

INTERNATIONAL COURT OF JUSTICE

**LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM
MAURITIUS IN 1965**

(REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT OF THE GOVERNMENT OF THE REPUBLIC OF KOREA

28 FEBRUARY 2018

I. INTRODUCTION

1. The United Nations General Assembly adopted resolution 71/292 on 22 June 2017 requesting the International Court of Justice to render an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. The Court issued an Order on 14 July 2017, in accordance with Article 66, paragraph 2, of its Statute, to the effect that the United Nations and its Member States are likely to be able to furnish information on the question, initially setting 30 January 2018 as the time-limit within which written statements on the question may be submitted. By the Court's Order of 17 January 2018, the aforementioned time-limit has been extended to 1 March 2018. This Statement is intended to share the opinion of the Republic of Korea, as a Member State of the United Nations, with the Court, pursuant to its above-mentioned Orders, with the hope of assisting the Court in the assessment of the request from the General Assembly. More specifically, this Statement will focus on the issue of the judicial propriety of the giving of an advisory opinion.
2. The Republic of Korea fully acknowledges the legitimacy of the issue of decolonization as a critical agenda item of the General Assembly, as the General Assembly recognized, in its *Declaration on the Granting of Independence to Colonial Countries and Peoples*, “the peoples of the world ardently desire the end of colonialism in all its manifestations” (G.A. Res. 1514(XV), U.N. Doc., A/RES/1514(XV), 1960). As a past victim of colonization, the Republic of Korea is well aware of the historical context and political implications of this issue, and therefore supports the constructive manner in which the General Assembly is addressing the matter.
3. In this respect, the Republic of Korea wishes to clarify that the purpose of this Statement is neither to review the approaches of the General Assembly towards the issue of decolonization, nor to evaluate its relevance as an agenda item of the General Assembly. As the Republic of Mauritius indicated in its non-paper dated 12 June

2017, the United Nations has a direct interest in this issue, with the General Assembly having played a historic and central role in addressing decolonization.

4. Furthermore, the Republic of Korea does not take a stance on the ongoing legal and political dispute between Mauritius and United Kingdom. The Republic of Korea hopes the two countries will reach an amicable solution through various mechanisms of pacific settlement of disputes under international law. Also, the Republic of Korea wishes to confirm that this Statement does not affect its position on any other issues of international law unrelated to the current request of the General Assembly for an advisory opinion of the Court.

II. JURISDICTION AND DISCRETIONARY POWER OF THE COURT TO GIVE AN ADVISORY OPINION

a. Jurisdiction of the Court

5. The Republic of Korea is of the view that the Court has “jurisdiction” to render an advisory opinion on the questions submitted by the General Assembly in the above-mentioned resolution, pursuant to Article 96, paragraph 1, of the Charter of the United Nations and Article 65, paragraph 1, of the Statute of the Court. Specifically, the General Assembly is permitted to request an advisory opinion on “any legal question” under Article 96, paragraph 1, of the Charter, and the Court may give an advisory opinion on “any legal question” at the request of the General Assembly under Article 65, paragraph 1, of its Statute. The questions submitted by the General Assembly may have political aspects, but this does not deprive them of their quintessential legal character.
6. While the General Assembly may request an advisory opinion on any legal question, the Court “has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly” (*Legal Consequences of the Construction of a*

Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports 2004*, p. 145). The General Assembly is entitled to request an advisory opinion from the Court on issues relating to the process of decolonization. One of the purposes of the United Nations is the development of friendly relations based on respect for the principle of self-determination, as enshrined in Articles 1 and 55 of the Charter. This has been further enhanced by the General Assembly in a series of landmark resolutions, including resolution 1514 (XV) of 14 December 1960, containing the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. To deny the General Assembly the competence to request an opinion of the Court on such matters would run against well-established principles and long-standing judicial practice. Hence the Republic of Korea will set aside further discussion on matters of jurisdiction, and turn its focus to the discretionary power of the Court.

b. Discretionary Power of the Court and the Principle of Consent

7. As the Court has repeatedly stated in previous cases, the Court must consider whether there is any reason it should decline to exercise jurisdiction to give a reply to the request of the General Assembly for an advisory opinion, if it decides first that it has such jurisdiction. The Court has consistently held that only “compelling reasons” could lead it to such a refusal (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, *I.C.J. Reports 1962*, p. 155; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 156).
8. It is true that there has been no refusal by the Court, based on its discretionary power, to act upon a request for advisory opinion in its history (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 235). States, however, have continued to make various arguments to persuade the Court on the existence of “compelling reasons” in each advisory case: the abstract nature of the question asked; lack of any useful purposes; unavailability of the requisite facts and evidence; possibility to undermine or complicate the relevant political process; and lack of consent by either Party to a dispute to judicial settlement.

9. With regard to the present questions, there is a need to consider in particular the applicability of the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. The Court has stated that, “the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character”, and this issue has been examined in the context of “judicial propriety” in the Court’s jurisprudence (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p.25*).
10. As is reflected in Article 36 of the Statute, the jurisdiction of the Court rests on the consent of parties to disputes. The International Court of Justice, just as its predecessor, the Permanent Court of International Justice did, has confirmed on numerous occasions that consent is the fundamental ground for its jurisdiction. This principle of consent to judicial settlement is explained as a corollary of sovereignty. It can be said that the care with which the Court has conducted itself in many cases to uphold this principle has significantly contributed to enhancing the confidence of the international community in the Court and, for that matter, in international judicial institutions in general.
11. The Court has in no case accepted the principle of consent to be a compelling reason to decline to give an advisory opinion ever since the Permanent Court of International Justice did so once in the case of *the Status of the Eastern Carelia* (P.C.I.J., 23 July 1923, *Series B, No. 5*). The Court, however, does not view the principle of consent as being without relevance in the advisory proceedings (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p.25*; Separate Opinion of Judge Higgins, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 209*). The rationale of the Permanent Court of International Justice on why it was unable to give an advisory opinion in the *Eastern Carelia* case remains relevant. As stated by the Permanent Court, “[t]he question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being

a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.” (P.C.I.J., 23 July 1923, *Series B, No. 5*, pp. 28-29).

12. It is true that bilateral legal disputes and agenda items of the United Nations overlap with each other in many cases. As a general political institution whose core mission lies in the preservation of international peace and security, the United Nations has addressed various legal disputes among its Member States, mainly with focus on their political aspects. Every dispute between its Member States has the potential to be submitted for discussion or action to the General Assembly or the Security Council. In this connection, the Court has pointed out that differences of views on legal issues have existed in practically every advisory proceeding (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 7). This means that focusing only on the aspect of an issue being an agenda item of the General Assembly could lead to practically eroding the principle of consent. There is a need to find the right balance between the principle of consent and the advisory function of the Court. The advisory function of the Court is not intended to provide legal solutions to disputes between States without the consent of either party. Therefore, it is necessary in the advisory proceedings to carefully examine the propriety of giving an advisory opinion when one sees the possibility of infringing upon or circumventing the principle of consent to judicial settlement.
13. In this context, it is to be noted that the Court has applied the “compelling reasons” standard to the applicability of the principle of consent: the Court does not automatically reach a conclusion of impropriety merely because the element of a bilateral dispute between interested States exists. Instead, the Court requires strict scrutiny into why it is necessary to decline to give an advisory opinion on a legal question in which the United Nations has a legitimate interest. In other words, there is a strong presumption in support of the power of the Court to give an advisory opinion. Given the Court’s strict approach, careful examination is needed into what would constitute a compelling reason in the case where the exercise of the advisory function of the Court as an organ of the United Nations is likely to result in substantially

deciding a bilateral legal dispute without the consent of each party to the dispute. One needs to more clearly define “a dispute of this kind” mentioned in the *Status of the Eastern Carelia* (P.C.I.J., 23 July 1923, *Series B, No. 5*, p. 28).

14. The attempt on such definition is all the more significant, considering the expanding roles and responsibilities of international organizations including the United Nations. It could contribute to removing any uncertainty or concerns States might have about the advisory role of the Court, thereby strengthening their confidence in the system of international law in which the Court plays a central part.

III. SOME CRITERIA FOR “COMPELLING REASONS” IN LIGHT OF THE PRINCIPLE OF CONSENT

15. In dealing with the request for an advisory opinion on legal questions that are related to a legal dispute between States and, at the same time, constitute an agenda item of the United Nations, one can think of some criteria for the determination of the existence of “compelling reasons” to decline to give an advisory opinion. The criteria that will be discussed in the following paragraphs should be regarded as practical examples to be considered in each specific case.

a. Object of the Request

16. *First*, if it is the case that the object of the request itself is to decide or resolve a dispute between States later on the basis of the opinion of the Court without the mutual consent of the parties, it would constitute a compelling reason to decline to give an advisory opinion requested. Judge Rosalyn Higgins indicated this point in her separate opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, *I.C.J. Reports 2004*, p. 210). The General Assembly would understandably formulate a question to be submitted to the Court in a way that could avoid the possible criticism that it is seeking an advisory opinion of the Court to decide or resolve a bilateral dispute between Member States,

but the genuine intent or object of the request can be identified in the course of written or oral proceedings, or by resort to examination into some other aspects or circumstances of relevant discussion at the General Assembly. When it is reasonably established that the majority of the General Assembly intends to practically impose a judicial resolution to the dispute in question, then the Court would be able to find a compelling reason to decline to give an advisory opinion. This criterion could be more relevant when one of the States directly involved has made it clear that it refuses to bring the dispute to the Court or another judicial body, in the form of a declaration under the Statute of the Court or other applicable treaties.

b. Subject Matter of a Case before an International Adjudicative Body

17. *Secondly*, a compelling reason to decline to give an advisory opinion may exist when the question placed before the Court is practically identical to the subject matter of a past or current contentious case presented before an international adjudicative body including courts of arbitration.
18. When an international tribunal has already decided a dispute in one way or another to the dissatisfaction of one party, that party would be able to use the advisory proceedings to appeal or revise the tribunal's decision if that party or other interested States succeeded in having the General Assembly request the Court to give an advisory opinion on essentially the same subject matter. This kind of attempt at appeal or revision clearly constitutes an infringement or circumvention of the principle of consent to judicial settlement, which would most likely be a compelling reason not to give an advisory opinion. This also runs against the principle of *res judicata*.
19. One might argue that judicial settlement is distinguished from advisory proceedings: the former involves States as parties to the proceedings, whereas the latter is pursued by international organs such as the General Assembly and the Security Council. This formalistic distinction, however, is irrelevant when what actually takes place is an attempt at revision or appeal of judicially decided cases. We are dealing with issues of discretion and propriety in this connection, and one needs to approach them in terms

of substantive and practical effects, rather than of formalistic distinction.

20. Even when a case is dismissed for lack of jurisdiction of the relevant international court, without any decision made on substantive issues, pursuing an advisory opinion on the same subject matter from the Court would be an abuse of advisory proceedings and an attempt to circumvent the principle of consent. The Court would be required to decline to give an advisory opinion in such a case in order to preserve the integrity of the international judicial system. From a certain point of view, the General Assembly and the Security Council might be said to possess *prima facie* discretion to “take advantage” of advisory proceedings since they are allowed to request an advisory opinion on “any” legal question. The Court, on the other hand, is given certain discretion to object to such a practice, and is thus able to exercise its discretion when necessary.
21. In the case of an ongoing dispute before another international adjudicative body, the parties would have already chosen to pursue such judicial settlement based on the principle of consent. Therefore, intervention by the Court in the form of an advisory opinion would not help advance the cause of the harmonious development of international dispute settlement.
22. From a policy point of view, apart from legal rationales, allowing an already decided case to be reopened by the Court without the consent of each party in the form of advisory proceedings would bring about more harm than expected benefit to the overall confidence in the international judicial system. This is the case even when such an advisory opinion is most likely to contribute substantially to the actual resolution of an international dispute and the development of international law as well. The most desirable approach that the General Assembly could take under such circumstances is to promote the resolution of a dispute through negotiations and compromise instead of imposing a responsibility of legal resolution upon the Court through the request for an advisory opinion without consent of each party. It would not be a good idea for the General Assembly to step forward to make the jurisdiction of the Court available for a dispute based on the will of only one party to it.

c. Inherent Judicial Function of Courts on Exclusive Rights

23. *Thirdly*, a compelling reason can be said to exist when answering a legal question asked rests on the inherent judicial function of courts to confirm and identify exclusive rights in a contentious setting, such as territorial sovereignty over a certain piece of land; maritime or territorial delimitation, or the ownership of certain valuable objects such as artifacts and historic relics. This is not to say that the judicial function of courts is limited to the above subject matters, since the scope of the judicial function of courts encompasses, among other things, issues of human rights and environmental rights.

24. It is difficult to define the “inherent judicial function of courts”, but one can at least say that the issues referred to above (territorial sovereignty, delimitation, ownership of objects, etc.) are unsuitable to be determined by a majority vote at a political body such as the General Assembly. An advisory opinion directly related to the main point of a dispute of that kind would be substantially equivalent to deciding the dispute between the parties. Therefore, there is a compelling reason to decline to give an advisory opinion if the request for the opinion is to resolve issues of such judicial nature without the mutual consent of the parties, even if there are aspects of international peace and security related to the legal question posed.

d. Concluding Remarks: Fluctuation of Discretionary Power

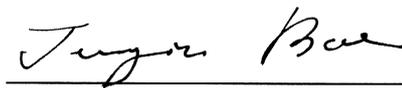
25. So far, the different types of compelling reasons have been discussed which could prompt the Court to decline to give an advisory opinion. These types are presented as a practical guide to help preserve the integrity of the international judicial system, based on realistic considerations for striking a proper balance between the need to provide necessary legal advice in support of the activities of the United Nations and the judicial function of the Court as an adjudicative body subject to consensual jurisdiction.

26. As has already been suggested, many legal disputes between States are at the same

time political agenda items of the United Nations. Hence, the propriety of giving an advisory opinion depends to a large degree on the specific contents and contexts of the question posed to the Court. In other words, the powers of the Court to give an advisory opinion vary and fluctuate according to the nature of each request. When the Court deals with situations falling within one of the three cases discussed above, its discretionary power is at its lowest ebb.

IV. CONCLUSION

27. The Republic of Korea will refrain from analyzing substantive elements of the dispute between the two parties in this case, and therefore from opining on whether any of the three criteria suggested above is applicable. What the Republic of Korea would like to stress is that it is possible and necessary to consider these criteria where the request for an advisory opinion involves a legal dispute between States either of which refuses to consent to judicial settlement.
28. The current request provides the Court with an opportunity to present clearer guidelines on the issue of the propriety of giving an advisory opinion in terms of the principle of consent to judicial settlement. The Republic of Korea hopes that the Court will use this opportunity to the fullest in carefully examining the extent of its discretion permissible in this case.



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