

CASE NOTE

Legal Consequences of The Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ Advisory Opinion, 25 February 2019, General List No. 169)

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On 25 February 2019 the International Court of Justice (ICJ or the Court) issued its advisory opinion on legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. The request for the advisory opinion was made by the United Nations General Assembly (UNGA) through its Resolution 71/292. The Resolution adopted on 22 June 2017 with 94 votes in favor, 15 against and 65 abstentions. The Court held unanimously that it has jurisdiction to give the advisory opinion as requested and by 13 votes to one decided that the detachment of the Chagos Archipelago immediately before the final stage of decolonization was wrongful thus violating international law and specifically the right to self-determination. Inter alia the court was of the opinion that the agreement between the United Kingdom of Great Britain and Northern Ireland (United Kingdom) and Mauritius concluded in 1965 leaving Chagos Archipelago under administration of United Kingdom after completion of decolonization was flawed because it lacked the free expression of the will of the people on the side of Mauritius. Therefore according to the Court the United Kingdom is obliged to bring to an end its administration over Chagos Archipelago as rapidly as possible and that all members states are obliged to cooperate in the process. Eight judges presented their declarations among whom two presented a joint declaration, four judges presented separate opinions and one of the judges presented a dissenting opinion at the end of the proceedings. Thirty three states have submitted written statements. In addition the African Union organization was allowed to submit written statement. Eleven state have submitted comments related to written statements and 23 states have presented their oral argument before the ICJ. The Chagos Archipelago is located in the Indian Ocean about 500 km from the Maldives archipelago.

Keywords: Chagos Archipelago; Self-Determination; Decolonization; Mauritius; United Kingdom

Introduction

On 25 February 2019 the International Court of Justice (hereafter: ICJ or the Court) issued its advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.¹ The request for the advisory opinion was made by the United Nations General Assembly (hereafter: UNGA) through its Resolution 71/292.² The Resolution was adopted on 22 June 2017 with 94 votes in favor, 15 against and 65 abstentions.³ The Court held unanimously held that it has jurisdiction to provide the advisory

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¹ *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice General List no. 169 (25 February 2019).

² Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UNGA Res A/RES/71/292 (22 June 2017) (adopted at the 71st session, agenda item 87).

³ UN Meeting Coverage and Press Releases of the General Assembly Plenary Seventy First Session, (AM) GA/11924 (22 June 2017) (88th meeting).

opinion as requested and by 13 votes to one decided that the immediate detachment of the Chagos Archipelago before the final stage of decolonization was wrongful thus violating international law and specifically the right to self-determination. *Inter alia*, the Court was of the opinion that the agreement between the United Kingdom of Great Britain and Northern Ireland (hereafter: United Kingdom) and Mauritius concluded in 1965 leaving the Chagos Archipelago under the administration of the United Kingdom after the completion of decolonization was flawed because it lacked the free expression of the will of the people on the side of Mauritius. Therefore according to the Court, the United Kingdom is obliged to end its administration over the Chagos Archipelago as rapidly as possible and that all member States are obliged to cooperate in the process.⁴ Eight judges presented their declarations. Of those, two presented a joint declaration, four judges presented separate opinions and one of the judges presented a dissenting opinion at the end of the proceedings. Thirty-three States have submitted written statements. In addition, the African Union was allowed to submit a written statement. Eleven States have submitted comments related to written statements and twenty-three States have presented their oral arguments before the ICJ.

Background of the case

The case concerns the validity of the agreement concluded between the United Kingdom and Mauritius during the decolonization process. The latter was under the administration of the former State under a UN mandate. In 1810, before the UN came into existence, the UK had already taken control over the territory. Back then, the occupied territories were known as *Ile de France* and were later renamed and called Mauritius. In 1814, France agreed to formally cede Mauritius to the UK through the Treaty of Paris.⁵ Up until 1967, when decolonization of Mauritius was claimed to be completed, the Chagos Archipelago formed part of Mauritius and was administered as a dependent territory of the colony of Mauritius. The Chagos Archipelago is namely located in the Indian Ocean about 500 km from the Maldives archipelago. The status of the Chagos Archipelago was never disputed as it was confirmed by several documents such as the ordinances of the Governors of Mauritius, the Constitution of Mauritius, reports of the UK to the UN under art. 73 (e) of the UN Charter on Mauritius as non-self-governing territory but also other reports presented to other bodies of the UN.⁶

After the UN adopted its Resolution 1514 (XV) entitled 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (Resolution 1514 (XV))⁷, the decolonization process of the 60s and 70s of last century was put in motion. As the decolonization of Mauritius was approaching, the UK moved to secure an agreement with the representatives of Mauritius regarding the future status of the Chagos Archipelago, which the UK managed to secure after months of negotiations. On several occasions during the year-long negotiations, the Premier of Mauritius refused to accept detachment of the Chagos Archipelago as proposed by the Governor while on the other hand offering a long term lease agreement. Finally, on the 23rd of September 1965, together with high ranking UK officials the Premier of Mauritius and his ministers secured an agreement regarding the Chagos Archipelago. The agreement foresaw the detachment of the Chagos Archipelago from Mauritius together with a commitment to further negotiate the following matters with Mauritius: defense and security, compensatory payment for landowners, resettlement processes, sugar concessions, navigational and meteorological facilities, fishing rights, use of an air strip for emergency landing and any benefits stemming from minerals of oil discovered.⁸

The agreement was signed on 23 September 1965 at Lancaster House in the UK, known also as the 'Lancaster House agreement'.⁹ On the side of Mauritius, the agreement was signed by the representatives who were elected or nominated by the new UK promulgated Constitutional Order of 1964 regarding Mauritius, which among others regulated the composition main State organs. The Legislative Assembly consisted of 40 elected members plus 15 others nominated by the Governor. The Council of Ministers was composed of appointed members by the Governor in consultation with the Premier. The Premier presided over the Council. This setting precluded, elected representatives from the side of Mauritius from exercising real power to properly represent the will of the people of Mauritius. This imbalance in power indeed implied that the UK Government would stay in control of any decision-making regarding Mauritius.¹⁰

⁴ ICJ Advisory Opinion on the Chagos Archipelago (n 1) para 183.

⁵ *ibid* para 27.

⁶ *ibid* para 29.

⁷ Declaration on the granting of independence to colonial countries and peoples, UNGA Res 1514 (XV) (14 December 1960) (adopted at 15 session, agenda item 87).

⁸ *ibid* paras 98–112.

⁹ ICJ Advisory Opinion on the Chagos Archipelago, paragraphs 31 and 32.

¹⁰ *ibid* paras 98–99.

Later, by decision of the UK government, the islands forming the Chagos Archipelago would be attached administratively to three other islands in the region that were all under UK administration. Those islands were Aldabra, Farquhar and Desroches and would form a separate legal entity under the UK administration in the form of the British Indian Ocean Territory (hereafter: BIOT).¹¹

The islands would see its population departing, in many cases through force, as part of the UK policy to rid the islands from civilians in order to meet its security needs.¹² Furthermore in 2010, the UK announced the creation of a protected marine area in and around the the Chagos Archipelago. This decision would become object of discussion before an Arbitral Tribunal constituted according to Annex VII of the United Nations Convention on the Law of Sea (hereafter: UNCLOS) which found that by establishing this protected area the UK has breached its obligations under art. 2 para 3, art. 56 para 2 and art. 194 para 4 of the convention and that UK's intention to return the Chagos Archipelago to Mauritius, when no longer needed for defense purpose, is legally binding.¹³

In other legal proceedings, cases were brought before the UK courts, the European Court on Human Rights and the Human Rights Committee regarding the status of Chagossians (citizens of the Chagos Archipelago) which found multiple violations of human rights. Pressured by this number of judicial proceedings, the UK changed its ordinances regarding resettlement but without any real effect.¹⁴ Again, in one of its later decisions, the UK decided against resettlement due to security, defense interests, but also the stark reality that this process would cost British taxpayers money.¹⁵

On several occasions, the UNGA condemned the detachment of the Chagos Archipelago and stated that it was done contrary to the principles of the UN Charter and Resolution 1514 (XV).¹⁶ The situation was condemned by the UN Committee of Twenty-Four in its report as well as by the Organization of African Unity (later African Union) on several occasions.¹⁷

On 22 June 2017, the UNGA adopted a resolution requesting an advisory opinion from the ICJ on the matter of the Chagos Archipelago. The questions presented in the resolution are as follows:

- (a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514(XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967';
- (b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?'.¹⁸

Jurisdiction of the Court

When deciding to give an advisory opinion, the Court inquires whether the question was raised by a competent authority and whether the request is a legal question. On both concerns the Court answered affirmatively. First, with regards to the authority requesting the question, the Court noted that the question was raised by the UNGA under art. 86 paragraph 1 of the Charter authorizing the UNGA to request advisory opinions from the ICJ on matters of interests. Second, with regard to the legal nature of the question, the

¹¹ *ibid* para 33.

¹² *ibid* paras 43–44.

¹³ *ibid* para 50.

¹⁴ *ibid* paras 113–131.

¹⁵ *ibid* para 129.

¹⁶ Question of Mauritius, UNGA Res 2066 (XX) (16 December 1965); Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent. Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands, and the United States Virgin Islands, UNGA Resolution 2232 (XXI) (20 December 1966). Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent. Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands, and the United States Virgin Islands, UNGA Resolution 2357 (XXII) (19 December 1967).

¹⁷ ICJ Advisory Opinion on the Chagos Archipelago paras 38–39, 45, 47, 49–50.

¹⁸ Request for an advisory opinion (n 2).

Court noted that the question is of such nature and refuted claims that the question is of a political nature. The Court reaffirmed its legal practice that in cases where questions also have a political dimension, it has the power to clarify the question presented before it and to refocus on the legal issue in question.¹⁹

Discretion of the Court

In its practice, the Court has repeatedly reiterated its stance that even in cases of questions having been raised by an authorized authority which are of a legal nature, it still has discretion to decide to answer the question raised before it in order to protect the integrity of the Court. However, there should be compelling reasons to decline to answer a question presented by an authorized organ.

In the current case, the Court was challenged on several grounds: 1) the complexity of the situation and dispute, as well as the matter that the factual issues would not be suitable for an advisory opinion; 2) the advisory opinion would not be of any help to the UNGA; 3) it would not be appropriate for the Court to deal with an issue allegedly settled earlier by an Arbitral Tribunal constituted under UNCLOS Annex VII in the Arbitration regarding the Chagos Marine Protected Area; and 4) the question deals with a dispute between two States which have not consented to a settlement by the Court. Whilst tackling these issues one by one the Court did not find anything of particular concern which might jeopardize its integrity. Regarding the first issue, the Court noted that the complexity of the question does not represent a significant challenge as the Court is supplied with abundant information to form a proper opinion. On the second issue it was stated that it is not of the concern of the Court to determine how the General Assembly will use the advisory opinion provided. It is up to the organization requesting it to decide on this matter. On the third issue, the Court noted that the principle of *res judicata* does not preclude giving an advisory opinion. Yet, the Court acknowledged that the issues settled at the Arbitral Tribunal regarding the Chagos Marine Protected Area does not cover the same dispute. On the fourth issue, the Court noted that the question relates to the decolonization process which is a particular concern of the United Nations and does not represent a bilateral territorial issue regarding sovereignty.²⁰ Thus by answering all these issues, the Court cleared the way to provide the UNGA with an advisory opinion.

The applicable law

The Court determined that the law applicable in the present case was the law on self-determination which was in place during the decolonization of Mauritius in 1965-1968.²¹ The principle of self-determination as one of the key principles in international law is laid down in important treaties and resolutions of the UNGA having declaratory nature such as the UN Charter, the Covenant on Civil and Political Rights, the GA Resolution 1514 (XV) and the Declaration Concerning Friendly Relations and Co-operations among States in accordance with the Charter of the United Nations. Even though it is of such importance, it still 'leaves the General Assembly a measure of discretion with respect to the forms and procedures by which the right is to be realized' and reiterates that no specific mechanism of implementation is recognized in customary international law in this regard.²² Furthermore, the Court noted that the decolonization process falls squarely within the scope of the UNGA and that it did not act *ultra vires* whatsoever when discussing and adopting resolutions or when requesting the advisory opinion at hand.²³

Opinion of the Court

After analysing the factual situation of the case, the arguments presented by the States as well as the documents provided, the Court came to the conclusion that the detachment of the Chagos Archipelago was unlawful due to the fact that the right to self-determination was not exercised properly on behalf of the people of Mauritius when the archipelago was ceded to the UK. According to the Court, the right to self-determination cannot be properly exercised when one of the parties involved has control over the other party. In this case, the UK had control over Mauritius when the Lancaster House Agreement was signed and entered into force. This situation detracts from the notion that such an agreement should be an expression of the free and genuine will of the people.²⁴

¹⁹ ICJ Advisory Opinion on the Chagos Archipelago (n 1) paras 55–62.

²⁰ *ibid* paras 63–91.

²¹ *ibid* para 161.

²² *ibid* paras 144–162.

²³ *ibid* paras 163–169.

²⁴ *ibid* paras 170–174.

Consequences of the ICJ Advisory Opinion

The opinion of the ICJ is of advisory nature and is not binding. It is addressed to the organ requesting it, in this case the UNGA and it remains up to the requesting organ to decide how to effectuate it. However, the advisory opinion is provided by an authoritative and prestigious judicial body. In the current case, the advisory opinion has direct effect on the legal and political status of the Chagos Archipelago which, according to the Court, continues to be administered unlawfully by the UK as part of the BIOT. The opinion strengthens Mauritius' claim over the territory concerned and puts pressure on the United Kingdom to find a solution and mitigate any further negative consequences of legal, political and financial nature. The responsibility incurred was stated very clearly by the Court when it noted that the administration of the United Kingdom constitutes a wrongful act entailing international responsibility as stipulated in the articles on Responsibility of States for Internationally Wrongful Acts.²⁵

In legal terms, this opinion might serve as a basis for the parties involved to establish the jurisdiction of an international court such as the ICJ or an arbitral body to settle all issues regarding the political status of the Chagos Archipelago. This would include any possible indemnity to be paid to Mauritius by the UK for decades of unlawful administration of the islands. Such a settlement could also be reached by bilateral agreements forming an international treaty addressing these matters. In political terms, this may have a negative effect on the UK's international standing both in its bilateral relations with Mauritius as well as with other nations, in particular former States under the UN Trusteeship System. The situation is already condemned by both the UNGA and the African Union, as mentioned above. In financial terms, the opinion might give rise to indemnity claims by Mauritius based on decades of unlawful administration of the islands. It may also give rise to other claims of satisfactory nature which does not always have to be in the form of financial compensation.

Should the UK decide not to take the opinion to heart, it would probably impact the agenda of the UNGA as well as the work of the UN Trusteeship Council (hereafter: the UNTC) and other regional organization such as the African Union which will continue to call on the UK to end this unlawful situation. On the other hand, the UN Security Council would be ineffective as a body to address the situation due to the fact that the UK is a permanent member with veto power. Of particular interest is the UNTC which, as of 1 November 1994, has suspended its operations when it concluded that there is no remaining trust territories after Palau's independence.²⁶ The current case overturns this conclusion and thus presents a *raison d'être* to reopen its operations until the decolonization of Mauritius is completed.

From another perspective, if the *status quo* is maintained, it is possible that in the future, we will see power politics taking its place. The case might give rise to international security concerns, however with its current military, political and economic powers, the UK's administration might still present a safe deterrence and keep down any possible hostilities from the side of Mauritius. Nevertheless, any shift of power towards Mauritius might lead to friction and possibly an international conflict, which is probably not likely to happen in the near future. According to the UK, the Chagos Archipelago is important for the security of the country. However, the situation it created over the islands might in fact be the cause of concern for international security. In the same light, the decision by the ITLOS Arbitral Tribunal was rather dubious. It upheld that actions taken by the UK to return the Chagos Archipelago back to Mauritius are legally binding when any justifications regarding defence are no longer applicable. However by attaching such conditions to the obligation to return the Chagos Archipelago to Mauritius, it has made this matter too vague and open to flexible interpretation. Thus, the matter remains an object of subjective interpretation which does not help the situation any further.

Ultimately, the opinion of the Court implies that, had the agreement for detachment of the Chagos Archipelago been signed after the completion of the decolonization process with legitimate representatives of the Mauritius people present, the UK could have avoided similar claims from Mauritius or in a similar situation it would have been able formulate a better legal defence to plead their case.

Competing Interests

The author has no competing interests to declare.

²⁵ Responsibility of States for internationally wrongful acts, UNGA Res 56/83 (12 December 2001) (adopted at the 56th meeting, agenda item 162), art. 1.

²⁶ 'Trusteeship Council' (United Nations) <https://www.un.org/en/sections/about-un/trusteeship-council/>, accessed 26 October 2020.

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