



ICJ DELIVERS ADVISORY OPINION IN CHAGOS ISLANDS CASE

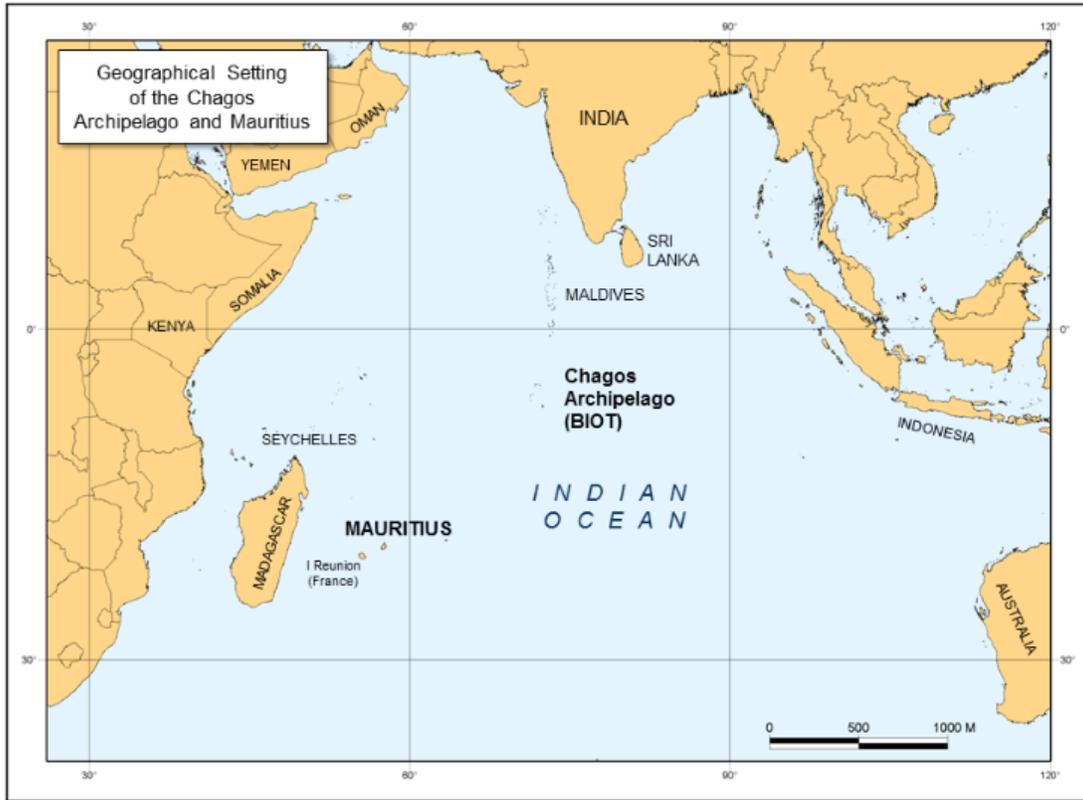
Introduction

In an Advisory Opinion delivered by the International Court of Justice (ICJ) on 25 February 2018, the ICJ found that the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence and that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible. This is the first Advisory Opinion handed down by the ICJ in over seven years (the last being the advisory opinion delivered in the case of *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*).

As the Advisory Opinion was rendered to the UN General Assembly, it is not strictly binding on the United Kingdom. However, consistent with the UK's approach to International Law obligations generally, it would be unusual for the United Kingdom not to have regard to the conclusions stated in the Advisory Opinion, albeit that the context for this matter has involved very protracted litigation before the English Courts, as well as engaging sensitivities regarding US/UK relations.

Background

The current proceedings arise from the separation of the Chagos Archipelago (a group of islands in the Indian Ocean, with Diego Garcia being the largest island) from Mauritius in 1965. There is a long-standing dispute between the United Kingdom and Mauritius as to the sovereignty of the Chagos Islands.



While the history of the Islands is lengthy, in brief, the Chagos Islands were occupied by the Dutch from 1638 to 1710 and then colonised by the French in 1715. By the Treaty of Paris of 1814, France ceded Mauritius and all its dependencies to the United Kingdom, which administered by the United Kingdom as a dependency of the colony of Mauritius between 1814 and 1965. In 1965, the United Kingdom detached the Chagos Islands from Mauritius, and they became part of a new colony called the British Indian Ocean Territory. Mauritius subsequently became independent.

On 30 December 1966, the United Kingdom and the USA (following over two years of talks) concluded an Agreement entitled “Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory” in which the parties agreed that the United Kingdom would take any “administrative measures” necessary to ensure that their defence needs were met. Between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning by the United Kingdom.

Proceedings

In a letter dated 14 July 2016 to the Secretary-General (A/71/142), the Permanent Representative of Mauritius to the United Nations transmitted a request from Mauritius for the inclusion in the provisional agenda of the seventy-first session of the General Assembly of an item entitled "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".

Subsequently, on 22 June 2017, the General Assembly of the United Nations adopted resolution A/RES/71/292 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on the following questions:

(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?”

The request for the Advisory Opinion was filed on 23 June 2017.

In addition to the United Kingdom and Mauritius, a number of other countries filed written statements (Belize, Germany, Cyprus, Liechtenstein, Netherlands, Serbia, France, Israel, Russia, USA, Seychelles, Australia, India, Chile, Brazil, Korea, Madagascar, China, Djibouti, Nicaragua, Guatemala, Argentina, Lesotho, Cuba, Viet Nam, South Africa, Marshall Islands, Namibia, Niger, along with the African Union).

Oral proceedings before the ICJ were held on 3-6 September 2018. Twenty two States and the African Union had expressed their intention of participating in the oral proceedings before the ICJ, with Mauritius and the United Kingdom being allocated 3 hours each, and other countries receiving 40 minutes for their submissions.

Mauritius’ position was that the ICJ had jurisdiction to give the advisory opinion and there was no reason for the Court to decline to give it. As to the merits, Mauritius stated that the decolonization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, and had not been lawfully completed to this day, as a result of the separation of the Chagos Archipelago from Mauritius. Accordingly, Mauritius’ position was that “*international law requires that:*

(a) The process of decolonisation of Mauritius be completed immediately, including by the termination of the administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, so that Mauritius is able to exercise sovereignty over the totality of its territory;

(b) Mauritius be able to implement with immediate effect a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin;

(c) No State may render aid or assistance that will prevent the process of decolonisation from being completed; and

(d) The United Nations, and especially the General Assembly, shall take all actions necessary to enable the process of decolonisation to be completed without further delay.”

In contrast, the UK, while accepting that *“it treated the Chagossians very badly at and around the time of their removal and it deeply regrets that fact”*, requested that the ICJ should exercise its discretion and decline to give the requested Advisory Opinion for reasons of judicial propriety. In particular, the UK asserts that this is a long standing dispute and for the ICJ to give a reply would (citing Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 25, paras. 32-33) *“have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.”*

The written statements filed by other States were broadly in support of Mauritius’ position as to the Court’s jurisdiction (and merits, where discussed in those written submissions). However, some jurisdictions agreed with the UK’s position that the ICJ should decline jurisdiction as this was a bilateral dispute and there was no consent for the referral of the dispute to the ICJ; including France, USA, Australia, and Israel (which voted against the General Assembly resolution).

Following the conclusion of the oral proceedings, written comments were filed in response to questions asked by Judge Gaja and Judge Cançado Trindade during the oral phase.

Decision

In its Advisory Opinion dated 25 February 2019, the Court,

- (1) unanimously, found that it has jurisdiction to give the advisory opinion requested;
- (2) by twelve votes to two (Judges Tomka, Donoghue dissenting), decided to comply with the request for an advisory opinion;
- (3) by thirteen votes to one (Judge Donoghue dissenting), was of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago;
- (4) by thirteen votes to one (Judge Donoghue dissenting), was of the opinion that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;
- (5) by thirteen votes to one (Judge Donoghue dissenting), was of the opinion that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

In addition to the Advisory Opinion, Vice-President Xue and Judges Tomka, Abraham, Gevorgian, Salam and Iwasawa delivered separate declarations; Judge Cançado Trindade and Robinson delivered a joint declaration; Judges Cançado Trindade, Gaja, Sebutinde and Robinson delivered separate opinions; and Judge Donoghue delivered a dissenting opinion.

On jurisdiction, the Court addressed four questions:

- **Whether advisory proceedings are suitable for determination of complex and disputed factual issues:** there was sufficient information on the facts available before the Court to give the requested opinion.
- **Whether the Court's response would assist the General Assembly in the performance of its functions:** it was not for the Court to determine the usefulness of its response to the requesting organ, but instead for the General Assembly to decide.
- **Whether it would be appropriate for the Court to re-examine a question allegedly settled by the Arbitral Tribunal constituted under UNCLOS Annex VII in the Arbitration regarding the Chagos Marine Protected Area:** the Court noted that its opinion is given not to States, but to the organ which is entitled to request it, and the principle of res judicata does not preclude it from rendering an advisory opinion. In any event, the issues that were determined by the Arbitral Tribunal in the Arbitration regarding the Chagos Marine Protected Area were not the same as those that are before the Court in the present proceedings.
- **Whether the questions asked relate to a pending dispute between two States, which have not consented to its settlement by the Court:** the Court did not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State, on the basis that the General Assembly had not sought the Court's opinion to resolve a territorial dispute between two States, but instead was seeking the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius; and the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute.

The ICJ concluded that there were no compelling reasons for it to decline to give the opinion requested by the General Assembly.

On the merits, the Court considered:

- **Whether the process of decolonization of Mauritius was lawfully completed having regard to international law:** The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968
- **The consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago:** given that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State. Accordingly, the Court concluded that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.

Judge Donoghue's dissent was based on her conclusion that giving the Advisory Opinion had the effect of circumventing the absence of the UK's consent to judicial settlement of its bilateral dispute with Mauritius regarding sovereignty over the Chagos Archipelago and therefore that it undermines the

integrity of the Court's judicial function. This was accordingly a compelling reason for the Court to exercise its discretion to decline to give the Advisory Opinion.