessions and extraterritorial jurisdiction. Like newly independent States, Thailand still today has to cope with the legal consequences of agreements concluded with colonial Powers during the era of colonial

[5] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, para. 421.

presence in South-East Asia. Accordingly the Kingdom of Thailand welcomes this opportunity to address the Court on these matters.

3. The Request to the Court is addressed in specific terms relating to the decolonization of Mauritius and the legal consequences that flow from that decolonization process. But these consequences and the questions to which they give rise cannot be answered without keeping in mind the broader consequences of colonialism. Colonial power affected not just colonial territories but also other independent States that had to deal with the colonial Powers. Colonialism was marked by colonial Powers making decisions and then imposing those decisions on a take it or leave it basis. That situation is at the heart of the present Request. And the inequality of the relationship that is the hallmark of colonialism applied to both dependent colonial territories and other independent non-colonial States, which had no choice but to deal with the colonial Powers.

4. Indeed the situation of non-colonial States that had to interact with colonial States is in some respects unique. They suffered the disadvantage of being treated as subservient in their dealings with colonial Powers, but did not have the benefit of the rules, some of which became *jus cogens*, that have been developed to deal with decolonization and its consequences that help alleviate the situation of decolonized States. The consequences for these non-colonial States, such as Siam (now Thailand), are real and even today they face problems arising out of the relationship of that prior colonial period without the benefit of any alleviating rules. Thus, this Request for an advisory opinion has implications beyond the specific relationship of Mauritius and the United Kingdom.

II. The role of the Court in dealing with the consequences of colonialism

5. Mr. President, many States have commented in both written and oral statements before this Court on whether the Court should give an advisory opinion on the questions asked or whether it should exercise its discretion to decide not to answer the questions. The Kingdom of Thailand is not going to engage in an analysis of matters such as whether the Request is to deal with what is in essence a bilateral dispute or whether the Request for an advisory opinion is an abuse of the advisory opinion procedure. Others have spoken in detail on this. The Kingdom of Thailand would simply observe that the consequences of colonization and decolonization are not bilateral issues

any more than self-determination is a bilateral issue. Colonialism and decolonization as well as self-determination affect the international community as a whole and have always been matters of intense international concern. The Court has not shied away from taking decisions on issues relating to self-determination and decolonization which are in fact some of the most fundamental issues that have faced and are still facing the international community. This case provides a further opportunity for throwing light on some of these critical issues.

III. Unequal treaties and unequal relationships

6. Mr. President**,** the Request for an advisory opinion is about the consequences of colonization and of decolonization. Decolonization and the emergence of new States has been an historic achievement of the United Nations in which the Court has played a pre-eminent role. However, decolonization has not fully resolved issues from the past, as the present proceedings show. The questions in the Request for an advisory opinion deal directly with these unresolved matters.

7. The task now is for the Court to interpret events during the decolonization process and commitments made and consider their implications for today, keeping in mind that the materials surrounding these matters involve the records of meetings between the United Kingdom and the representatives of the colony, Mauritius. They are materials held essentially in the archives of the British government, a typical feature of the colonial relationship.

8. In making this statement on the substance of the issues before the Court, the Kingdom of Thailand wishes to provide some context and to draw the attention of the Court to some essential considerations that have to be taken into account in giving its advisory opinion as well as the broader consequences of colonialism, that are implicated in any opinion of the Court on these matters.

9. A key part of the move towards the process of decolonization was recognition of the notion of unequal treaties or unequal agreements resulting from unequal relationships, and the elaboration of their consequences. There can never be complete equality of the parties in all respects in any treaty arrangement, but the factual statement that in certain circumstances by the very nature and status of the parties the relationship is one of inequality cannot be gainsaid. This

applies to agreements arising out of colonial relationships, whether they qualify as a treaty under the Vienna Convention on the Law of Treaties or not, which by their very nature and the nature of the parties are based on an unequal relationship. This is ~~***more***~~ ***most*** conspicuous in situations where the agreement was reached between the colonial Power and the representatives of the colony, prior to its independence, since the protagonists were not on an equal footing, but it also applies where a colonial Power concluded a formal treaty with a non-colonized independent State on the basis of an unequal relationship.

10. Where the law of treaties is applicable, it is worth noting that there is no precise definition of unequal treaties or of the criteria leading to such qualification. However, one could hardly deny that treaties dictated by the stronger to the weaker party would qualify as unequal treaties. This idea of inequality has been recognized and has played a crucial role in the development of international law. One of the important achievements of the International Law Commission was the recognition that coercion can make a treaty void resulting in the inclusion of Article 52 in the Vienna Convention of 1969 respecting treaties resulting from the threat or use of force. This was a response to the views of newly emerged States that were dealing with the consequences of statehood and inequality in treaties they had entered into and were active in commenting on the International Law Commission drafts and in the Vienna Conference itself.

11. That Article 52 is not a panacea for the problems of treaties arising out of colonial relationships was evident even at the time of the Vienna Conference. Some newly emerged States sought to have the category of what constitutes coercion under Article 52 expanded from the threat or use of force to other forms of coercion, including economic and political pressure. An amendment adding this phrase to Article 52 was finally withdrawn, as a form of compromise between the proponents of a broad interpretation of the notion of force and those arguing for a narrow approach, in which force was synonymous with military force[6]. In exchange for its withdrawal, the Conference adopted, without any opposition, a declaration annexed to the Final Act of the Vienna Conference which "solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform

[6] O. Corten, "1969 Vienna Convention : Article 52. Coercion of a State by the threat or the use of force", in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary*, 2 vols., OUP, Oxford 2011, pp. 1205-1209.

any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent"[7]. In other words, the potential for inequality was broader than treaties resulting from the use of or the threat to use military force. As the representative of the United Kingdom conceded during the Conference, "of course, there might be cases where flagrant economic or political pressure amounting to coercion could justify condemnation of a treaty"[8]. What this means is that the Vienna Convention on the Law Treaties Article 52 does not exhaust the categories for dealing with treaties that are the product of unequal relationships between the parties. Those treaties may remain valid, but their interpretation and implementation must take into account the circumstances of their adoption, in order not to perpetuate the inequality.

12. That treaties concluded during the process of gaining independence or its aftermath cannot necessarily be viewed like other treaties was adverted to by the then Vice-President Yusuf in his declaration in *Somalia* v. *Kenya*, when he pointed out the anomaly of the Court seeking to determine the intentions of the parties to a memorandum of understanding entered into between Somalia and Kenya, which had been neither drafted nor negotiated by them but rather provided to them by a third party. In pointing out the particularity of that agreement Judge Yusuf invoked the experience of African countries with protectorate, unequal and capitulation treaties[9].

13. The *Somalia* v. *Kenya* example is a reminder that questions relating to treaties concluded in the colonial and early post-colonial period have to be looked at in the light of their particular and often unique circumstances, and this has implications for the way the Court should approach the issues before it in the present Request for an advisory opinion.

14. The fact that unequal treaties are void in accordance with Article 52 of the Vienna Convention may not necessarily help in considering the questions before the Court in the Request for an advisory opinion. But there are further implications of the fact of inequality for agreements that have arisen out of the colonial relationship, be they instruments concluded between the

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[7] UN Conference on the Law of Treaties, *Official Records*, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, p. 329.

[8] UN Conference on the Law of Treaties, *Official Records*, Summary Records, 1st session, 50th meeting, p. 283, para. 31.

[9] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*; declaration of Vice-President Yusuf, p. 56.

colonial Power and its colonies — again, whether they qualify as a treaty under the Vienna Convention or not — or treaties concluded with a less powerful independent State.

15. Beyond the legal consequences codified in the Vienna Convention on the Law of Treaties, unequal treaties could also trigger political consequences, in particular a duty to consider in good faith their revision or extinction. Indeed, unequal treaties rest on a fundamental injustice and the international legal order cannot insist on their prolongation. State practice — in particular relating to unequal treaties concluded between Western Powers and Asian countries like China, Japan or Siam, now Thailand — shows that they were often revised or extinguished[10]. It is mainly boundary treaties which continue to produce legal effects, either by application of the principle of *uti possidetis juris* or in the name of the stability of the boundaries, which, as it is well established, achieve "a permanence which the treaty itself does not necessarily enjoy. The treaty can [thus] cease to be in force without in any way affecting the continuance of the boundary."[11] The question is whether there are mechanisms in international law, which may alleviate the effects of inequality, without affecting the validity of the treaties in question. The Kingdom of Thailand believes that there are such mechanisms.

16. In answering the questions before it, the Court has to look carefully at the relationship between Mauritius and the United Kingdom in the time leading up to Mauritius becoming independent. Those events have been fully canvassed in these proceedings. They demonstrate not only the fact of substantial inequality but also the way in which the British Government dealt with the Mauritius authorities following independence, which at the time were, from a constitutional point of view but also in practice, regarded as officials representing an inferior Authority. One of the issues before the Court is the significance to be attached to the "agreement" of the Mauritius Council of Ministers of 22 September 1965. The Kingdom of Thailand would simply note, that, the "agreement" of 22 September 1965 and its confirmation on 5 November 1965 was a condition for the colony to be granted independence. The modalities of its adoption speak to the profound inequality between the two sides.

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[10] A. Peters, "Treaties, Unequal", *Max Planck Encyclopaedia of Public International Law*, online edition, updated: Feb. 2018, paras. 8-22.

[11] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 73.

IV. Les conséquences sur l'interprétation

17. Monsieur le président, comment la Cour doit-elle appréhender de tels événements et arrangements et par quel biais peut-elle prendre en compte, dans le processus d'interprétation, l'inégalité des rapports entre les parties ? Plusieurs intervenants ont exprimé des points de vue divergents sur la nature conventionnelle ou unilatérale des engagements de Lancaster House, et partant, sur l'applicabilité de la convention de Vienne de 1969 sur le droit des traités. Le Royaume de Thaïlande ne prendra pas position sur ce point. Mais il convient de remarquer que la convention de Vienne de 1969, même lorsqu'elle n'est pas directement applicable, contient des directives d'interprétation dont la Cour peut s'inspirer pour dégager le sens de ces instruments. Les articles 31 à 33 de la convention de Vienne constitueraient le point de départ naturel. Même si ces dispositions ne consacrent pas de règle spécifique pour l'interprétation des traités inégaux, ils contiennent néanmoins des indices pertinents.

18. De l'avis de la Thaïlande, ceux-ci sont au nombre de trois. Premièrement, lorsque la Cour détermine l'intention des parties, elle doit tenir compte du fait que le texte reflète en réalité la volonté de la partie la plus forte. Deuxièmement, selon la règle fondamentale codifiée au paragraphe 1 de l'article 31 de la convention de Vienne, les termes du traité doivent être interprétés dans leur «contexte». Troisièmement, en vertu de l'article 32, «les circonstances dans lesquelles le traité a été conclu» peuvent être prises en compte comme un moyen complémentaire d'interprétation. J'aborderai successivement ces trois directives d'interprétation.

19. En principe, un traité est le produit et il reflète la volonté des parties. Dès lors, «les termes employés dans un traité doivent être interprétés sur la base d'une recherche de la commune intention des parties»[12]. Or, les traités inégaux reflètent le plus souvent, si ce n'est toujours, la volonté d'une des parties plutôt que leur intention commune. Face à cette inégalité manifeste, la Cour devrait prendre en considération «l'équité telle qu'elle s'exprime dans son aspect *infra legem*, c'est-à-dire cette forme d'équité qui constitue une méthode d'interprétation du droit et en est l'une des qualités»[13], pour reprendre les termes de l'arrêt *Burkina Faso/Mali*. De plus, dans la situation particulière des traités inégaux, le vénérable principe selon lequel «les limitations à l'indépendance

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[12] *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 242, par. 63.

[13] *Différend frontalier (Burkina Faso/Niger), arrêt, C.I.J. Recueil 2013*, p. 567-568, par. 28.

des États ne se présument pas»[14] gagne en acuité. La maxime d'interprétation selon laquelle «dans le doute, une limitation de la souveraineté doit être interprétée restrictivement»[15], doit *a fortiori* pouvoir bénéficier à la partie la plus faible.

20. Les dispositions d'un traité doivent par ailleurs être interprétées dans leur contexte. Celui-ci ne se limite pas au texte de l'instrument. En effet, il ressort clairement, au paragraphe 2 de l'article 31, que d'autres accords intervenus entre les parties lors de la conclusion du traité, ou plus largement des instruments consensuels se rapportant au traité, font également partie du contexte. En d'autres termes, il s'agit de déterminer ce que les parties se sont dit lors de la conclusion du traité. De plus, les accords ultérieurement conclus entre parties sont également pertinents pour la détermination du sens des dispositions conventionnelles. Toutes ces directives d'interprétation guident la Cour dans la détermination du sens du traité et de l'intention des parties.

21. Le Royaume de Thaïlande est d'avis que ce vaste mandat visant à examiner les mots dans leur contexte doit inclure la prise en compte d'autres aspects critiques de celui-ci. A cet égard, l'inégalité des relations entre les parties constitue la matrice essentielle des conditions de conclusion du traité et se reflète dans le contenu de celui-ci. Pour comprendre le contexte dans lequel un traité a été conclu, ou la formulation des droits et obligations que l'accord incarne, rien ne pourrait être plus significatif que la relation réelle entre les parties au moment de la conclusion. Ce contexte d'inégalité est un facteur central pour déterminer le sens des dispositions conventionnelles pertinentes. Comme la Cour l'a déterminé dans son premier arrêt dans l'affaire du *Sud-ouest africain*, les circonstances de l'adoption du Mandat étaient significatives pour déceler la véritable intention des parties intéressées:

> «toute interprétation de l'article 7 [du Mandat] . . . doit tenir compte de tous les faits et circonstances pertinents concernant l'acte de dissolution de la Société des Nations, si l'on veut s'assurer des véritables intentions et objectifs des Membres de l'Assemblée lorsqu'ils ont adopté la résolution finale du 18 avril 1946.»[16]

22. Le recours aux moyens complémentaires d'interprétation prévus à l'article 32 aboutit au même résultat. En faisant appel aux travaux préparatoires d'un traité et aux circonstances dans

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[14] Lotus, *arrêt n° 9, 1927, C.P.J.I. série A n° 10*, p. 18.

[15] *Zones franches de la Haute-Savoie et du Pays de Gex, arrêt, 1932, C.P.J.I. série A/B n° 46*, p. 167.

[16] *Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 341.

lesquelles celui-ci a été conclu, la Cour est invitée à considérer et à jauger la relation entre les parties. S'il y a une inégalité substantielle, comme c'est généralement le cas dans les relations coloniales, il importe d'en tenir compte dans le processus interprétatif. L'article 32 de la convention de Vienne autorise la Cour à le faire.

23. Bien sûr, le recours aux moyens complémentaires de l'article 32 n'est pas automatique et ne se justifie qu'en cas d'ambiguïté ou d'obscurité dans le texte, ou si l'application de l'article 31 conduit à un résultat absurde ou déraisonnable. Une interprétation qui, en application de l'article 31, prenait déjà en compte l'inégalité des relations entre les parties, serait ainsi confirmée par l'analyse des circonstances spécifiques de la conclusion du traité, au titre de l'article 32.

24. En outre, lorsque les relations entre les parties au traité sont inégales, il y a de fortes chances que le texte soit ambigu, ce qui justifierait davantage le recours à l'article 32. Selon les circonstances et les termes d'un traité inégal, une interprétation particulière de celui-ci peut conduire à une absurdité manifeste ou à un résultat déraisonnable. En bref, il existe une multitude de raisons qui justifieraient le recours aux moyens complémentaires d'interprétation dans le cas des traités inégaux.

25. De l'avis du Royaume de Thaïlande, l'inégalité entre le Royaume-Uni et l'île Maurice est une circonstance fondamentale à prendre en compte au cas d'espèce, car elle a marqué le processus de négociation de la décolonisation et elle a greffé la naissance de Maurice en tant qu'Etat indépendant. A les supposer établies, la Cour ne saurait ignorer les limites imposées à l'île Maurice dans l'exercice de son droit à l'autodétermination. Ce ne sont pas seulement les termes spécifiques des arrangements entre les parties qui doivent être examinés à la lumière de leur relation inégale, mais aussi tous les aspects de ce qui a été fait et décidé à l'époque critique, qu'il s'agisse d'un traité ou d'autres types d'instruments internationaux. En bref, en interprétant les événements qui se sont produits et en dégageant leurs implications pour les questions posées dans la demande d'avis consultatif, la Cour doit jauger les événements, les accords et les ententes à la lumière de l'inégalité de la relation entre les parties, qui donne la clef fondamentale pour leur compréhension.

V. Les conséquences de l'interprétation qui tient compte de l'inégalité

26. Monsieur le président, quelles sont les conséquences concrètes de l'application de cette approche dans la présente procédure d'avis consultatif ? D'une manière générale, la Cour doit être consciente de l'inégalité des relations lors de l'évaluation des conclusions présentées par les différents participants à la procédure. Plus concrètement, l'incertitude et le doute quant à la signification et au poids à accorder à des événements ou à des revendications particulières devraient être résolus en faveur de la plus faible partie, en l'espèce, de l'ancien territoire colonial. De même, l'ambiguïté doit être résolue en faveur de l'ancien territoire colonial. Faire autrement serait permettre au pouvoir colonial de bénéficier encore de l'inégalité originelle et perpétuerait ainsi cette inégalité.

27. En outre, si une partie considère que le droit à l'autodétermination s'exerce sur la base de traités inégaux ou d'ententes qui reflètent une relation inégale, la Cour doit scruter ces événements avec davantage de vigilance qu'elle ne l'eût fait dans les traités ordinaires. Cela a des implications particulières pour la première question par laquelle l'Assemblée générale demande à la Cour si la décolonisation de Maurice est achevée. *Prima facie*, un arrangement inégal et des événements se déroulant dans le contexte d'une relation inégale jettent le doute sur la question de savoir si le territoire décolonisé a exercé pleinement et librement son consentement.

28. S'agissant précisément des engagements de Lancaster House, la question est de savoir quel effet produit l'inégalité des parties sur leur interprétation et leur application. Comme dit précédemment, lorsque des engagements sont pris par une puissance coloniale, la question critique est de savoir comment l'autre partie, qu'il s'agisse d'un territoire colonial ou d'un Etat indépendant, a compris ces engagements. Il en va de même en l'espèce. L'inégalité de la relation constitue une considération importante pour l'interprétation de ces engagements, et le doute quant à leur sens ou toute ambiguïté doit être résolu en faveur du territoire colonisé ou de l'autre Etat indépendant. En outre, les engagements de Lancaster House donnent l'assurance de la restitution de l'archipel des Chagos à Maurice «lorsque les îles ne seront plus nécessaires aux fins de la défense du Royaume-Uni et des Etats-Unis» («when the islands are no longer needed for the defence purposes of the United Kingdom and the United States»). Cette disposition ne doit pas être interprétée de manière à perpétuer l'inégalité, laissant au Royaume-Uni le pouvoir de décider

unilatéralement quand les conditions sont remplies et privant l'île Maurice de tout droit de regard sur ces aspects-là. De l'avis du Royaume de Thaïlande, même si le droit international et l'équité sont différents, les deux ne devraient pas être dissociés. La Cour n'a pas toujours le pouvoir de réparer entièrement les torts du passé, mais elle dispose souvent de moyens juridiques pour empêcher la perpétuation de l'inégalité. Les règles d'interprétation lui permettent de remplir une telle mission sans outrepasser son rôle judiciaire.

29. En outre, l'existence d'une inégalité dans les relations entre les parties devrait éclairer l'application des principes juridiques plus larges. Ainsi, l'invocation en l'espèce du principe de l'*uti possidetis* est problématique, car elle présuppose que les frontières coloniales soient déterminées et que l'on ait déjà répondu à la question de savoir si l'autodétermination a été pleinement réalisée. L'intangibilité des frontières héritées de la colonisation, qu'elles soient héritées des limites coloniales internes ou des frontières internationales établies par les puissances coloniales, a été un facteur important pour assurer la stabilité des relations internationales. Toutefois, dans les cas de colonialisme, ce principe peut consolider une situation juridique acquise en violation des principes fondamentaux de justice. Comme l'a dit une chambre de la Cour à propos de l'*uti possidetis juris*, celui-ci «gèle le titre colonial [à la date critique] ; il arrête la montre sans lui faire remonter le temps»[17]. Dans le cas présent, la véritable question ne porte pas sur le caractère intangible des frontières coloniales ; elle est de savoir si le peuple de Maurice a donné un consentement libre et plénier à l'arrangement prévoyant l'excision territoriale. Le moins qu'on puisse dire c'est que le principe de l'*uti possidetis* ne fournit pas une réponse immédiate aux questions dont la Cour est saisie, ni aux questions découlant de l'interprétation ou l'application des traités inégaux entre une puissance coloniale et un Etat indépendant.

VI. Remarques conclusives

30. Monsieur le président, Mesdames et Messieurs les juges, la Cour a déjà eu l'occasion par le passé de clarifier et de développer le droit de la décolonisation. Toutefois, comme la présente procédure le montre, bien que le colonialisme relève largement du passé, certaines de ses conséquences subsistent et continuent à produire des effets juridiques. La Cour est appelée par

[17] *Différend frontalier (Burkina Faso/République du Mali), C.I.J. Recueil 1986*, p. 568, par. 30.

l'Assemblée générale à ajouter une pierre à cet édifice inachevé de la décolonisation. Mais ce faisant, vous ne saurez vous contenter d'une approche formaliste du legs colonial, où l'acquiescement formel ou non l'emporte sur la volonté réelle, où la partie la plus faible doit céder aux ambitions et intérêts territoriaux des puissances coloniales et où l'indépendance est acquise ou préservée au prix du démembrement territorial. Du reste, à la différence d'une procédure contentieuse, où la Cour est tenue d'appliquer strictement le droit pour régler un différend spécifique, la procédure d'avis consultatif lui permet de définir et de clarifier les principes juridiques applicables d'une manière plus compatible avec l'esprit de justice.

31. Votre haute juridiction doit veiller par-dessus tout à ce que l'application du droit du colonialisme et de la décolonisation mette fin aux effets de l'inégalité des relations coloniales. Le droit ne devrait pas être un moyen de perpétuer une relation d'inégalité. Il appartient à la Cour de se saisir de cette occasion pour faire avancer et le droit et la justice internationale. Je vous remercie.

Le PRESIDENT : Je remercie la délégation du Royaume de Thaïlande pour son exposé. Je donne maintenant la parole à M. McCorquodale pour faire sa présentation au nom de la République du Vanuatu. Vous avez la parole, Monsieur.

Mr. MCCORQUODALE:

1. Introduction

1. Mr. President, Madam Vice-President, distinguished Members of the Court, it is my honour to appear to you today in these proceedings on behalf of the Republic of Vanuatu.

2. I will address the Court on Question *(a)* in regard to the territorial integrity of colonial territories, and Ms Jennifer Robinson will address you on the requirement of consultation of the free will of the people of a colonial territory and Question *(b)*. We thank our small legal team of Ms Nicola Peart and Mr. Noah Patrick Kouback of the Republic of Vanuatu.

3. This is the first time that Vanuatu has appeared before the International Court of Justice. It does so because it considers that the issue before the Court is of considerable importance to it. Vanuatu was a Franco-British Condominium from 1906 to 1980 and then, as an independent State,

Vanuatu has been an advocate for the right to self-determination and decolonization, especially in the Pacific region.

4. And if I may, I will quote from Father Walter Lini, the first Prime Minister of the Republic of Vanuatu:

> "[The] Pacific is one of the last regions of the world where the heavy hand of colonialism continues to be played . . .These remnants of the past must be lifted from our ocean, for . . . until all of us are free, none of us are."[18]

Vanuatu hopes that the Court takes these views of Pacific and Melanesian Islanders into account in this important advisory opinion.

5. The essence of this advisory opinion is that the United Kingdom claims that in 1965 it had the absolute power and discretion to separate a part of a colonial territory and forcibly remove its population so as to serve its own military purposes, without *any* regard to the will of the people of Mauritius, including the Chagos Islanders. In the alternative, the United Kingdom ventures that it was sufficient that Mauritius, three years later, held a general election where the people were not given the option of independence without detachment of the Chagos Archipelago[19]. In the end, these arguments are attempts to justify the unjustifiable. As Vanuatu will demonstrate, and as the Court, we hope, will affirm, customary international law required that there be no division of a colonial territory without the free and genuine consent of the people of that territory.

6. Mr. President, Members of the Court, Vanuatu will focus on two specific issues: being territorial integrity and the free will of the people, on which Vanuatu considers that it is able to provide a unique and important perspective to this Court.

2. Competence of the Court

7. But before dealing with these core issues, there are two preliminary points on which Vanuatu wishes to make a brief submission.

8. First, Vanuatu agrees with the views expressed to the Court by the vast majority of States and the African Union that this *is* an appropriate matter for an advisory opinion, and that the Court

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[18] Walter Lini's keynote address to the Australia and the South Pacific Conference, 18 Feb. 1982, in *Pacific Islands Monthly*, April 1982, pp. 25-28.

[19] Indeed, as late as 2009, it seems that Chagossians were called "Man Fridays" by senior British officials: see *R (on the application of Bancoult No 3)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3, para. 30.

should exercise its discretion to accept this Request, *even if* there may be a bilateral issue within the broader international concern[20]. Indeed, the presence of Vanuatu in this Court today is representative of this broader international concern.

9. I note the argument that the United Kingdom has made: that it is many decades since the General Assembly last considered the issue of the Chagos Archipelago, which they claim is indicative of the lack of the relevance to the General Assembly of this opinion or of an acquiescence, perhaps, by the international community to the situation. However, the United Kingdom may have overlooked that it is extremely difficult for a small island State — be it Mauritius or Vanuatu — to bring a resolution to the General Assembly and to pass it. To *gain* the support for a request for an advisory opinion to this Court is *not* easy. In fact, it is a mark of considerable merit and determination by the Government of Mauritius that it managed to do so. It is also a clear acknowledgment by the large number of States who supported the Request for an advisory opinion that the issue is of relevance and of value to the General Assembly in its future actions, and I would add, it is also vital, that the views of small island States *do* matter in an inclusive legal system.

3. Customary international law

10. Second, Vanuatu agrees with the views expressed to the Court by the majority of States and the African Union, i.e. that the right to self-determination was a rule of customary international law by 1965. As is explained persuasively by those States and the African Union, the evidence from considerable State practice and *opinio juris*, is confirmed in a number of Security Council and General Assembly resolutions, and in the jurisprudence of the Court itself, and they support this conclusion[21].

11. Vanuatu also supports the conclusion that this customary international law was crystallized in resolution 1514. Vanuatu asks the Court to *affirm* the view it expressed in its advisory opinion on *Western Sahara*, where it referred to resolution 1514 as providing "the basis

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[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136.

[21] See e.g. StAU paras. 74-128; StMu, paras. 6.20-6.38.

for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations"[22]. This basis was due to both State practice and *opinio juris*, contrary to the submission of the United States[23].

12. The Court in that Opinion also noted that Spain, as the administering Power of Western Sahara, "has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory"[24]. And this statement by the Court must apply equally to all other administering Powers, including the United Kingdom because, like Spain, the United Kingdom abstained from voting on resolution 1514, and, of course, as you know, no State voted against it. Vanuatu agrees with Belize that the Court cannot accept an argument by the United Kingdom that an abstention must indicate non-acceptance of the substance of the resolution in these terms[25].

4. Territorial integrity

13. Mr. President, Members of the Court, Vanuatu now turns to its first main submission, being on the territorial integrity of colonial territory. It will submit that paragraph 6 of resolution 1514 *does* reflect customary international law; that State practice and *opinio juris* before the late 1950s confirm that it was not customary international law before that time; and that the *only* exception to this is where the people of the colonial territory freely and genuinely consented.

14. Paragraph 6 of resolution 1514 is of course very familiar to you by now. The key terminology talks about the partial disruption of the territorial integrity of a country.[26]

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[22] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 57.

[23] CR 2018/24, pp. 17-19, paras. 45-55 (Newstead).

[24] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 24, para. 30: "In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers. In the proceedings in the General Assembly, Spain did not oppose the reference of the Western Sahara question as such to the Court's advisory jurisdiction: it objected rather to the restriction of that reference to the historical aspect of that question."

[25] CR 2018/23, p. 10, paras. 12-13 (Juratowitch). It is notable that the United Kingdom attempts to buttress this assertion by referring to the International Law Commission's Draft Conclusions on the Identification of Customary International Law, at paragraph 5 of the commentary to Conclusion 12. However, this draft is not yet agreed by the ILC and this draft was written by Sir Michael Wood, who is a member of the United Kingdom legal team before this Court.

[26] UNGA res. 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples", A/RES/1514 (XV) of 14 Dec. 1960, para. 6.

15. The terminology of "territorial integrity" used in this resolution is *completely distinct* from that used about territorial integrity in, for example, the 1970 Declaration on Friendly Relations (resolution 2625)[27]. Resolution 1514 is solely about the territorial integrity of a *non-self-governing territory*. The Declaration on Friendly Relations, passed *ten years later* was concerned with the territorial integrity of *existing, independent States***.** Therefore, the United Kingdom's and the United States' reference to resolution 2625[28] is *completely* irrelevant to this advisory opinion.

16. The evidence that resolution 1514 concerns the territorial integrity of a colonial territory rather than that of independent States is threefold:

(1) First, the use of the non-State terminology of "country" aims at distinguishing between the territorial integrity of a State and the territorial integrity of non-self-governing territories. This follows from the context of resolution 1514, which deals with decolonization.

(2) Second, the title given to resolution 1514 is the Declaration on the Granting of Independence to *Colonial Countries* and Peoples. Hence it is the *colonial countries* which are the subject of the words set out in paragraph 6.

(3) And, third, the French text of the Declaration uses the word *"pays"* rather than *"état"*, when referring to the territorial integrity of countries, making clear it is not the State's territorial integrity in issue.

17. Accordingly, the people who had the right of self-determination under resolution 1514 were territorially defined as being within the territorial unit in which they lived. It was *this* colonial territory that had territorial integrity.

18. Vanuatu agrees with the submissions of Mauritius that paragraph 6 represents customary international law and is binding on all States[29]. Indeed, as they have shown, it has been accepted in State practice and *opinio juris*, as well as by key eminent jurists[30]. As Judge James Crawford concluded in his seminal work on *The Creation of States in International Law*: "Administering

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[27] UNGA res. 2625 (XXV) "Declaration on Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations" A/RES/25/2625 (XXV) of 24 Oct. 1970.

[28] CR 2018/24, p. 21, paras. 60-61 (Newstead); CR 2018/21, p. 38, para. 25 (Wordsworth).

[29] CR 2018/20, p. 28, para. 9 (Jugnauth).

[30] StMU, paras. 6.29-6.33.

States are not at liberty to divide up or dismember those [colonial] territories in violation of self-determination."[31]

19. The only comments that seem to have been made by States at the time of leading up to the drafting of paragraph 6, which might offer an alternative view, were those of Indonesia and Guatemala. But both stances were clearly made to bolster their claims to neighbouring non-self-governing territories. Their amendment was aimed at enabling them to reclaim separate colonial territories based on alleged pre-colonial ties and to refer to the territorial integrity of a State. It was rightly withdrawn.

20. Therefore, in Vanuatu's submission, there is no evidence to support the United States' submission that this attempt by Indonesia and Guatemala meant there was no agreed definition of paragraph 6[32]. Indeed, in the final agreed text, the paragraph clearly talks about, as I have just shown, the territorial integrity of colonial territory, and of course it was passed without a vote against.

21. Accordingly, it is Vanuatu's submission that the customary international law requirement of not disrupting in whole or in part the territorial integrity of a colonial territory was confirmed and crystallized as customary international law in resolution 1514. From this time onward, there was an international legal obligation on every administering Power not to fragment or otherwise divide a colonial territory. This includes a binding international legal obligation on the United Kingdom in relation to the non-self-governing territory that included within it both Mauritius and the Chagos Archipelago.

22. Mr. President, Members of the Court, Vanuatu agrees with the submission of the United Kingdom that the territorial integrity of non-self-governing territories was *not* part of customary international law at the time of the United Nations Charter or in the decade immediately following. For example, the partition of India into two entities before they became independent States in 1947 and the creation of West Papua as a non-self-governing territory when Indonesia became a State in 1949, are both situations where the territorial integrity of a colony was divided

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[31] James Crawford, *The Creation of States in International Law* (2nd ed., OUP, 2006), p. 645.

[32] StUS, paras. 4.48-4.49.

during the process of independence. And both were accepted by the General Assembly as having been lawfully undertaken[33].

23. However, by the late 1950s, State practice *opinio juris* shows a very different picture[34]. As Belize set out, between 1957 and 1960, 18 colonies became independent and the number of Member States of the United Nations increased by 25 per cent in just three years[35], so that State practice became intensive and consistent in contrast to the earlier decades. By 1960 it was clear that customary international law prohibited the division of the territorial integrity of non-self-governing territories without the full and free consent of the people of the colonial territory.

24. Now, the United Kingdom, despite its considerable resources, was only able in its oral submission to provide just three possible situations involving the separation or integration by administering Powers of colonial territories prior to their independence, and done without the consent by universal suffrage of the peoples of those colonies. The United States could only find two. In Vanuatu's submission, none of these are relevant. They all either occurred before resolution 1514, which, as Vanuatu has submitted, is not relevant, or did not involve a division of the territory where one part became independent and the other became a new colony — and none, of course, had the express disapproval of the General Assembly[36].

25. The United Kingdom also tries to raise a fear that this decision in this opinion would have an impact on the principle of *uti possidetis*[37]. It is the submission of Vanuatu that the territorial integrity of non-self-governing territories *should not be conflated* with the principle of

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[33] See UNGA res. 108 (II) "Admission of Yemen and Pakistan to Membership in the United Nations" (A/RES/108(II) of 30 Dec. 1947) (admitting Pakistan as a new Member of the United Nations); UNGA res. 448 (V) "Development of Self-Government in Non-Self-Governing Territories" (A/RES/448(V) of 12 Dec. 1950) (on Indonesian independence). Indeed, UNGA res. 448 of 29 June 1950 specifically mentions that West Papua (then called Netherlands New Guinea) will remain a colony of the Netherlands after Indonesia's independence. The General Assembly noted "the communication dated 29 June 1950 from the Government of the Netherlands in which it is stated that the Netherlands will no longer present a report pursuant to Article 73 *(e)* on Indonesia *with the exception of West New Guinea*" (emphasis added)**.** The resolution also requests that the "Special Committee on Information transmitted under Article 73 *(e)* of the Charter to examine such information as may be transmitted in the future to the Secretary-General [in relation to the non-self-governing territory of West New Guinea] and to report thereon to the General Assembly". This explicitly recognizes that the Netherlands had to continue reporting pursuant to Article 73 *(e)* of the UN Charter on West New Guinea, recognizing West New Guinea as a non-self-governing territory.

[34] See e.g. StAU, paras. 74-128; StMU, paras. 6.20-6.38.

[35] Oral submission of Belize: CR 2018/23, p. 11, para. 17 (Juratowitch).

[36] UNGA res. 2066 (XX) "Question of Mauritius", A/RES/2066 (XX) of 16 Dec. 1965) (regretting the administering Power's failure to fully implement resolution 1514 in relation to the Chagos Archipelago).

[37] See e.g. StGB, paras. 8.29 *et seq.*, 9.18; StMU, para. 6.58.

uti possidetis. Uti possidetis is a principle which concerns the maintenance of colonial boundaries *at the time of independence* of the colonial territory. It does not concern the lawful boundaries of a colonial territory before it becomes a State or otherwise exercises the right to self-determination. Accordingly, any application of *uti possidetis* to the boundaries of Mauritius on independence in 1968 are not applicable, as that boundary was based on the unlawful division in 1965 of its colonial boundary by the United Kingdom, which is contrary to the territorial integrity of colonial territory.

26. Returning to State practice, the United Kingdom itself resisted a division of a colonial territory prior to independence because of a lack of the free will of the people of a colonial territory. This happened during the process towards independence of Kenya (whose independence occurred on 12 December 1963), so we are talking contemporary times, when the people of the Northern Frontier District of the colony of Kenya sought to join with the new State of Somalia. As the eminent international jurist, who has appeared many times before this Court, Malcolm Shaw reports in his book *Title to Territory in Africa*:

> "The British Prime Minister, however, declared in April 1960, that 'Her Majesty's Government does not and will not encourage or support any claim affecting the territorial integrity of French Somaliland, Kenya or Ethiopia. This is a matter which could only be considered if that were the will of the Governments *and the peoples* concerned.'"[38]

At the time of making this statement in April 1960, both French Somaliland and Kenya were colonies. So when the British Prime Minister was demanding that the will of the peoples be considered, it was the will of colonial peoples he was referring to. Thus the United Kingdom itself — just a few months before resolution 1514 — was applying the customary international rule of territorial integrity of a colonial territory and recognizing that this rule was subject only to the freely expressed will of the people of the colonial territory.

27. Vanuatu has a few final comments in relation to this issue. Vanuatu notes that, like the independence Constitution of Mauritius, the independence Constitution of Vanuatu was drafted with the assistance of its colonial Powers, so it may not be so surprising that the

[38] Malcolm Shaw, *Title to Territory in Africa* (OUP, 1986), p. 110; emphasis added.

Mauritius Constitution of 1968, which was approved by the United Kingdom by Order in Council, did not extend its territory to the Chagos Archipelago[39].

28. Vanuatu takes this opportunity to reject, *strongly*, the argument made by the United Kingdom that islands some distance from each other cannot form a State. Vanuatu is an archipelagic State. Many of its islands are a great distance from each other, yet Vanuatu remains a sovereign State.

29. Accordingly, it is Vanuatu's submission that it was a customary international rule in 1960 that there is territorial integrity of a colonial territory. An administering Power cannot separate or integrate a colonial territory without first obtaining the free and genuine consent of the people of that colonial territory.

30. There is one final point. The reason for including territorial integrity of a colonial territory as part of the right to self-determination was to protect the peoples of that territory from actions of the administering Power that would, for example, divide or otherwise deal with the colonial territory against those peoples' interests. It was to make clear that the interests of the peoples of a colonial territory were more important than — and to have legal protection over — the financial, military or other interests of the colonial Power. Territorial integrity of a colonial territory cannot be sacrificed for the self-interests of a colonial Power or of other States.

31. Mr. President, Members of the Court, thank you for your attention. Ms Robinson will now make submissions by Vanuatu as to how the free and genuine consent of the people of a colonial territory is lawfully expressed — which is an issue which has not yet been covered, in Vanuatu's views, substantively by other oral submissions — and she will also make submissions in answer to Question *(b)*. Thank you.

Ms ROBINSON:

5. Free and genuine will of the people

1. Mr. President, Madam Vice-President and distinguished Members of the Court, it is my honour to address you on behalf of Vanuatu.

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[39] United Kingdom, *The Mauritius Independence Order 1968 and Schedule to the Order: The Constitution of Mauritius* (4 Mar. 1968), at Sect. 4 (1) of the Order and Sect. 2 of the Constitution; StMU, para. 3.100.

2. Vanuatu has already shown that administering Powers were, from 1960, prohibited from dividing or integrating non-self-governing territories without consulting the free will of the people.

3. Two pertinent questions flow from this rule of customary international law. The *first* is: what did this obligation to consult require? The *second*: to whom was it owed? Vanuatu thanks Judge Gaja for the question about the relevance of the free will of the Chagossian people in the process of decolonization, which squarely raises these issues. The free will of the people of Mauritius, including the Chagossians, was not only relevant in 1965, but it was *required* by international law for the detachment to be lawful.

4. My submission will be in four parts: *first*, I will set out the content of the obligation to consult the free will of the people and what that required of the United Kingdom in 1965. *Second*, I will address who the relevant people were for the purposes of that consultation. *Third*, applying these principles to the facts, and to provide Vanuatu's answer to Question *(a)* before this Court, I will explain why the United Kingdom's failure to consult the free and genuine will of the people meant that the detachment was unlawful. *Finally*, I will address the consequences of this in answer to Question *(b)*.

5. First, on *the content of the obligation to consult the free will*. The relevant law is found in resolutions 1514 and 1541 of 1960. Paragraph 5 of resolution 1514 requires that administering Powers act "in accordance with their freely expressed will" of the people of colonial territories[40].

6. As this Court confirmed in the *Western Sahara* Opinion, "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned"[41]. In that case, this Court also confirmed that Principle IX of resolution 1541 "give[s] effect to the essential feature of the right of self-determination as established in resolution 1514 (XV)"[42].

7. Resolution 1541 — passed the day after resolution 1514 — did not set any requirements for colonies declaring independence, but it did set procedural requirements about how the will of the people is to be determined where those people are presented with a status that does not amount to full independence. Principle IX requires that:

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[40] UNGA res. 1514 (XV), "Declaration on the Granting of Independence to Colonial Countries and Peoples", A/RES/1514 (XV) of 14 Dec. 1960, para. 5.

[41] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 55.

[42] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 57.

> "The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage."[43]

8. Where a colony is divided — as in this case — with one part becoming independent and the other part being divided and integrated with the colonial Power, the risk of continued colonial subjugation is clear. This is to be distinguished from a situation where the colony declares independence with its territorial integrity intact. The distinct procedural requirements set out in resolution 1541 for division or integration reflect the need to ensure that, in circumstances such as in this case, the people must be given a free and genuine choice before accepting a status less than independence.

9. Vanuatu agrees with Belize that the requirement to consult the people in resolution 1514, and the concomitant procedural requirements in resolution 1541, reflected customary international law from 1960[44].

10. State practice from the late 1950s shows that plebiscites or elections — based on universal suffrage — were organized or supervised in colonial territories before their division or integration with other States[45]. Indeed, as the Netherlands pointed out: this State practice was "practically uniform"[46]. By 1968, as Mauritius pointed out, United Nations-supervised plebiscites were "routinely used" to ascertain the will of the people[47].

11. Despite this, the United Kingdom claims that there was no such requirement. In the alternative, the United Kingdom ventures that a plebiscite was not required and a general election would suffice. There is of course ample evidence of State practice where colonies have declared independence, with their territorial integrity intact, after the government had won an election with a mandate of independence. However, the United Kingdom was unable to provide one example of

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[43] UNGA res. 1541 (XV), "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 *(e)* of the Charter", A/RES/1541 (XV) of 15 Dec. 1960. See also Principle VII which requires that free association "should be the result of a free and voluntary choice . . . expressed through informed and democratic processes".

[44] CR 2018/23, paras. 9-27 (Juratowitch).

[45] StMU, para. 6.44. See also StMU, para. 6.59: "By 1968, for example, U.N.-supervised plebiscites had been routinely used to ascertain the wishes of a people in case of both the merger and division of the territory of former colonies."

[46] Written Statement of the Netherlands (StNL), para. 3.29.

[47] StMU, para. 6.59: "By 1968, for example, UN-supervised plebiscites had been routinely used to ascertain the wishes of a people in case of both the merger and division of the territory of former colonies."

State practice after 1960 where the people of a colonial territory had agreed to division — with one part becoming independent and the other part being divided and integrated with a colonial Power — on the basis of a mandate from a general election.

12. But what *is* clear from State practice in the 1950s and 1960s is that there must be a vote, based on universal suffrage, and that vote must allow a free and genuine choice about whether the colonial territory is to be divided or integrated into another State.

13. In this regard, Vanuatu wishes to raise its concern that the United States, in attempting to argue that there was no such rule of customary international law, has cited the case of West Papua. In 1962, West Papua was a non-self-governing territory known as Netherlands New Guinea.

14. Vanuatu wishes to clarify that the 1962 Agreement under which Netherlands New Guinea was transferred from the Netherlands — first, to the administration of the United Nations and then to Indonesian administration — *required* that the inhabitants of West Papua would have the opportunity to express their freedom of choice on whether to integrate with Indonesia or become independent[48]. That Agreement, noted by the General Assembly in resolution 1752[49], *required* — consistent with customary international law — that the free will be ascertained by universal suffrage of the territory's inhabitants, in accordance with international practice[50].

15. Turning to my second point and Judge Gaja's question: who were the relevant people to be consulted in relation to the detachment of the Chagos Archipelago?

16. It was accepted by this Court in the *East Timor* case that it is an *erga omnes* principle that the peoples of a non-self-governing territory are "peoples" for the purposes of the right to

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[48] See Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), 15 Aug. 1962, 437 *UNTS* 273. The Treaty states in Article XVIII that one of its aims is "to give the people of the territory the opportunity to exercise freedom of choice", which would be based on "*(d)* the eligibility of all adults, male and female, not foreign nationals to participate in the act of self-determination to be carried out in accordance with international practice".

[49] UNGA res. 1752 (XVII), "Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)", A/RES/1752 (XVII) of 21 Sep. 1962. The General Assembly "takes note" of the agreement between the Netherlands and Indonesia.

[50] The US acknowledges that the vote was not conducted in accordance with democratic process: see StUS, para. 4.71, and in particular fn. 180.

self-determination[51]. In 1965, at the time of detachment, the relevant territorial unit for the purposes of self-determination was the non-self-governing territory of Mauritius, which included the Chagos Archipelago. The United Kingdom was therefore obliged to consult the free will of the inhabitants of Mauritius and the Chagos Archipelago — that is, all Mauritians in the territorial unit, including the Chagossians.

17. Turning to my third point. *Given these rules of customary international law, did the United Kingdom comply with the obligations to consult the free will of the Mauritian people in relation to the division of the territory?*

18. The United Kingdom's primary argument is that, in 1965, it had the absolute power and discretion to excise off a part of a non-self-governing territory without any regard to the will of the people. As Vanuatu has shown, this is not correct as a matter of customary international law. Indeed, the General Assembly at that time agreed, as was made clear in resolution 2066 in 1965[52].

19. In the alternative, the United Kingdom ventures that it was sufficient to hold a general election, *three years* after detachment *and* where independence without detachment was simply not an option.

20. Mr. President, Members of the Court, the United Kingdom's argument was eloquently put, but it was an exercise in attempting to justify the unjustifiable. As Vanuatu has set out, the customary international law requirement that the United Kingdom consult the free will of Mauritians required far more than that.

21. Vanuatu emphasizes that customary international law requires more than a consultation based on universal suffrage. It also requires that there be a "free and genuine choice". This requires, of course, a democratic vote, impartially conducted, and free from any form of coercion.

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[51] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29: "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court." See also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52 (stating that, following agreement of the UN Charter, "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them") and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59 (stating that "[t]he principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV)").

[52] UNGA res. 2066 (XX), "Question of Mauritius", A/RES/2066 (XX) of 16 Dec. 1965 ("Regretting that the administering Power has not fully implemented resolution 1514 (XV) with regard to [Mauritius]").

But it also requires that the options available to the people — whether independence or division — are clearly put to the people and that that consultation offers them a free and genuine choice between those options.

22. Mr. President, Members of the Court, what option did the Mauritian electorate really have at the 1968 general election? Their option was to vote for a party promising independence *with detachment*, or to vote for those parties who wished that Mauritius remain a British colony. Becoming independent, with Mauritius having its territorial integrity intact, was not an option. This cannot be considered a free and genuine choice on the division of the Mauritian territory.

23. Vanuatu therefore submits that — in answer to Question *(a)* — the process of decolonization was not lawfully completed.

24. As a consequence of applying these legal principles, the Court need not, in this case, determine the contested factual question of whether there was coercion or duress involved in securing the consent of Mauritian representatives during independence negotiations. This factual background is important because it shows the stark power imbalance between an administering Power and its colonial peoples struggling for their independence. But this serves to underline and emphasize the procedural requirements in resolution 1541. The question for this Court is *not* whether or not the Government of Mauritius or its representatives consented at any point of time or at various points of time or not.

25. The relevant question as to whether the detachment was lawful *according to the right of self-determination* was whether the United Kingdom complied with its obligation to provide the people of Mauritius a genuine and free choice as to the future of the territory. It clearly did not.

26. This brings me to my final point in relation to Question *(b)* on the consequences of all of this. The United Kingdom, as administering State, is responsible for the internationally wrongful act of detaching the Archipelago. The payment of compensation to some Chagossians did not address this wrong and does not relieve the United Kingdom of its obligations to Mauritius. The people of Mauritius continue to hold the right to self-determination in relation to the entire territory, including the Chagos Archipelago. International law requires that the United Kingdom

must cease forthwith its unlawful administration of the Chagos Archipelago and return it to Mauritius[53].

27. Vanuatu wishes finally to emphasize that all States have the obligation to refrain from any action that deprives the people of their right to self-determination. A military base for the purposes of defence for two States, no matter how powerful, cannot override the human right to self-determination for the people of Mauritius. In any event, there is no evidence before this Court that those defence purposes cannot be served, in accordance with international law, after the restitution of the territory to Mauritius.

28. In conclusion, this Court has the power to assert the applicable legal principles on decolonization and support the General Assembly's efforts to end colonization. Vanuatu draws the attention of the Court to the importance of this case for peoples around the world who remain under colonial rule. Vanuatu urges the Court to answer the questions put before it because, as Vanuatu's first Prime Minister, Walter Lini, said when Vanuatu finally got its own independence, *"until all of us are free, none of us are"*.

29. Mr. President, distinguished Members of the Court, that concludes the Republic of Vanuatu's oral submissions. We thank you for your kind and patient attention.

Le PRESIDENT : Je remercie la délégation de la République de Vanuatu dont l'intervention clôt l'audience de ce matin. La Cour se réunira de nouveau cet après-midi, à 15 heures, pour entendre la Zambie et l'Union africaine. L'audience est levée.

L'audience est levée à 12 h 25.

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[53] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, paras. 150-151; *Rainbow Warrior Arbitration*, 30 Apr. 1990, *RIAA*, Vol. XX, p. 215, para. 114. See also United Nations General Assembly, 22nd Session, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Agenda Item 23, UN doc. A/6700/Add.8* (11 Oct. 1967), para. 194.