

INTERNATIONAL COURT OF JUSTICE

*Legal consequences of the separation of the Chagos Archipelago
from Mauritius in 1965*

(Request for advisory opinion)

**WRITTEN STATEMENT
BY THE RUSSIAN FEDERATION**

27 February 2018

TABLE OF CONTENTS

I. Introduction.....	3
II. Jurisdiction of the Court	6
II. (1) General Assembly's functions and powers and the right to self-determination of peoples in the decolonization context	8
II. (2) General Assembly's functions and powers and the status of territories.....	10
III. Conclusions.....	12

I. Introduction

1. By Resolution 71/292, adopted on 22 June 2017, the United Nations General Assembly, acting in accordance with Article 96, paragraph 1 of the Charter of the United Nations and referring to Article 65 of the Statute of the International Court of Justice requested the Court to render 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 of its nationals, in particular those of Chagossian origin?”.

2. Resolution 71/292 of 22 June 2017 was approved by a recorded vote of 94 in favor, 15 against with 65 abstentions including the Russian Federation. Although the Russian Federation abstained during the vote on the above-mentioned resolution, it has decided to submit its written statement to the Court in order to set forth its position on some issues of international law that are relevant to the consideration of this matter by the Court.

3. While deciding on whether to give an advisory opinion, and if answered in affirmative, on how to formulate the opinion requested, the Court will inevitably address a number of important issues, in particular those pertaining to the role and mandate of the principal organs of the Organization, including the United Nations General Assembly, and division of powers among them. It may also address the

issue of correlation between the settlement of territorial disputes and the institute of advisory proceedings.

4. The United Nations is a unique universal organization established in order to be a center for harmonizing actions of nations in the attainment of common goals, such as maintenance of international peace and security, development of friendly relations among nations based on the principle of equal rights and self-determination of peoples, cooperation in solving international problems¹.

5. The successful attainment of these goals is inextricably linked to the smooth and effective functioning of the Organization, which cannot be achieved without consistent interpretation and application of the mandates of the principle organs of the Organization. The mandate of the United Nations General Assembly although significantly broad does not encompass questions concerning legal status of territories, with exception related to the powers of the Assembly with respect to the Trusteeship system and related issues of the mandate system.

6. The fundamental principles of contemporary international law are a cornerstone for just and equitable international relations, including the principle of equal rights and self-determination of peoples. By virtue of this principle more than 80 peoples under colonial rule gained independence since the establishment of the United Nations. Recognizing its fundamental role our country made a significant contribution to the decolonization process by supporting the African and Asian peoples' struggle for independence.

7. States shall resolve their disputes through the mechanisms that they have agreed upon in accordance with applicable international law, thus leading to de-escalation of tensions and promotion of peaceful cooperation among disputing parties.

¹ Art.1, Charter of the United Nations.

8. It is in this spirit that the Russian Federation submits the present written statement to the International Court of Justice, pursuant to its Orders of 14 July 2017 and of 17 January 2018.

II. Jurisdiction and discretion of the Court

9. Pursuant to Article 96, paragraph 1 of the UN Charter, the General Assembly may request the International Court of Justice to give an advisory opinion on any legal question.

10. Under Article 65, paragraph 1, of the ICJ Statute the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

11. As the Court stated in its advisory opinion *“Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo”*, “when seized of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it.”².

12. In this opinion the Court further noted that “while paragraph 1 of Article 96 [of the UN Charter] confers on the General Assembly the competence to request an advisory opinion on “any legal question”, the Court has... 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 (*“Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase”*, Advisory Opinion, I.C.J. Reports 1950, p. 70; *“Legality of the Threat or Use of Nuclear Weapons”*, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 232-233, paras. 11-12; *“Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 145, paras. 16-17)”.

² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 17.*

13. In all these cases the issue was raised as to whether the UN General Assembly while addressing a request for an advisory opinion to the Court was acting *ultra vires*. Although the Court did not reject the request on this basis it has carefully examined the relation between the question posed and the competence of the Assembly.

14. The examination of the mandate of the General Assembly in the field of advisory proceedings on the part of the Court is indispensable and is to be conducted rigorously each time.

15. Unfortunately, recent practice shows less respect for the mandate and procedures of the United Nations organs, which leads to the collision of their competences and undermines the international legal order.

16. The Court's own jurisprudence confirms that the purpose of its advisory opinions is the furnishing to the requesting organs the elements of law necessary for them in their action³ or in other words "the object of ... request for an Opinion is to guide the United Nations in respect to its own action"⁴. According to the Opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia, "the request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions".

17. The purpose of the Court's advisory jurisdiction is not to settle, at least directly, inter-state disputes, but rather to offer legal advice to the organs and institutions requesting the opinion.⁵ Thus, "the advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly ... in accordance

³ See, *inter alia*, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 19; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 24, para. 32; *Western Sahara*, I. C. J. Reports 1975, p. 37, para. 72.

⁴ *Reservations to the Convention on the Prevention and Punishment of the crime of Genocide* ICJ Reports 1951, p. 19.

⁵ See, *inter alia*, *The Legality of the Threat or Use of Nuclear Weapons case*, ICJ Reports, 1996, pp. 226,236;

with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it".⁶

18. Therefore it is submitted that the UN General Assembly may request an advisory opinion only on the questions within its mandate, pertaining to its work and necessary for its future actions.

(1) The General Assembly's functions and powers and the right to self-determination of peoples in the decolonization context

19. Article 10 of the UN Charter entitles the General Assembly "to discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

20. The self-determination of peoples is mentioned in Articles 1(2), 55 and related article 56 of the United Nations Charter. Article 1 (2) sets forth the self-determination of peoples among the purposes of the Organization. The Rapporteur of Committee I/1 to the San Francisco Conference referred to the purposes as "the *raison d'être* of the Organization,... the aggregation of the common ends... the cause and object of the Charter to which member states collectively and severally subscribe"⁷. Decisions of the organs taken under other Articles may be regarded – if one takes a constitutional view – as bearing upon, or even implementing, such

⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para.33.*

⁷ *UNCIO VI, 447, Doc. 944*

purposes and principles⁸. The important role in establishing the self-determination of peoples among the purposes of the United Nations was played by the USSR⁹.

21. According to the Court, those provisions have direct and particular relevance for non-self-governing territories, which are dealt with in Chapter XI of the Charter. As the Court stated in its Advisory Opinion of 21 June 1971 on “*The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*”: “...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”¹⁰.

22. The self-determination in the decolonization context is firmly established as part of the mandate of the UN General Assembly. The UN General Assembly over the years has adopted a number of resolutions on the implementation of the Declaration and in particular resolutions 9 and 66 (I) of 1946, resolutions 334 and 569 (IV) of 1949, resolution 567 (VI) of 1951, resolutions 637 and 648 (VII) of 1952, 742 (VIII) of 1953, resolution 1188 (XIV) of 1959, resolutions 1514 (XV) and 1541 (XV) of 1960.

23. Since 1946 the UN General Assembly has special subsidiary organs dealing with the issue of non-self-governing territories and self-determination. With the adoption of the breakthrough Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 a Special Committee on the Situation with regard to the Implementation of the Declaration was established (also known as the Special Committee on decolonization or C-24).¹¹ Currently, decolonization is one

⁸ *The Charter of the United Nations, A commentary, third edition, Volume I, edited by B.Simma. D-E Khan, G.Nolte, A.Paulus, Oxford University Press, 2012, p. 109, p. 6*

⁹ *The Charter of the United Nations, A commentary, third edition, Volume I, edited by B.Simma. D-E Khan, G.Nolte, A.Paulus, Oxford University Press, 2012, p. 318, para 6.*

¹⁰ *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). I.C.J. Reports 1971, p. 31*

¹¹ *General Assembly Resolution 1514 (XV) of 14 December 1960.*

of the main subjects that the Special Political and Decolonization Committee (Fourth Committee) of the General Assembly deals with.

24. In the *Western Sahara* case the Court stated that a United Nations Member “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...”¹². According to the Court “the object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory”.¹³

25. Consequently, the General Assembly may have an institutional interest in the decolonization process given its mandate and activities in this sphere.

(2). The General Assembly’s functions and powers and the status of territories

26. Articles 10-17 of the UN Charter describing the mandate of the UN General Assembly do not contain any provisions regarding the competence of the UN General Assembly to establish the legal status of the territories.

27. The UN “General Assembly is not generally entitled to exercise rights of ownership and title of territories or to impose permanent status changes. These

¹² *Western Sahara Advisory Opinion, I.C.J. Reports 1975, p. 15, para. 30*

¹³ *Western Sahara Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 39*

powers remain with the territorial sovereign, or ultimately with the inhabitants of the territory”.¹⁴

28. An exception to this rule is related to the powers of the Assembly with respect to the Trusteeship system and related issues of the mandate system. As it was stated in the South-West Africa Advisory opinion, “the Court has arrived at the conclusion that the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and render annual reports to it”¹⁵.

29. Any territorial disputes between States may be resolved by peaceful means agreed upon by them in accordance with applicable international law. The power of the UN General Assembly to request an advisory opinion of the International Court of Justice may not be used *ultra vires* in order to settle the issue of legal status of a territory by circumventing the agreement of parties to a territorial dispute. Therefore the Court lacks jurisdiction to respond to such a request.

30. In the Western Sahara advisory opinion the Court noted that “in certain circumstances... the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would 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. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction”¹⁶.

¹⁴ See, *inter alia*, C. Stahn. *The Law and Practice of International Territorial Administration : Versailles to Iraq and Beyond*. Cambridge University Press. 2008, P. 545.

¹⁵ “*International status of South-West Africa, Advisory Opinion : I.C. J. Reports 1950, p. 128.page 137*

¹⁶ *Western Sahara Advisory Opinion, I.C.J. Reports 1975, p. 12, para.33*

31. As a criterion for resolving the issue the Court analyzed the question whether the dispute arose independently in bilateral relations or during the proceedings of the UN General Assembly¹⁷.

32. The Court deals with a request for an advisory opinion which in fact transmits to the Court not just a dispute but a bilateral territorial dispute the criterion must be even higher. It is supported, *inter alia*, by the fact that in “*Western Sahara*” Advisory Opinion the Court did not dismiss Spain’s objection that the consent of a State to adjudication of a dispute concerning attribution of territorial sovereignty is always necessary, but responded that “the questions in the request do not... relate to a territorial dispute, in the proper sense of the term, between interested States”¹⁸.

Conclusions

33. It is important for the Court to carefully evaluate the circumstances of each request for an advisory opinion in order to take an informed decision as to whether a particular request is adopted within the mandate of the requesting organ (even if this organ is the UN General Assembly) for the purposes of discharging its functions.

34. In “*Certain expenses of the United Nations*” Advisory Opinion the Court stated: “as anticipated in 1945,... each organ must, in the first place at least, determine its own jurisdiction”¹⁹. This assertion remains true today. However, in a request for advisory opinion the competence of the UN General Assembly is the basis for the Court’s jurisdiction and, therefore, the scrutiny of the mandate of the General Assembly in this request is appropriate.

35. In this context it should be noted also that in some previous cases the Court “has departed from the language of the question put to it where the question was

¹⁷ *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, para.34

¹⁸ *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, para.43

¹⁹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962: I.C. J. Reports 1962, p. I-I., page. 21

not adequately formulated (see, for example, in Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (“*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*”, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46)”²⁰.



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²⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para 50.