Written comments on the written reply of Mauritius to the question put by Judge Gaja

AFRICAN UNION

AFRICAN UNION

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Ref: BC/OLC/10.9/2126.18

Date: 12 September 2018

Dear Sir,

I have the honour to refer to your letter dated 3 September 2018 relating to the question put to the Republic of Mauritius by Judge Gaja at the end of the morning's pubic sitting of 3 September 2018 and to forward to you the comments of the African Union on the written reply of the Republic of Mauritius.

Yours sincerely,

Ambassador Dr. Namira Negm
The Legal Counsel
African Union

To: **Mr. Philippe Couvreur**
Registrar
International Court of Justice
The Hague
Netherlands

WRITTEN REPLY OF THE AFRICAN UNION TO JUDGE GAJA'S QUESTION

"In the process of decolonization relating to the Chagos Archipelago, what is the relevance of the will of the population of Chagossian origin?"

1. The African Union fully agrees with the reply of the Republic Mauritius concerning the relevance of the will of the people of Mauritius, including the will of the population of Chagossian origin, in the process of decolonization of Maurice in 1965/1968.

2. As the African Union has emphasized in its Written Statement, its Written Observations as well as its Oral statement of 6 September 2018, under customary international the will of the colonized people must be respected in the process of decolonization.

3. The will of the people is a sine qua non of the right to self-determination.

4. As such, the detachment of the Chagos Archipelago from Mauritius in 1965 was unlawful since the people of Mauritius in its whole, including those of Chagossian origin, did not express their will and did not consent to the said detachment.

5. In the view of the African Union, the so-called consent of few Mauritian political representatives does not meet the threshold required under customary international law.

6. Since the population of Chagossian origin, including the Mauritians of non-Chagossian origin, did not express their will and their consent to the detachment of Chagos from Mauritius, there is no doubt that the process of decolonization was incomplete.

7. Under customary international law, as applicable as of 1965, it is for the people of Mauritius, including the population of Chagossian origin, to decide of the future of the Chagos Archipelago. It is not for the United Kingdom to decide, under its own internal law, when to return the Archipelago. The position of the United Kingdom contradicts the principle according to which international law prevails over domestic law. International law requires to give primacy to the will of the people of Mauritius, including those of Chagossian origin.

ARGENTINA

Embassy
of the
Argentine Republic

NOTE OI 55/2018

The Hague, September 12th 2018.

Dear Registrar,

I have the honour to refer to the Note of 3 September 2018, concerning the question put to the Republic of Mauritius by Judge Gaja within the framework of the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of United Nations on the question of the *"Legal Consequences of the separation of Chagos from Mauritius in 1965"*.

In this regard, and on behalf of the Government of the Argentine Republic, I have the honour to enclose the written comment of the Argentine Republic.

Please accept the assurance of my highest consideration.

Nicolás F. VIDAL
Minister

REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE
MR. PHILIPPE COUVREUR

Ministerio de Relaciones Exteriores y Culto
de la República Argentina

Buenos Aires, 12 of september 2018

Excellency,

I have the honour to refer to the question put by Judge Gaja to the Republic of Mauritius concerning the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of the United Nations on the question of the "Legal Consequences of the separation of Chagos from Mauritius in 1965".

In this regard, an on behalf of the Government of the Argentine Republic I hereby submit a written comment in relation to the reply by the Republic of Mauritius to the above mentioned question.

I avail myself of this opportunity to renew to you the assurances of my highest consideration.

Mario Oyarzábal
Legal Adviser

Mr. Phillipe Covreur
Registrar
International Court of Justice
Peace Palace
THE HAGUE

LEGAL CONSEQUENCES OF
THE SEPARATION OF CHAGOS FROM MAURITIUS IN 1965
(REQUEST FOR ADVISORY OPINION)

Written comment of the Argentine Republic in relation to the reply by the Republic of Mauritius to the question put by Judge Gaja

In view of the possibility given by the Court to participants to the oral proceedings, Argentina presents the following written comment in relation to the reply by the Republic of Mauritius to the question put by Judge Gaja at the end of the hearing on 3 September 2018 in the morning.

The question was as follows: "In the process of decolonization relating to the Chagos Archipelago, what is the relevance of the will of the population of Chagossian origin?"

Argentina agrees with Mauritius that the Chagos Archipelago, having been considered by the United Nations General Assembly as an integral part of the territory of the Non-Self-Governing Territory of Mauritius, "the process of decolonization relating to [it]" is part and parcel of the process of decolonization of Mauritius.

Argentina also agrees that the "will of the population of Chagossian origin" must be considered not for the determination of the status of the Chagos Archipelago, but in relation to the question of their deportation and the consequences thereof, particularly the question of its resettlement in the territory from which the population was expelled. In its resolution 2066 (XX), the General Assembly recognized the right of the Mauritian people to independence and did not recognized the existence of a "Chagossian people", separate and distinct from the Mauritian people. On the contrary, the said resolution warned the administering Power against the separation of some islands (in obvious reference to the Chagos Archipelago) as being contrary to the territorial integrity of Mauritius.

Argentina further agrees that the resettlement is a matter of free choice to be decided on an individual basis by each person of Chagossian origin.

MARIO OYARZÁBAL
CONSEJERO LEGAL

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Peter Wilson CMG
Ambassador
Lange Voorhout 10
2514 ED The Hague
The Netherlands

British Embassy
The Hague

H.E. Mr Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague

12 September 2018

Dear Excellency

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request by the United Nations General Assembly for an Advisory Opinion)

I have the honour to refer to the Registry's Note (No. 151045) dated 7 September, regarding the written reply of the Republic of Mauritius to the question put by Judge Gaja during the above proceedings.

I have the further honour to present to the Court the written comments of the United Kingdom of Great Britain and Northern Ireland on the reply of the Republic of Mauritius.

Accept, Sir, the assurances of my highest consideration.

Yours sincerely

Peter Wilson CMG
British Ambassador to the Netherlands

INTERNATIONAL COURT OF JUSTICE

COUR INTERNATIONALE DE JUSTICE

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965 (REQUEST FOR ADVISORY OPINION)

EFFETS JURIDIQUES DE LA SEPARATION DE L'ARCHIPEL DES CHAGOS DE MAURICE EN 1965 (REQUETE POUR AVIS CONSULTATIF)

Judge Gaja: In the process of decolonization relating to the Chagos Archipelago, what is the relevance of the will of the population of Chagossian origin?

Comment of the United Kingdom of Great Britain and Northern Ireland on the Written Reply of Mauritius

1. The United Kingdom's comment on the Written Reply of Mauritius of 7 September 2018 is without prejudice to its position that the Court should exercise its discretion so as not to give an Advisory Opinion.

2. The United Kingdom does not accept that there has been, or now should be, a "process of decolonization relating to the Chagos Archipelago"[1]. The process of decolonization is "of Mauritius" according to Question (a) of the Request. The Chagos Archipelago was not an integral part of Mauritius prior to 1965 and did not form a part of Mauritius at the time of independence in 1968[2]. The process of decolonization "of Mauritius" was lawfully completed in 1968 at the time of its independence.

3. The United Kingdom makes four observations on the Written Reply of Mauritius.

4. First, Mauritius asserts that "the will of the people of Mauritius, including the 'will of the population of Chagossian origin', was not taken into account prior to the detachment of [the] Chagos Archipelago in 1965, or prior to the independence of Mauritius"[3]. The United Kingdom has set out in its written and oral pleadings that the people of Mauritius freely consented to the detachment in exchange for concrete undertakings and substantial benefits

[1] Emphasis added.
[2] StGB, paras. 2.12-2.29; CoGB, paras. 2.5-2.13; cr 2018/21, pp. 10-11, paras. 19-21 (Buckland).
[3] Written Reply of Mauritius, para. 5.

in the 1965 Agreement, and this consent was reaffirmed multiple times at and after independence[4]. The 1967 general election was another opportunity for the free expression of will by the Mauritian people, and the party whose leaders had agreed to the detachment was elected by majority[5].

5. Second, as regards the will of the population of Chagossian origin, the United Kingdom observes that this was not treated as a requirement by the representatives of Mauritius at the time of the 1965 Agreement and independence in 1968. The Chagos Archipelago was loosely administered - as a matter of convenience - as a dependency of Mauritius. The vast distance of the Archipelago from Mauritius explains why its inhabitants had limited contact with Mauritius. As can be seen from the Mauritius Written Statement, the only consistent and in any way significant tie with Mauritius was the import of copra from the Archipelago[6]. This was the reality in the 1960s, and it is disingenuous of Mauritius in 2018 to say that the "will of the population of Chagossian origin" was "required to be taken into account"[7] when its own leadership did not consider this necessary in 1965 or at the time of the subsequent reaffirmations of consent that were given (which Mauritius continues determinedly to ignore).

6. It should also be recalled how little was known about Chagossians in 1965 given their small population and the remoteness of the Archipelago. There were approximately 1360 people resident on the islands in November 1965[8]. Including those born on the islands, the total population of persons of Chagossian origin was between 1500-1750[9].

7. Third, in Question (b) proposed to the General Assembly (and now addressed to the Court), in its written and oral pleadings, and now in its Written Reply to Judge Gaja, Mauritius continues to define the "population of Chagossian origin" as "*Mauritians* residing in the Chagos Archipelago or of Chagossian origin" [10]. The Republic of Seychelles emphasised in its Written Statement that a significant number of persons of Chagossian origin are

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[4] StGB, paras 3.38-3.50; CoGB, paras. 2.86-2.96; CR 2018/21, p. 9, para. 18; p. 15, para. 41; pp 21-41, paras. 66-77 (Buckland); pp. 29-30, para. 8; p. 34, para. 15, p. 37, para. 22; p. 39, para. 27; p. 40, para. 30 (Wordsworth); p. 44, para. 8 (Webb); p. 54, para. 6; pp. 57-58, paras. 14-18 (Wood).
[5] StGB, paras. 3.36-3.37; CoGB, paras. 2.17, 2.77-2.85, 4.10-4.11; CR 2018/21, p. 20, para. 64 (Buckland).
[6] StMU, paras. 2.24-2.31.
[7] Written Reply of Mauritius, para. 5.
[8] The population of Mauritius in 1965 was more than 700,000.
[9] *Chagos Arbitration* Award, para. 88 (UN Dossier 409).
[10] Written Reply of Mauritius, para. 2. Emphasis added.

present in the Seychelles and have obtained citizenship[11]. A significant number of Chagossians also reside in the United Kingdom and have obtained British citizenship.

8. The question that Mauritius wishes the Court to determine is not about Chagossians wherever they may live today, but about Mauritius and its claim to sovereignty over the Chagos Archipelago[12]. Mauritius' motivations are apparent when it comes to the question of resettlement, which it also raises in its Written Reply (paras 6-7). Mauritius appears to have in mind to settle its nationals generally, but only its nationals. In its understanding, "resettlement" would both extend beyond Chagossians yet not cover all Chagossians (those who do not have Mauritian nationality)[13]. It is noteworthy that Mauritius says that if it exercised sovereignty over the Chagos Archipelago, it will allow return and resettlement "in accordance with the laws of the Mauritius"[14].

9. As the Court is aware, the United Kingdom has renewed its commitment to work with all Chagossians in Mauritius, Seychelles and the United Kingdom, establishing in 2016 a new fund of approximately £40 million to improve their lives and present greater opportunities for their families in the places where they now live, including outside of Mauritius[15].

10. Fourth, Mauritius ignores the settlement that was individually agreed to by the very great majority of Chagossians in Mauritius following the treaty between the Governments of the UK and Mauritius of 7 July 1982 (the 1982 Agreement)[16]. If it were appropriate to focus on the population of the Chagos Archipelago, the voluntary renunciation by Chagossians of all claims arising out of their removal from the Chagos Archipelago, following the payment by the United Kingdom of compensation, would be a factor of great and determinative importance, as follows not least from the decision of the European Court of Human Rights in *Chagos Islanders v United Kingdom* in 2012[17].

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[11] Seychelles Written Statement, paras. 4, 6 (requesting "that the unique perspectives and legitimate concerns of the Seychellois Chagossian community be taken into due consideration").
[12] StGB, paras. 1.5, 9.8-9.10; CoGB, paras. 1.14 and 5.20; CoUS, para. 4.4; CR 2018/21, p. 53, para. 2 and p. 61, paras. 24-25 (Wood).
[13] CR 2018/21, p. 61, para. 25 (Wood).
[14] Written Reply of Mauritius, para. 6.
[15] CR 2018/21, p. 61, para. 25 (Wood).
[16] StGB, paras. 4.9-4.19; CR 2018/21, p. 7, para. 6 (Buckland); p. 31, para. 9 (Wordsworth); p. 54, para. 6 (Wood).
[17] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2004] EWCA Civ 997, see para. 83 (StGB Judgments Volume, Tab 4).

UNITED STATES OF AMERICA

United States Department of State

Washington, D.C. 20520

September 12, 2018

Sir,

With reference to your letters of September 3 and 7, 2018 regarding the question put to the Republic of Mauritius by Judge Gaja during the oral proceedings concerning the request for an advisory opinion on the *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, I have the honor to forward to you the written comments of the United States of America on the reply of Mauritius.

Accept, Sir, the assurances of my highest consideration.

Jennifer G. Newstead
Legal Adviser

Enclosure:
As stated.

Mr. Philippe Couvreur
Registrar,
International Court of Justice,
Peace Palace,
The Hague

Request by the United Nations General Assembly for an Advisory Opinion on the "Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965"

Written comments of the United States of America on the Written Reply of Mauritius of September 7, 2018 to the question posed by Judge Gaja

1. The United States offers three observations on the Written Reply of Mauritius to the following question posed by Judge Gaja on September 3: "In the process of decolonization relating to the Chagos Archipelago, what is the relevance of the will of the population of Chagossian origin?"

2. First, the United States remains of the view that the Court should exercise its discretion to decline to respond to the questions referred by the General Assembly. To respond to those questions would require the Court to examine a number of issues that bear directly on the main points of the dispute between Mauritius and the United Kingdom, including the role of consent of the elected representatives of Mauritius. These would not be appropriate inquiries in an advisory proceeding.

3. Second, as discussed in detail in our written and oral submissions, by the Court's own standards for determining the existence of a rule of customary international law, no rule had crystallized by 1965 or 1968 that would have prohibited the establishment of the British Indian Ocean Territory.[1]

4. Third, in its response to Judge Gaja's question, Mauritius continues to make questionable or erroneous assertions. As we noted in our Written Comments, for example, it should not simply be taken as fact that the present-day people of Mauritius represent the wishes of all Chagossians throughout the world. In this respect, the United States directs the Court's attention to paragraph 4.4 of the United States Written Comments of May 15, 2018, in which we addressed this assumption, which appeared in several written statements from the first round of submissions:

[1] *See* United States Written Statement, Chapter IV; United States Written Comments, Chapter III; United States Oral Presentation, paras. 35–66.

[S]cvcral statements assumed that any unexcrciscd right of self-determination with respect to the Chagos Archipelago would belong to the present-day people of Mauritius.[151] If, however, the Court were to determine that any right of self-determination exists in these circumstances and remains to be exercised, the holder of that right may not be the modern people of Mauritius.[152] As the Republic of Seychelles highlighted in its submission, a significant Chagossian population is present in the Seychelles.[153] Chagossians are also living in the United Kingdom.[154] As such, determining who may hold the right of self-determination with respect to the Chagos Archipelago today would be an exceedingly complicated undertaking.

5. In the view of the United States, such an undertaking is not appropriate in the context of an advisory opinion given its direct relationship to issues at the heart of a bilateral sovereignty dispute. If it were undertaken, it is difficult to see how the Court could resolve the question in the absence of detailed submissions by States on this specific issue during the earlier stages of these proceedings.

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[151] *See, e.g.*, African Union Written Statement, paras. 66, 224; Argentina Written Statement, para. 51; Belize Written Statement, para. 4.2; Djibouti Written Statement, para. 42; Mauritius Written Statement, para. 6.3(5); Namibia Written Statement, pp. 3–4; Serbia Written Statement, para. 50; South Africa Written Statement, para. 85.

[152] *See, e.g.*, STEPHEN ALLEN, THE CHAGOS ISLANDERS AND INTERNATIONAL LAW 286 (2004) ("The Chagos Islanders ... qualify as the beneficiaries of the entitlement to self-determination in relation to the BIOT.").

[153] Seychelles Written Statement, paras. 4, 6 (noting that "a significant number of the Chagossians were brought to the Seychelles" and requesting "that the unique perspectives and legitimate concerns of the Seychellois Chagossian community be taken into due consideration").

[154] United Kingdom Written Statement, para.1.5 n. 7; *id.*, para. 4.38.