



OSSERVATORIO SULLA CORTE INTERNAZIONALE DI GIUSTIZIA N. 3/2019

1. THE ADVISORY FUNCTION AND *ERGA OMNES* OBLIGATIONS IN THE *CHAGOS* CASE

[Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 25 February 2019](#)

On 25 February 2019, the International Court of Justice rendered its advisory opinion concerning the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The questions submitted by the General Assembly of the United Nations on 22 June 2017 ([resolution 71/292](#)) were the following: (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?».

Mauritius and its dependencies, which included the Indian Ocean territories of the Seychelles and the Chagos Archipelago, were ceded to the United Kingdom with the Treaty of Paris of 1814. Following the creation of the United Nations, Mauritius was registered as a non-self-governing territory. On 8 November 1965, with the British Indian Ocean Territory Order, the United Kingdom established a new colony known as the British Indian Ocean Territory (BIOT) which included several islands and the Chagos Archipelago. The decision to separate the Chagos Archipelago from Mauritius stemmed from a decision of the United Kingdom to accommodate the United States' desire to use certain islands in the Indian Ocean for defence purposes (see S. ALLEN, *The Chagos Islander and International Law*, Oxford, 2014). The two governments entered into an [exchange of notes](#) in 1966 establishing that while the United Kingdom would retained sovereignty over the BIOT, the Diego Garcia island would be available to the United States government for an initial period of 50 years allowing the establishment of a military facility (S. MARCHISIO, *Le basi militari nel diritto internazionale*, Milano, 1984, pp. 96-97). In 1968 Mauritius obtained independence over a territory that did not include the BIOT. On 30 December 2016, notwithstanding the reiterated actions against the situation of the Chagos Archipelago, the

50-year period covered by the 1966 Agreement came to an end and it was extended for a further period of twenty years, in accordance with its terms.

The detachment of the Chagos Archipelago was not without reaction. Over the decades, Mauritius has regularly claimed restitution of the Chagos Archipelago so that to allow the return of the local population that was removed from the UK before independence. In addition, the General Assembly in resolution 2066 (XX) 1965 expressed deep concern about the situation, in 1980 the Organisation of African Unity demanded the return of Diego Garcia to Mauritius (OAU Assembly of Heads of State Resolution on Diego Garcia, 4 July 1980, AHG/Res 99 (XVII)), and in 1983 the Non-Aligned Movement adopted a Declaration supporting Mauritian sovereignty over the Chagos Archipelago (J. TRINIDAD, *Self-Determination in Disputed Colonial Territories*, Cambridge, 2017, p. 89). In 2011, Mauritius initiated arbitration proceedings against the United Kingdom under Art. 287 and Annex VII of the UNCLOS, challenging the designation by Britain of a marine protected area (MPA) around the Chagos Islands. The Tribunal found that the United Kingdom was under a binding obligation to return the Chagos Archipelago to Mauritius when it was no longer required for defence purposes, and that consequently Mauritius had an interest in significant decisions that bear upon the possible future uses of the Archipelago Chagos Marine Protected Area (*Republic of Mauritius v. United Kingdom*, Award, 2015, para 298.).

With respect to the questions posed by the General Assembly, the Court found that the separation of the Chagos Archipelago from the British colony of Mauritius was contrary to the right to self-determination which is an *erga omnes* obligation. The Court was of the opinion that in 1965 the right to self-determination had already the character of customary law and that the decolonization of Mauritius was not completed in conformity with international law. Accordingly, the Court stated that Mauritius did not genuinely consent to the separation of Chagos Archipelago and that «[...] peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power» ([Advisory Opinion](#) §174). Moreover, the Court found that the continuing administration of the United Kingdom on the Chagos Archipelago, which includes the Diego Garcia island made available to the United States, is a continuing internationally wrongful act and the United Kingdom was under an obligation to bring to an end its administration as rapidly as possible ([Advisory Opinion](#) §177-178). The decision of the Court to exercise the advisory function was almost unanimous, founding by 12 votes to 2 not to exercise discretion and decline giving an opinion, whereas judges agreed on the merits by 13 votes to 1. The recent advisory opinion concerning the Chagos Islands has, understandably, received particular attention. The present paper focuses on two specific aspects of the advisory opinion. On the one hand, it addresses the procedural aspect linked to the exercise of judicial propriety when the opinion regards the alleged breach of *erga omnes* obligations. On the other hand, it concentrates on the position of the Court on the legal consequences that are attached to the violation of such obligations.

1. The Judicial Propriety of the Court

It is known that once the Court deems itself competent to render an advisory opinion, it has then to consider its judicial propriety, that is the discretion to exercise such jurisdiction connected to circumstances that might render more appropriate to decline the request. Indeed, as the Court has already noted «[...] art. 65 par. 1 of its Statute should be interpreted as to mean that the Court has a discretionary power to decline to give an

advisory opinion even if the conditions of jurisdiction are met» (*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; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 (II), pp. 415-416, para. 29). For instance, the Court could abstain from exercising its advisory jurisdiction if giving a reply would entail circumventing the principle of consent to its contentious jurisdiction.

The Court has always been careful in considering as to whether there were compelling reasons for it to decline to respond to a request for an advisory opinion, although it has never refused to do so (M. M. ALJAGHOUB, *The Advisory Function of the International Court of Justice 1946-2005*, Berlin, 2006, pp. 97-106). The discretion that the Court has to render or refuse advisory opinions is, indeed, a way by which the Court respects the principle of consent to its contentious jurisdiction. Indeed, when the Permanent Court of International Justice refused to render an advisory opinion in *Eastern Carelia* case, it justified its decision by the fact that one of the parties to the underlying dispute (Russia) had not given its consent as it was neither a party to the Statute of the Permanent Court nor a member of the League of Nations. The Court has later clarified that the purpose of the advisory function does not concern the settlement of disputes between States, but consist of offering legal advice to the organs and institutions requesting the opinion (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 15).

In the *Chagos* case, the key issue was whether the Court would be effectively deciding on a bilateral dispute between States over territorial sovereignty raising a matter of consent (Mauritius and the UK) or whether it could give the opinion without circumventing the principle of consent. Some participants to the proceedings argued that there was a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and that this dispute was at the core of the advisory proceedings ([Written Statement United Kingdom](#), pp. 104-116; [Written Statement USA](#), pp. 12-16). Similarly, it has been contended that the dispute over sovereignty, which arose in the 1980s in bilateral relations, was the «real dispute» that motivated the request of the General Assembly ([Written Statement France](#), p. 7). Another State affirmed that in the circumstance of the case giving the requested opinion « [...] would gravely compromise the judicial integrity of the Court contending that Mauritius' claims in the *Arbitration regarding the Chagos Marine Protected Area* revealed the existence of a bilateral territorial dispute between that State and the United Kingdom» ([Written Statement Israel](#), p. 14).

These opinions were not shared by the judges. In the Court's view, the existence of a pending bilateral dispute, by itself, is not considered to be a compelling reason for declining to give an advisory opinion (*Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 26, para. 38). In the *Namibia* case, the Court found that it was not uncommon that the questions submitted to the Court in advisory proceedings involved a bilateral dispute (*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. 24, para. 34). Moreover, the Court affirmed that even where the request for an Opinion relates to a legal question actually pending between States « [...] The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take [...] the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle,

should not be refused» (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), para. 47).

In the present case, the Court determined that the questions submitted by the General Assembly related to the decolonization of Mauritius, a subject-matter which was of particular concern to the United Nations ([Advisory Opinion](#) § 86) and that the issues were located in the broader framework of decolonization, including the General Assembly's role therein, from which those issues were inseparable ([Advisory Opinion](#) § 88). The reasoning of the Court recalls its jurisprudence in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* where it did not consider that responding to an opinion requested «on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute [...] would have the effect of circumventing the principle of consent to judicial settlement» (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), para. 50). In its opinion, the Court stressed that the object of the request was not to resolve a territorial dispute between Mauritius and the United Kingdom, but « [...] to assist the General Assembly in the discharge of its functions relating to the decolonization of Mauritius» ([Advisory Opinion](#) § 86). The fact that the Court might have to pronounce on legal issues disputed between Mauritius and the United Kingdom did not mean that, by replying to the request, it was dealing with a bilateral dispute. Indeed, as noted by Judge Xue, in the jurisprudence of the Court what is decisive is the object and nature of the request ([Separate opinion of Judge Xue](#), para 4). As affirmed by Judge Iwasawa, the Court gave an opinion that did not amount to adjudication of a territorial dispute between the United Kingdom and Mauritius; it answered to the questions requested by the General Assembly to the extent necessary to assist it in carrying out its function concerning decolonization ([Separate opinion of Judge Iwasawa](#), para 10).

For the purposes of the present analysis, the main aspect is that the Court exercised its advisory function on a legal issue which involves the international community as a whole and this might have had an impact on its decision not to decline to exercise its advisory jurisdiction. In this sense, the conclusion of the Court seems to rely on the assumption that in cases concerning the breach of *erga omnes* obligations, that is issues of collective interest for the entire international community and of particular concern to the United Nations, it should not decline to exercise its advisory function. In such circumstance, the collective dimension of the legal question would play a paramount role when compared to the underlying bilateral dispute and the principle of consent. Judge Gaja in its separate opinion affirmed that in questions raising the concern of third States or of the international community the Court should not decline to exercise its advisory function ([Separate opinion of Judge Gaja](#), para 4). In such cases, the exercise of the Court's function serves the interests of the whole international community and would not go against the principle of consent. The Chagos advisory opinion could be used as a precedent to support the exercise of the Court's advisory function when the legal question concerns the breach of *erga omnes* obligations.

2. The Position of the Court on the Legal Consequences for Breaching Erga Omnes Obligations

In *Chagos* the Court found that the United Kingdom's continued administration of the Chagos Archipelago constituted a wrongful act of a continuing character, entailing the international responsibility of that State. Moreover, the Court stated that the United Kingdom was under an obligation to bring to an end its administration of the Chagos

Archipelago as rapidly as possible, «thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination» ([Advisory Opinion](#) § 179). By recalling its jurisprudence in the *East Timor* case and in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court reiterated that the right of peoples to self-determination «[...] evolved from the Charter and from United Nations practice and that is an obligation *erga omnes* from which all States have a legal interest in protecting that right» ([Advisory Opinion](#) § 180).

The Court did not pronounce on the modalities required to ensure the completion of the decolonization of Mauritius leaving this task to the General Assembly. However, it required that «Member States must cooperate with the United Nations to put those modalities into effect» (*ibid.*, 180). This conclusion seems a little weaker when compared to the positions expressed by the Court in other cases related to self-determination, especially if we refer to the legal consequences attached to the breach of the principle, despite the general agreement of the judges (for dissent on this part of the reasoning see [Separate opinion of Judge Tomka](#), para. 9; [Separate opinion of Judge Gevorgian](#), para. 5).

The consequences of an internationally wrongful act are well known; the responsible State is under a duty to make full reparation to the injured State or other injured entity or individual in the form of restitution, compensation or satisfaction. In addition, the serious breach of *jus cogens* obligations entails the legal consequences codified by art. 41 of the ILC Articles on State Responsibility. In the present case, the Court did not qualify self-determination as a peremptory norm of international law (see [Joint declaration of Judge Cañado Trindade and Judge Robinson](#), para. 8; [Separate opinion of Judge Sebutinde](#), para 25) but it can arguably be considered that the consequences of art. 41 apply to serious breaches of *erga omnes* obligations. A «[...] serious breach of an obligation owed to the international community that does not arise under a peremptory norm could also conceivably raise great concern and call for additional consequences» (G. GAJA, *The Protection of General Interests in the International Community*, in *Collected Courses of the Hague Academy of International Law*, vol. 364, Leiden/Boston, 2013, p. 125).

Seen against the background of the Court's case law on self-determination, especially in the *Namibia* and *Wall* cases, one can conclude that at least some of the additional secondary obligations listed in art. 41 do apply to the breach of the self-determination principle. For instance, in the *Namibia* case the Court found that the continued presence of South Africa in Namibia was illegal and that UN Member States had an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia. Additionally, they were «under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, Member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation» (*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, para. 122). The advisory opinion continued by affirming that «[i]n the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof» (*ibid.*, para. 126).

Most interestingly, the legal consequences of art. 41 were attached by the Court to the breach of *erga omnes* obligations in the *Wall* case. The Court observed that Israel had violated certain obligations *erga omnes*, including «the right of the Palestinian people to self-determination that [...] gives rise to an obligation to the international community as a whole to permit [...] its exercise» (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C.J. Reports 2004, p. 136 para. 155). The Court emphasized that such obligations are by their very nature the concern of all States and that in view of the importance of the rights involved, all States can be held to have a legal interest in their protection (*Ibid.*, para. 155). In that case, the Court added that « [g]iven the character and the importance of the rights and obligations involved, [...] all States are under an obligation not to recognize the illegal situation [...] They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end» (*ibid.*, para. 159).

In the *Chagos* case the Court recalled that since self-determination was an obligation *erga omnes* all the United Nations Member States had to cooperate in order to finalize the decolonization of Mauritius. By referring to the duty of cooperation of all the States to which the obligation is owed the Court encouraged their response to the wrongful act that affected a general interest of the international community. However, the Court did not recall, as in previous opinions, the other consequences set forth in art. 41 of the Articles on State responsibility. In the *Wall* case, the Court seemed to accept the idea that, when a State is responsible for an infringement of an *erga omnes* obligation, such as the principle of self-determination, other States have also the duty not to recognize the illegal situation and not to render aid or assistance in maintaining the situation created. One may wonder whether in *Chagos* the Court did not refer to such additional obligations. One possible reading is that the Court did so on purpose in order to avoid pronouncing on more specific aspects that characterize the existing bilateral dispute between Mauritius and the UK. In other words, the Court might have found appropriate to render the opinion in order to protect the general interests of the international community and foster the intervention of the General Assembly, but would have preferred not to mention specific secondary obligations that could have entailed issues of judicial propriety.

3. Conclusions

The *Chagos* case offered the opportunity to highlight certain aspects of the advisory function of the Court. Indeed, any time the Court receives the request to render an opinion it has to decide whether an issue of judicial propriety exists. It has been highlighted that the Court has never refused to render an opinion due to its discretionary power and, in this specific case, the *erga omnes* nature of the obligations invoked might have played a crucial role. Indeed, in case of legal questions arising issues of collective interest or of particularly acute concern to the United Nations it seems that the existence of an underlying bilateral dispute is a secondary aspect that does not raise issues of judicial propriety and of circumvention of the principle of consent. The Court considers that to give the requested opinion on legal questions that involve the international community as a whole would not pose at risk its integrity. As a result, this conclusion would safeguard the coherence of the legal system leading the Court to exercise its advisory function in order to contribute to the development of international law within the United Nations system. In the present case,

the Court left to the General Assembly the task of deciding how the decolonization of Mauritius will be put to an end in a manner consistent with the right of peoples to self-determination and more generally with international law.

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