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Background

From 1814 until 1965, the UK Government administered the Chagos Archipelago in the Indian Ocean as a dependency of the Colony of Mauritius. In 1965, as part of negotiations leading to the independence of Mauritius in 1968, the UK Government excised the Chagos Archipelago from colonial Mauritius to form part of a new colony it called the British Indian Ocean Territory (BIOT), paying £3 million to Mauritius in compensation. In 1966, an Exchange of Notes between the UK and the US made the Chagos Archipelago available for military purposes for 50 years (with provision for extension for a further 20 years) in exchange for \$14 million. Since 1971 the largest Chagos island of Diego Garcia has been the site of a major US overseas military base. By 1973 the UK Government had depopulated the Chagos islands, deporting between 1,560 and 1,754 people to Mauritius and Seychelles. Displaced Chagos islanders have campaigned for adequate compensation and their right of return to the Chagos Archipelago. In 2002, the British Overseas Territories Act conferred UK citizenship on Chagos-born islanders and most (but not all) of their second-generation descendants, since when an estimated two thousand members of the extended Chagossian community have migrated to the UK. Around 500 Chagos-born islanders are still alive today.

Since 1980, successive Mauritian governments have asserted Mauritian sovereign rights to the Chagos Archipelago at the United Nations General Assembly (UNGA) and in bilateral discussions with the UK, which responded that it would 'return' the Chagos Archipelago to Mauritius when 'no longer required for defence purposes'. On 22 June 2017, following a concerted effort led by the African Union, the UNGA adopted resolution 71/292 – with 94 votes in favour, 15 against, and 65 abstentions – to seek an Advisory Opinion from the International Court of Justice (ICJ) on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.¹ Voting on UNGA resolution 71/292 took place almost exactly a year after the Brexit referendum in the UK on 23 June 2016, and its adoption was attributable in part to widespread abstention by European Union states.

As part of proceedings at the ICJ, the African Union and 31 UN Member States filed written statements; of these, the African Union and 10 UN Member States subsequently filed written comments on written statements, and the African Union and 21 UN Member States (including Mauritius, the UK, and the USA) participated in oral proceedings between 3 and 6 September 2018. The ICJ also heard oral evidence from a displaced Chagossian woman, Marie Liseby Elysée, via a pre-recorded film (although she was also present in court for the proceedings). On 25 February 2019, the ICJ found unanimously that it had jurisdiction to give an Advisory Opinion, decided (by 12 votes to 2)² to comply with the request for an Advisory Opinion, and declared (by 13 votes to 1)³ firstly that the process of decolonization of Mauritius was not lawfully completed following the separation of the Chagos Archipelago, secondly that the UK is obliged to end its administration of the Chagos Archipelago as rapidly as possible, and thirdly that all UN Member States are obliged to cooperate with the UN to complete the decolonization of Mauritius. This article examines the questions the UNGA put to the ICJ and the implications of the Advisory Opinion itself.

Questions put to the Court by the General Assembly

¹ <https://www.un.org/press/en/2017/ga11924.doc.htm>

² Judges Joan Donoghue (USA) and Peter Tomka (Slovakia) dissented on this decision.

³ Judge Joan Donoghue (USA) dissented on all of these declarations.

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UNGA resolution 71/292 asked the ICJ to address two questions: Question (a) concerns the process of decolonization of Mauritius, while Question (b) concerns the implications of the UK's continued administration of the Chagos Archipelago. This section considers the consequences of the UNGA's wording of the two questions in relation to the ICJ's jurisdiction, the history of the establishment of the right of self-determination, the process of decolonization, and resettlement of the Chagos Archipelago.

Question (a): jurisdiction and self-determination

Question (a) asks: "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?"⁴ UNGA resolution 1514 (XV) is the Declaration on the Granting of Independence to Colonial Countries and Peoples, which requires the decolonizing state to maintain the territorial integrity of the colony in question. UNGA resolution 2066 (XX) relates specifically to the Question of Mauritius, calling on the UK not to violate the territorial integrity of Mauritius during the decolonization process. The UNGA's wording of Question (a) was significant in two main respects.

Firstly, the UK objected to the request for an Advisory Opinion on the grounds that advisory proceedings cannot be used to settle a bilateral territorial dispute between two states that have not both consented to the settlement of that dispute by the Court. The framing of Question (a) in terms of decolonization rather than sovereignty demonstrated the conviction of UN Member States that decolonization is a multilateral issue raising broader issues of principle.⁵ The judges devote seven pages of the Advisory Opinion to the question of jurisdiction, underlining that the purpose of advisory proceedings is for the Court to assist the GA in the performance of its functions (paragraphs 75-78).⁶ Given that "the General Assembly has a long and consistent record in seeking to bring colonialism to an end" (paragraph 87), the Court concluded that it did have jurisdiction to give an Advisory Opinion on the decolonization of Mauritius (paragraph 91).⁷

Secondly, the UNGA's framing of Question (a) in terms of decolonization enabled the ICJ to consider whether the right of self-determination – as expressed in UNGA resolutions 1514 and 1541 – was already established in customary international law and therefore binding on the UK by the time of Mauritian independence in 1968.^{8,9} The judges devote a further seven pages of the Advisory Opinion to consideration of whether the process of decolonization of Mauritius had been lawfully completed. In relation to the negotiations between UK and Mauritius that resulted in the excision of Chagos Archipelago in anticipation of independence, the ICJ found that: "it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the

⁴ <https://www.icj-cij.org/files/case-related/169/169-20170623-REQ-01-00-EN.pdf>

⁵ <https://www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/>

⁶ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

⁷ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

⁸ <https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>

⁹ <https://esil-sedi.eu/fr/esil-reflection-shrinking-self-determination-the-chagos-opinion-of-the-international-court-of-justice-copy/>

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United Kingdom, was under the authority of the latter... this detachment was not based on the free and genuine expression of the will of the people concerned” (paragraph 172).¹⁰ The Advisory Opinion therefore concludes 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 acceded to independence in 1968” (paragraph 174).¹¹

Question (b): decolonization and resettlement

Question (b) asks: “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?”¹² Regardless of the ICJ’s response to Question (a), then, the UNGA also asks the Court to address the consequences for resettlement of the Chagos Archipelago arising from continued administration by the UK.¹³ The judges devote only two pages of the Advisory Opinion to addressing Question (b). In relation to the incomplete process of decolonization, the Advisory Opinion concludes 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” (paragraph 178).¹⁴

In considering the consequences for resettlement of the UK’s continued administration of the Chagos Archipelago, Question (b) specifically asks the ICJ to consider the plight of the displaced Chagos islanders. However, the particular wording – “Mauritian nationals ... of Chagossian origin” – includes non-Chagossian Mauritians and potentially excludes people of Chagossian origin who are not also Mauritian citizens: in particular, Seychellois citizens of Chagossian origin and, increasingly, UK citizens of Chagossian origin who are not also citizens of either Mauritius or Seychelles. This wording, at the Mauritian Government’s request, also averted questions about Chagossian indigeneity and Chagossian rights to self-determination (as opposed to Mauritian rights to self-determination).¹⁵ Nevertheless, in response to Question (b) the judges reflected the original wording of the question, concluding that: “As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius” (paragraph 181).¹⁶ The ICJ thus delegates responsibility for resettlement to the UNGA without a firm steer.¹⁷

Implications of the Advisory Opinion

¹⁰ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

¹¹ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

¹² <https://www.icj-cij.org/files/case-related/169/169-20170623-REQ-01-00-EN.pdf>

¹³ <https://www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/>

¹⁴ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

¹⁵ <https://esil-sedi.eu/wp-content/uploads/2019/03/ESIL-Reflection-Klabbers.pdf>

¹⁶ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

¹⁷ <https://voelkerrechtsblog.org/imperialism-international-law-and-the-chagos-islands/>

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The ICJ website's FAQs includes the question "Are decisions of the Court binding?" to which the answer with regard to Advisory Opinions is that "it is usually for the United Nations organs and specialized agencies requesting them to give effect to them or not, by whichever means they see fit".¹⁸ The question, then, is what can the UNGA do to give effect to the Advisory Opinion. This section considers the implications of the Advisory Opinion for Mauritian decolonization, the Chagos Marine Protected Area and the US military base on Diego Garcia, and Chagossian resettlement.

Mauritian decolonization

The Advisory Opinion is unambiguously a comprehensive victory for the Mauritian Government in terms of its recognition of historic wrongs.¹⁹ Looking forward, the Advisory Opinion concludes that the UK Government "has an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible", and that "all Member states must co-operate with the United Nations to complete the decolonization of Mauritius" (paragraph 182).²⁰ The ICJ is unequivocal: administration of the Chagos Archipelago is unlawful and should be transferred from the UK to Mauritius. The Advisory Opinion reports that several participants in the advisory proceedings had argued for "an immediate end" to UK administration; a few had argued that determining the timescale "is a matter for bilateral negotiations to be conducted between Mauritius and the United Kingdom" (paragraph 176).²¹ In the end, however, the Court concludes that "The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization" (paragraph 179).²²

The decolonization of Mauritius is therefore now firmly on the UNGA's agenda, regardless of the UK's position vis-à-vis bilateral negotiations with Mauritius. The question remains as to how and when this transfer will take place. At talks in London on 18 March 2019, the UK PM Theresa May reiterated the UK's position that the question of the Chagos Archipelago is bilateral and should therefore be discussed bilaterally, while the Mauritian PM Pravin Jugnauth announced his intention to table a draft resolution on implementation of the Advisory Opinion at the UNGA in late April 2019.²³ The UK Government has yet publicly to acknowledge its obligation to withdraw from the Chagos Archipelago, with Government Ministers declaring in both Houses of Parliament that the Advisory Opinion is "not a judgment", reiterating in the House of Commons that "The UK has a longstanding commitment to cede sovereignty over BIOT when we no longer need the territory to help keep us and others safe",²⁴ and asserting in the House of Lords that the Government would

¹⁸ <https://www.icj-cij.org/en/frequently-asked-questions>

¹⁹ <https://www.eiiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>

²⁰ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

²¹ <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

²² <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

²³ <https://www.lexpress.mu/article/349501/londres-pravind-jugnauth-et-theresa-may-evoquent-dossier-chagos>

²⁴ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-25/225589/>

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consider the Advisory Opinion in relation to the strategic importance of the territory in relation to 'marine protection' and 'security purposes'.²⁵

The Chagos Marine Protected Area and the US military base on Diego Garcia

In 2010, the UK Government unilaterally declared a 640,000 km² 'no-take' Marine Protected Area (MPA) in which all commercial fishing and extractive activities are prohibited around the Chagos Archipelago (with the exception of Diego Garcia, the site of the US military base). In 2015, an Arbitral Tribunal in the UN's Permanent Court of Arbitration found that the UK's unilateral declaration of the MPA was incompatible with the UK's obligations under the UN Convention of the Law of the Sea (UNCLOS) because the UK had failed to consult Mauritius and had disregarded Mauritius's fishing rights in Chagos waters and rights to minerals and oil in the seabed and subsoil.²⁶ The Arbitral Tribunal also noted that the UK was bound by international law to return the Chagos Archipelago to Mauritius at the end of the agreement with the US. The Advisory Opinion goes much further in declaring that the UK's administration of the Chagos Archipelago is unlawful and must be ended as rapidly as possible, which raises questions about the current and future status of the MPA. Once administration is transferred to Mauritius, it will be up to Mauritius to determine how to handle marine protection in the Chagos Archipelago. Mauritius is subject to UNCLOS obligations to protect and preserve the marine environment, but will not be obliged to retain the 'no-take' MPA in its current form.

In relation to the US military base on Diego Garcia, the 1966 Exchange of Notes between the UK and the US made the Chagos Archipelago available for 50 years (i.e. until 2016), whereupon the agreement would roll over automatically for a further 20 years (i.e. until 2036) unless terminated by either government between 2014 and 2016. Despite the UNCLOS ruling on the MPA in 2015, which highlighted but did not resolve questions about the UK's jurisdiction over the Chagos Archipelago, the agreement was extended automatically from 2016 until 2036. Following the transfer of administration from the UK to Mauritius, however, the future of the US military base would depend instead on agreement between the US and Mauritius. Since the first Gulf War in 1991, successive Mauritian governments have stated that Mauritius would continue to accommodate the US military base on Diego Garcia, seeing it as a potential source of political and economic benefits. In an interview with BBC World News shortly after the Advisory Opinion was handed down, the Mauritian PM Pravind Jugnauth reiterated that Mauritius "recognizes the existence of the military base and accepts its future operation in accordance with international law".²⁷

Chagossian resettlement

On 8 February 2019, a fortnight before the Advisory Opinion was handed down, the High Court in London had ruled that the UK Government's decision in November 2016 not to facilitate Chagossian resettlement of the Chagos Archipelago was not unlawful (paragraph 213).²⁸ However, the High Court judgment assumed continuing UK administration and did

²⁵ <https://hansard.parliament.uk/Lords/2019-02-26/debates/1F356B7D-4220-404C-A9F3-C44834DFC8F0/ChagosArchipelago>

²⁶ <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>

²⁷ <https://defimedia.info/entretien-de-pravind-jugnauth-accorde-la-bbc-maurice-reconnait-l'existence-de-la-base-militaire-americaine>

²⁸ <https://www.judiciary.uk/wp-content/uploads/2019/02/judgment-hoareau-bancoult-v-ssfca-final-8-feb-19.pdf>

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not anticipate imminent resolution of the ‘sovereignty dispute’ (paragraph 244).²⁹ The overlapping timeframes of the two cases raise questions about whether the High Court case might have been argued and/or judged differently in light of the ICJ Advisory Opinion. Either way, even before the Advisory Opinion was handed down, the Chagossians’ legal teams in the UK had already lodged their application for permission to appeal.

Regardless of proceedings in the UK, however, the Advisory Opinion considers ‘resettlement’ as a human rights issue that should be addressed by the UNGA during the process of decolonization, whereupon the Mauritian Government (overseen by UNGA) will become responsible for resettlement. Whereas the UK High Court considered the UK Government’s obligation (or otherwise) to facilitate Chagossian resettlement, the Advisory Opinion referred to ‘resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin’. Shortly after the Advisory Opinion was handed down, Mauritian PM Pravind Jugnauth told BBC World News that: “It is our earnest hope that the decolonization process of Mauritius will now be expeditiously completed, thereby enabling all Mauritians to move freely within the entire territory of Mauritius including the Chagos Archipelago”.³⁰ Asked whether this included Chagossians now living in the UK, Jugnauth responded: “all Chagossians wherever they are staying – whether they are in Mauritius, whether they are in Seychelles, or in the UK – obviously they have a right to go back and return to their islands”.³¹ But many Chagossians are concerned that the Mauritian Government, seeing access to the Chagos Archipelago as an (economic) opportunity for ‘all Mauritians’, might not be concerned with the best interests of the forcibly displaced Chagos islanders and the wider Chagossian community.

Conclusions

The wording of the questions put by the UNGA enabled the ICJ firstly to determine that it had jurisdiction to give an Advisory Opinion and secondly to find that the decolonization of Mauritius was not lawfully completed. The ICJ declared that the UK’s continued administration of the Chagos Archipelago is unlawful and should be ended as rapidly as possible. However, the Court delegated responsibility to the UNGA, and the process and timetable for decolonization are not yet clear, especially while the UK Government and the European Union are preoccupied instead with Brexit. Meanwhile, Mauritius has reiterated its intention to retain the US military base on Diego Garcia, but this does not necessarily reflect the US Government’s preference, which would be for the UK to retain control. And much remains unclear in relation to the implications of the Advisory Opinion for marine protection and for resettlement, especially for Chagossians who are not also Mauritian citizens.

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²⁹ <https://www.judiciary.uk/wp-content/uploads/2019/02/judgment-hoareau-bancoult-v-ssfca-final-8-feb-19.pdf>

³⁰ <https://defimedia.info/entretien-de-pravind-jugnauth-accorde-la-bbc-maurice-reconnait-lexistence-de-la-base-militaire-americaine>

³¹ <https://defimedia.info/entretien-de-pravind-jugnauth-accorde-la-bbc-maurice-reconnait-lexistence-de-la-base-militaire-americaine>