THE HISTORIC ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE REGARDING THE LEGAL CONSEQUENCES OF THE SEPARATION OF CHAGOS ARCHIPELAGO FROM MAURITIUS BY THE UNITED KINGDOM IN 1965

Introduction

During my term of office as the Attorney General of the Republic between the years 2013 – 2020, Cyprus was engaged in many important legal battles either as claimant – plaintiff, or as defendant. Cyprus thus took part in various judicial or, quasi judicial proceedings instituted by or against her, both in Cyprus and abroad. Some of these proceedings for one reason or another, had, or could have had, enormous impact and consequences on the economy, or on important issues of human rights.

Amongst those cases, I stress outmost importance on the following proceedings:

1. The arbitral proceedings before the ICSID in Paris by which a number of investors in the Cyprus Popular Bank, were claiming as against the Republic of Cyprus a vast amount of damages exceeding the total sum of 1Billion Euros for loss allegedly caused by the measures taken by Cyprus in order to save the banking sector and the economy in general. That was the subject of the first Guest Lecture at the School of Law of UCLan Cyprus on the 1st March 2023.

2. The appeal proceedings before the Supreme Court of Cyprus, regarding the constitutionality and legality of the measures taken by the Republic to impose an obligatory cut in the wages of all civil servants in order to reduce public spending and cope with the economic crisis which had hit Cyprus between 2012 – 2013.

3. The proceedings regarding the implementation and execution of the judgment of the ECHR in the 4th Interstate Recourse of Cyprus v. Turkey.

4. The proceedings before the International Court of Justice in the Hague for an advisory opinion regarding the legality and the legal consequences of the separation of Chagos Archipelago from Mauritius by the United Kingdom in 1965.

The apparent importance of the first two of the aforementioned proceedings lies in the catastrophic consequences which inevitably would be caused on the economy of Cyprus if an award or judgment was to be issued against the Republic as a result of which the government would be called upon to pay billions of euros as damages to the successful litigants and possibly to many others. And this, at a time when the Republic had almost reached the stage of bankruptcy, following the collapse of its banking system and was under strenuous efforts to be able to stand on her own feet again.

The other two proceedings owe their importance to the fact that they involved extremely important issues of human rights and fundamental liberties.

The fourth of the aforementioned cases which forms the subject matter of the present lecture, arose as a result of a dispute between the state of Mauritius and the United Kingdom, but its importance lies on the fact that the highest judicial organ on the planet, the International Court of Justice of the United Nations

which is based in the Hague, dealt through that case with very important issues relating to the fundamental and inalienable right of the peoples of all countries to self – determination. In those proceedings, Cyprus was not directly involved as a party, but had taken active part in it as an interested party. The reasons for that stand will appear further on, as well as the answer to the question as to why Cyprus had and should have had a special interest in those proceedings.

The factual background which had preceded the proceedings before the International Court of Justice.

The Republic of Mauritius consists of a group of islands in the Indian Ocean, the largest of which is Mauritius. It lies 2,200 km southwest of the Chagos Archipelago which also consists of a number of smaller islands of which the Diego Garcia covers an area of 27 sq. km. In 1810 the British captured Mauritius from the French and in 1814 the French transferred its sovereignty to the British together with its dependent areas of the Archipelago. Since then, the British ruled Mauritius as one of the many colonies of the Crown.

In 1964 the United Kingdom had entered into negotiations with representatives of Mauritius, regarding the separation of Chagos Archipelago from Mauritius with a view of granting rights to the United States for the use of Diego Garcia as a military base. The negotiations which were held in London led to an agreement, known as "*The Lancaster House Agreement*", by virtue of which the Chagos group of islands was separated from Mauritius. The provisions of that Agreement includes, inter alia, some economic consideration in the form of granting the sum of £3m. as damages for the benefit of the few inhabitants of Diego who were going to be displaced.

In September 1965 the government of the United Kingdom announced that it favored the granting of independence to Mauritius. Sometime later in November of the same year, the Lancaster House Agreement was approved by the Council of Ministers of the colony of Mauritius, following the granting of some further benefits and the Archipelago was thus separated officially from Mauritius, forming a separate colony called BIOT (British Indian Ocean Territory) together with some other small islands. It should be noted in this respect that the approval of the separation took place at the time when the colony of Mauritius was under a status of self – government. Years later, when the prime Minister of Mauritius was asked as to why they had consented to the separation, he answered by saying: "*We had no choice*".

In December 1965, the General Assembly of the United Nations adopted *Resolution no. 2066 (XX)* with regard to the issue of Mauritius and through this, the Assembly expressed its deep concern regarding the separation of islands from the territory of Mauritius with a view of establishing a military base and called upon the administrative power to abstain from taking any action which would dismember the territory of Mauritius, thus violating its territorial integrity.

In December 1966, the General Assembly of the United Nations adopted *Resolution no. 2232 (XXI)* with regard not only to Mauritius but to other countries as well. The Resolution reiterated that any attempt targeting at the partial or whole of the national unity and the territorial integrity of colonies as well as the creation of military bases on them, is an act incompatible with the scope and the principles of the United Nations Charter as well as with the General Assembly's *Resolution no. 1514 (XV).*

Eventually, in March 1968 Mauritius became an independent state and during the following month, was accepted as a member state of the United Nations. The Constitution of the new independent state had been prepared by the United Kingdom and provided that the state of Mauritius consisted of the territories which immediately before the 12th March 1968 constituted the colony of Mauritius. This definition of course, clearly showed that the Chagos Archipelago which had already been separated before that date was not included amongst the territories which were designated to form the new independent state of Mauritius.

This point is I think convenient to interrupt for a moment the exposition of the facts which had preceded the judicial proceedings before the ICJ, in order to point out certain similarities which exist in both the issue of Mauritius and the case of Cyprus. The most important similarities are the following:

1. Both Mauritius as well as Cyprus had been colonies of the Crown i.e. of the United Kingdom during a period at which the international community would no longer accept the existence of colonies and the International Law which safeguards human rights demanded the complete decolonization of all countries in the world.

2. In the case of both countries, Cyprus and Mauritius, the intention of the colonial power became clear from the very beginning that at the moment of granting independence during the sixties, a specific part of the territory of these countries was going to be retained in one way or another by the United Kingdom, in order to be used as a military base.

3. In the case of both countries, negotiations took place in London which led to the signing of the so called "*Lancaster House Agreements*".

4. Both in the case of Mauritius and Cyprus, with the signing of agreements and treaties, these countries were becoming independent states but their sovereignty was so designed as to cover the whole area of their territory, except for the specific part selected by the United Kingdom which was going to be retained in order to be used for military purposes. Thus, on the one hand, in the case of Mauritius, the Chagos Archipelago was to be excluded and on the other hand in the case of Cyprus, the selected areas of Akrotiri and Dhekelia were to be retained in order to be used as military bases.

5. Both in the case of Mauritius and Cyprus, the withholding of specific territories by the colonial power which were to be used for military purposes, was accompanied by some kind of economic benefits in exchange.

6. Both in the case of Mauritius and Cyprus, the withholding of specific territories by the colonial power which were to be used for military purposes, appears to have been a condition precedent to the agreement for granting independence.

Being on this point, however, an important difference in the two cases of Mauritius and Cyprus should be pointed out, which is this: In the case of Mauritius the colonial power in furthering its plans to create a military base, proceeded and forcibly removed all the inhabitants of the affected area of Diego Garcia who had refused to be evacuated. In the case of Cyprus however, apparently due to the fact that the territory to be kept covered a much larger area, there was no need to evacuate any part of the local population from their homes and properties. Strict restrictions as to land development were, however, imposed.

After this parenthesis with the similarities of the cases of Mauritius and Cyprus, I will now continue with the exposition of the main facts which had preceded the judicial proceedings before the International Court in the case of Mauritius.

Following the declaration of the independence of Mauritius and mainly since the beginning of the eighties, public statements and actions took place targeting towards claiming the return of Chagos Archipelago to Mauritius from which it was separated. According to the basic position of the claimants and their supporters, the separation of that part of the territory by the then colonial power which took place before the granting of independence, violated, inter alia, the provisions of United Nations' Resolution no. 1514. Resolution 1514 (XV) was a resolution of historic importance which was adopted by the General Assembly on the 14th December 1960, under the title "*Declaration on the granting of independence to colonial countries and peoples".* That Resolution, condemned all forms of colonialism, it declared that the peoples of all countries possess the right to self – determination and it called upon all states to urgently take measures regarding all countries which had not yet gained their independence, so as to transfer all powers to the peoples of those countries without any conditions or reservations, according to their freely expressed will and without any discriminations as to race, religion or color, thus enabling them to enjoy full independence and freedom. Specific mention must be made to Article 6 of the Resolution, which provided the following:

> *«6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations. »*

In October 2000, the African Union had adopted a Resolution by which it was expressing its concern for the separation of Chagos Archipelago from Mauritius which was effected by the colonial power before its independence.

In April 2010, the United Kingdom announced the creation of an area of naval protection which extended in and around the Archipelago. Mauritius disputed this and filed a recourse before an Arbitration Tribunal which was constituted on the basis of the *United Nations Convention on the Law of the Sea* (*UNCLOS*). In its award, which was issued in 2015, the Tribunal decided that it did not possess jurisdiction to deal with any matters which involved disputed sovereignty of the Archipelago, since these matters did not relate to the proper interpretation or application of UNCLOS. With regard to the aspect of the case which related to the compatibility of the specific action taken by the United Kingdom with the provisions of the UNCLOS Convention, however, the Tribunal decided that it did possess jurisdiction and concluded that the United Kingdom had indeed violated specific articles of the Convention.

The persistent challenging of the legality of the separation of Chagos Archipelago from Mauritius finally led to the examination of the issue by the General Assembly of the United Nations. As a result of the discussions before the Assembly, *Resolution no. 71/292* of the *23rd June 2017* was adopted by which the Assembly decided to seek an Advisory Opinion from the International Court of Justice,

The proceedings before the International Court in the Hague.

The International Court of Justice was established by virtue of the provisions of the United Nations Charter and it is the supreme judicial body of the Organization. The Court is functioning according to the provisions of the *Statute of the International Court of Justice* and is based in the Hague, Holland.

According to Article 65(1) of the Statute the Court is competent to give an advisory opinion on any legal issue requested by any body which is authorized to do so by the Charter. The General Assembly of the United Nations is specifically authorized to request an opinion by virtue of Article 96(1) of the Charter.

Based on the above legal provisions, the General Assembly in 2017 requested from the International Court an advisory opinion which was expressed into two separate questions to be answered by the Court 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?'."

Having received the request for an advisory opinion, the Court's Secretarial pursuant to the Statute informed in writing all member states or organizations which have the right to appear before it and later on, in July 2017 the Court decided to give the right to any one of them who wished to provide assistance on the relevant issues to do so by providing their written submissions not later than the 30th January 2018 and also fixed the 16th April 2018 as the time-limit within which States and organizations having presented a written statement might submit written comments on the other written statements.

Following discussions in Cyprus between the Ministry of Foreign Affairs and the Law Office, it was eventually decided that the Republic of Cyprus should take part in the proceedings before the Court in order to put forward its positions on the very important legal issues which were involved in dealing with the two questions raised.

Finally, within the time limit fixed by the Court which was later extended until the 1st March 2018, written statements had been submitted by the following states or organizations:

Belize, Germany, Cyprus, Liechtenstein, Netherlands, United Kingdom of Great Britain and Northern Ireland, Serbia, France, Israel, Russian Federation, United States of America, Seychelles, Australia, India, Chile, Brazil, Republic of Korea, Madagascar, China, Djibouti, Mauritius, Nicaragua, the African Union, Guatemala, Argentina, Lesotho, Cuba, Viet Nam, South Africa, Marshall Islands and Namibia.

As far as Cyprus is concerned, the Law Office of the Republic, aiming towards the best codification and projection of our position on the very serious issues of international law which were involved in this extremely important procedure, secured the services of an internationally acknowledged legal expert on the matter, viz. Alan Vaughan Lowe QC. A team of law officers and other experts was formed in order to coordinate and cooperate with him during the furtherance of the proceedings.

This team consisted of the following members:

The Attorney General of the Republic who is the ex officio Agent of the Republic in the International Court.

Ms Mary Ann Stavrinides, Attorney of the Republic (Law Office).

Ms Joanna Demetriou, Counsel of the Republic (Law Office).

Mr. Tassos Jonis, Ambassador, (Ministry of Foreign Affairs).

Ms. Maria Pilikou, Councilor (Ministry of Foreign Affairs).

Dr. Nicolas Ioannides, Councilor (Ministry of Foreign Affairs).

Mr. Polys Polyviou, Advocate.

Mr. Levon Aralekian, Advocate.

Mr. Antonios Tzanakopoulos, Associate Professor of International Law, Oxford University.

The main points put forward by Cyprus in its written statement.

In its initial written statement, Cyprus explained at first the reasons for which it had decided to take part in the proceedings before the International Court, which were mainly the following two:

1. As a member of the international community, the Republic of Cyprus holds the view that the international legal framework governing decolonization must be further clarified, *inter alia* due to the *jus cogens* character of the right of self-determination and the *erga omnes* nature of the obligations stemming from it. It considers that decolonization is a proper subject-matter for an advisory opinion given the critical role of the General Assembly in the decolonization process. As a result, the Republic of Cyprus is further of the view that the General Assembly, and the international community, would substantially benefit from an advisory opinion on the legality of the decolonization process of Mauritius and its consequences. To this end, the Republic of Cyprus emphasizes the essential role that the Court serves in issuing advisory opinions on matters requested by authorized bodies, such as the General Assembly.

2. Cyprus is itself a former colony, where at the end of British colonial rule in 1960, the United Kingdom retained two areas of the territory of the island as bases, to be used solely for military purposes. The guidance of the Court on, and the clarification of, the international legal framework governing the decolonization process and its consequences are therefore of direct interest to the Republic of Cyprus.

The first issue which was dealt with in the written statement of Cyprus was the issue of the Court's jurisdiction. With references to the legal framework for the

functioning of the Court as well as to the United Nations Charter, fully reasoned arguments were put forward leading to the safe conclusion that the General Assembly of the U.N. was entitled to request from the Court an advisory opinion and that the Court had jurisdiction to deal with the two questions referred to it and to answer them. Provided that according to Article 96(1) of the Charter and Article 65 of the Treaty establishing the Court an advisory opinion can be provided only in respect to purely legal points which raise issues of international law, the written statement of Cyprus dealt extensively with arguments proving exactly that irrespective of the fact that these issues might also have a political aspect, in view also of the fact that even if the points raised are in fact purely legal issues the Court still has a discretion to refuse to deal with them, Cyprus put forward good reasons why the Court should proceed and decide the relevant issues.
Regarding other issues of substance, Cyprus reserved its right to argue further at a later stage.

The main points put forward by Mauritius in its written statement.

Further to its strong arguments in favour of the view that the General Assembly possessed the right to request an advisory opinion regarding the specific issues raised, Mauritius dealt extensively with the matters of substance, with special weight given to the right of all peoples for self determination. Its main submission being that the obligation of decolonization must be effected fully in accordance with the right for self determination as envisaged in international law. And that this right has as a prerequisite the exercise of the free and pure will of the people of a country which could be expressed through e.g. a referendum by which the

people are asked to decide about their future. The agreements which were signed in 1965 in London were the result of pressure and coercion exerted upon the ministers of the then self government of Mauritius, since it had become clear to them by the colonial power that the granting of independence could in no way include the area of Archipelago. According further to Mauritius, the right to self determination should have been exercised with regard to the whole territory of the country without excluding any part of it in order to serve the interests of the colonial power. Consequently, it was further argued that the decolonization as effected in 1968 which excluded the Archipelago, was not complete and this situation exists since then. The failure to completely decolonize constitutes a continuing illegality which must be terminated with the withdrawal of the colonial power from the area of Archipelago and with the recognition of the sovereignty of Mauritius over the same.

The main points put forward by the United Kingdom in its written statement.

The main arguments put forward by the United Kingdom were twofold:

(i) That the Court is not called upon to decide on international law issues of general application but on a long lasting bilateral dispute between Mauritius and the United Kingdom, a dispute which Mauritius attempts to present as a case of decolonization, having failed to succeed in other proceedings. That the Court therefore, could not deal with this dispute without violating the legal principle

according to which a state cannot be forced to allow the solving of its disputes with other states without its consent.

(ii) In the alternative, even if the case under consideration was deemed to be a suitable one for an advisory opinion, Mauritius could not escape from the basic fact that its elected representatives had agreed to the separation of the Chagos Archipelago only a few years before independence and that the newly constituted state had reconfirmed its consent to it after independence, to come some decades after that to dispute the legality of its consent on the basis of international law principles which did not even exist at the material time in the mid sixties.

The written statement of Cyprus commenting on written statements of other states.

Following the submission of written statements by other states, Cyprus made use of its right to submit written comments on these and on the 11th May 2018 it submitted its comments. This time, Cyprus dealt both with issues of jurisdiction as well as issues of substance. Amongst those, were the right to self determination as a continuing right coupled with the obligation for its full application on the basis of principles which are applicable today, along with the principles of Customary International Law and with the principle of respecting the territorial integrity of all countries.

Following the completion of the stage of submitting written comments on other states' statements, the Court proceeded and fixed dates and times for holding hearings with oral addresses before it in the Hague, between 3 – 6 September 2018.

The oral hearings before the International Court.

In addition to submitting a written statement and comments, the Republic of Cyprus took also part at the stage of the oral hearings before the Court. More specifically, Cyprus divided the time allocated to it by the Court into 3 parts, with oral addresses by the Attorney General of the Republic, by Ms. M.A. Stavrinides Attorney of the Republic and by advocate Mr. P. Polyviou.

In his address before the Court, the Attorney General explained the reasons for which Cyprus had decided to participate in the proceedings and laid particular stress to the fact that under various names or characterizations the colonialism still exists in various territories. Example of this situation was recently provided by the judgment of the Supreme Court of the United Kingdom which was given on the 30th July 2018 in the case of *Bashir.* In that judgment, the Supreme Court had held that the area which covers the 3% of the territory of the Republic of Cyprus and hosts the British military bases, is in effect considered to have the status of a colony (*R on the application of Tag Eldin Ramadan Bashir and others) v. Secretary of State for the Home Department (Appellant) [2018] UKSC 45*. *Judgment dated 30 July 2018)*. The judgment in the *Bashir* case was the result of litigation following

the salvage by helicopters of the British Bases in Cyprus of 75 immigrants who were in a shipwreck, some of which filed court actions. The question arose whether the applicants should be permitted to be resettled in the United Kingdom by virtue of the provisions of the *United Nations Convention Relating to the Status of Refugees (1951)* as modified by the *Protocol of 1967*. Inevitably in the proceedings the issue had to be decided as to what is the real legal status of the Bases in Cyprus. In this respect, the Supreme Court of the United Kingdom which was seized with the issue, decided that the legal arrangements which were agreed upon in 1960 by which independence was granted to Cyprus, had not altered the status of the territory covered by the Bases because the land which these cover was simply exempted from the territory which was transferred to the newly constituted Republic of Cyprus. Based on that judgment, it was the argument on behalf of Cyprus that the United Kingdom appears to accept that it still retains territories separated from a country which became independent and these territories are considered to preserve the status of a colony. Regarding these territories, the colonial power is under a continuing obligation to apply the right to self determination and to fully decolonize the whole territory of the country.

The principle of equality regarding the enjoyment of rights and the right of all peoples to self determination is a fundamental and irrevocable rule of contemporary international law generating erga omnes obligations. The right of self determination is fundamental, inalienable and cannot be waived or surrendered. According to the case law, the people of a country can agree to arrangements which allow, *revocably,* other States to use a part of their territory, only by exercising their free choice and continuing consent.

Furthermore, no one can accept that the international law on self-determination is frozen at the date when the first steps towards the realization of the right to self-determination are taken in respect of a territory. Thus, situations such as the one prevailing in the Chagos Archipelago must be kept constantly under review, and appraised through the prism of the law on self-determination as it evolves over time.

In her address, Ms Stavrinides, Attorney of the Republic of Cyprus dealt mainly with responding to some of the arguments raised by other states. She stressed the fact that the subject-matter of the advisory opinion is not a bilateral dispute between Mauritius and the United Kingdom. Cyprus reiterated that matters pertaining to self-determination in general and the lawful completion of a process of decolonization in particular, can never properly be characterized as purely bilateral matters between a former colonial Power and a former colony. This is confirmed by the *jus cogens* character of the right to self-determination, and by the *erga omnes* character of the obligations it generates. The relevant obligations are owed to the international community as a whole, and all States have a legal interest in their proper implementation. The competence of the General Assembly over decolonization is a further, crucially important factor that precludes the characterization of such matters as purely bilateral. This Request comes not from States, but from the General Assembly which is an organ of the United Nations. Nowhere did the General Assembly's Request ask the Court, nor was it in effect requiring it, to adjudicate on a bilateral dispute. This Request, seen objectively, required a determination regarding what constitutes a lawful completion of decolonization and a determination of the legal consequences.

Commenting upon some references to Cyprus made by other states in their addresses, the Attorney referred inter alia, to the proposals which were made by the United Kingdom's government in 1958 regarding the future of Cyprus. She submitted that the Republic of Cyprus does not consider these representations to be germane to the present advisory proceedings; and this is not the place to pursue the question of their accuracy or significance.

Finally, Mr. Polyviou who also addressed the Court on behalf of Cyprus, emphasized some important points which merit particular emphasis. For example, that there is a presumption in favour of independence of a territorial unit as a whole, and the disruption of its territorial integrity by the excision and retention of part of the territory by the colonial power is, on the face of it, incompatible with the right to self-determination. Accordingly, for as long as there are parts of excised territory of a country that have been retained by the former colonial power, that power is under a continuing obligation to give full effect to the principle of self-determination, as that principle applies under contemporary international law**,** of course**,** for the benefit of the people of the affected country. With regard to the issue of consent, he rejected the suggestion in some of the written statements according to which the principle that prohibits the disruption of territorial integrity in the context of the implementation of the right to self-determination may be subject to qualification, or that the excision of a parcel of territory with the consent of the former colony may, in some circumstances, be permissible. As it was already mentioned by the Attorney General, the right to self-determination is *"inalienable"*. The *"inalienability"* of a right means that the right may not be ceded or transferred. The fact that consent

cannot preclude the wrongfulness of an act that is in breach of *jus cogens* is confirmed by, *inter alia*, *Art. 53 of the Vienna Convention on the Law of Treaties of 1969* whereby a "*treaty is void if . . . it conflicts with a peremptory norm of general international law*" and by *Art. 26 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts of 2001* whereby wrongfulness cannot be precluded for "*any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law"*. Cyprus submits that a purportedly permanent alienation would, in this context, be clearly incompatible with the inalienable nature of the right to self-determination.

Cyprus more strongly drew the Court's attention to the legal principles, described earlier, governing the validity of an agreement which is in conflict with an international legal rule holding the status of *jus cogens*, and to the submission advanced in many of the written statements, namely that the rules governing self-determination had in 1965, or have since acquired, the status of peremptory norms of international law. Colonialism is a remnant of the past. It should not be preserved as an impediment to the future. We have a duty to bring it to a speedy end.

Those were the main points of the arguments put forward by Cyprus in its oral addresses before the Court.

Following the conclusion of the hearings in the Hague, the Advisory Opinion of the Court was reserved.

The announcement of the Court's Advisory Opinion

The Advisory Opinion of the Court was publicly announced on the 25th February 2019. Regarding the issues of substance, the Opinion was almost unanimous with 13 votes concurring and only one dissenting vote, the vote of Judge Joan Donoghue from the United States.

The dissenting opinion of Ms Donoghue was mainly based upon the view that in the exercise of its discretion the Court should not have dealt with the case. According to the judge, she did not disagree with the general finding of the Court that the issues which had been raised through the request for an advisory opinion fall into the wider framework of decolonization and the role of the UN General Assembly. In spite of this however, it was the view of the judge that the request for an opinion took no cognizance of the fact that the United Kingdom did not consent to the trial of its everlasting dispute with Mauritius and this fact was a mandatory reason for the Court to refuse providing an advisory opinion.

In its Opinion the majority of the Court dealt firstly with the issue of its jurisdiction and its discretion to deal with this case or not. It did so because even if the Court decides that it has jurisdiction, nevertheless it retains the option to refuse giving an advisory opinion if, according to the case law there exist compelling reasons not to do so.

In dealing with the matter of its jurisdiction, the Court noted that the United Nations General Assembly is a body competent to request an advisory opinion and also that the two issues on which the opinion was sought were indeed clear legal issues in their character. Consequently, the Court decided that it had jurisdiction to deal with the request of the General Assembly.

Regarding the exercise of its discretion to deal with the request despite the existence of jurisdiction, the Court proceeded and examined whether there were compelling reasons to decline doing so. The reason for this was that according to some arguments put forward during the proceedings, advisory proceedings are not suitable for determination of complex and disputed factual issues; secondly, that the Court's response would not assist the General Assembly in the performance of its functions; thirdly, that it would be inappropriate for the Court to re-examine a question already settled by the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *Arbitration regarding the Chagos Marine Protected Area*; and fourthly, that the questions asked in the present proceedings relate to a pending bilateral dispute between two States which have not consented to the settlement of that dispute by the Court.

The Court examined thoroughly the above arguments one by one and dismissed them mentioning that no one of them constituted a valid reason in favour of exercising its discretion in such a way as to decline dealing with the issues referred to it by the Assembly.

The Opinion continued with an extensive reference to the main facts which had preceded the independence of Mauritius and the referral of the issues before the Court by the UN General Assembly. This factual substratum was then used by the Court in order to apply to it all the legal principles pertaining to the two issues and proceed to extract its conclusions.

The Court's opinion as to the first of the two issues referred to it

As mentioned earlier, the first issue which was referred to it by the Assembly related in essence to the question whether the process of decolonization of Mauritius was lawfully completed having regard to international law.

In order to express a view on this issue of vital importance, the Court examined first a number of side issues which it considered as necessary.

With regard to the question as to which is the relevant period of time for the purpose of identifying the applicable rules of international law, the Court expressed the opinion that while its determination of the applicable law must focus on the period from 1965 to 1968, this will not prevent it, particularly when customary rules are at issue, from considering the evolution of the law on self-determination since the adoption of the Charter of the United Nations and of *Resolution 1514 (XV) of 14 December 1960* entitled *"Declaration on the Granting of Independence to Colonial Countries and Peoples"*. The Court may also rely on legal instruments which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles.

With regard to the question as to which is the applicable international law in the case in hand, the Court expressed the view that it should limit itself in its Opinion to analyzing the right of self determination from the angle of decolonization. The means of implementing the right to self-determination in a non-self-governing territory, described as "*geographically separate and . . . distinct ethnically and/or culturally from the country administering it*", were set out in *Principle VI of General Assembly resolution 1541 (XV)*, adopted on 15 December 1960:

> "*A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:*
>
> *(a) Emergence as a sovereign independent State;*

(b) Free association with an independent State; or

(c) Integration with an independent State."

The Court however stressed that while the exercise of self-determination may be achieved through one of the above options laid down by Resolution 1541 (XV), it must in all cases be the expression of the free and genuine will of the people concerned. It added that no example had been brought to the attention of the Court in which, following the adoption of Resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the 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. It follows that any detachment by the administering power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.

Reverting to the first issue referred to it by the General Assembly, the Court considered that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius, require the United Kingdom as the administering

power, to respect the territorial integrity of that country, including the Chagos Archipelago.

The Court concluded 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 was granted independence in 1968.

The Court's opinion as to the second of the two issues referred to it

In dealing with the second issue referred to it by the General Assembly i.e. the consequences, under international law, arising from the United Kingdom's continued administration of the Chagos Archipelago, it was the inescapable conclusion of the Court that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State (see *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47; *see also Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts)*. It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

Accordingly, the Court concluded that the United Kingdom is under an obligation to bring an end to 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. Furthermore, all Member States must co-operate with the United Nations to

complete the decolonization of Mauritius since respect for the right to self-determination is an obligation *erga omnes* and all States have a legal interest in protecting that right.

As to the modalities necessary for ensuring the completion of the decolonization of Mauritius, the Court pointed out that this task fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization. As the Court had stated in the past, it is not for it to "*determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps" (Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II), p. 421, para. 44)*.

Those were in brief the main points of the historic Advisory Opinion of the International Court of Justice regarding two legal issues which were so important to a single state but are even more important to humanity as they relate to the inalienable right of all peoples to exercise their right of self determination.

The developments which followed the announcement of the Advisory Opinion.

Reacting to the announcement of the Opinion, the United Kingdom's government had publicly stated that the Opinion was not accepted and at the same time called upon the government of Mauritius to participate in bilateral discussions regarding the developments.

On the 22nd May 2019 the United Nations' General Assembly adopted *Resolution no. 73/295* which ratified the Advisory Opinion of the International Court of

Justice and declared that Archipelago forms an integral part of the territory of Mauritius. It demanded that the United Kingdom withdrew its colonial administration from the Chagos Archipelago unconditionally within a period of no more than 6 months from the adoption of the Resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible.

The United Kingdom did not accept the Resolution and the time limit set by it passed with no result. The Prime Minister of Mauritius stated that he was exploring the possibility of submitting new complaints for alleged committal of crimes against humanity before the International Criminal Court. Indeed, complaints were filed with the ICC in October 2020 against the administrator of Chagos Archipelago, his deputy and the military officer in charge in the region.
The official policy of the United Kingdom on this matter as it was recently reiterated is that a military presence will be retained in Chagos Archipelago permanently.

Concluding remarks

It is true that however important it may be, the Advisory Opinion of the ICJ remains advisory and not binding, since the implementation of its conclusions are entirely up to the states involved and there exist no mechanism regarding compliance with its terms.
It is an undisputable fact however, that it can be characterized as a legal opinion of a historic importance which was issued by the most significant international

judicial body and which has a serious effect upon the legal and political status of all territories which still remain under similar conditions.

C. Clerides UCLan Cyprus, 15th March 2023