INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

ORAL STATEMENT OF THE REPUBLIC OF VANUATU

6 September 2018

PROFESSOR ROBERT MCCORQUODALE

1. INTRODUCTION

1.1 Mr. President, Madam Vice-President, distinguished Members of the Court, it is an honour for me to appear before you today in these proceedings on behalf of the Republic of Vanuatu.

1.2 I will address you on Question (a) in regard to the territorial integrity of colonial territory, and Ms. Jennifer Robinson will address you on the requirement for consultation of the free will of the people of a colonial territory and Question (b). We thank our legal team of Ms. Nicola Peart and Mr. Noah Patrick Kouback of the Republic of Vanuatu.

1.3 This is the first time that the Republic of Vanuatu has appeared before the International Court of Justice. It does so because it considers that the issue before the Court is of considerable relevance to it. Vanuatu was a Franco-British Condominium from 1906 to 1980 and, as an independent State, Vanuatu has been an advocate for the right to self-determination and decolonisation, particularly in the Pacific region.

1.4 Indeed, if I may quote from Father Walter Lini, the first Prime Minister of the Republic of Vanuatu:

> *"[The] Pacific is one of the last regions of the world where the heavy hand of colonialism continues to be played. […] These remnants of the past must be lifted from our ocean, for, in all truth, and as I have remarked before, until all of us are free, none of us are."*[1]

Vanuatu hopes that the Court takes these views of Pacific and Melanesian Islanders into account in this important Advisory Opinion.

1.5 The essence of this case is that the United Kingdom claims that in 1965 it had the absolute power and discretion to separate a part of a colonial territory and forcibly remove its population so as to serve its own military purposes, without any regard to the

[1] Walter Lini's keynote address to the Australia and the South Pacific Conference, 18 February 1982, in *Pacific Islands Monthly*, April 1982, pp. 25-28.

will of the people of Mauritius and the Chagos Archipelago. In the alternative, the United Kingdom ventures that it was sufficient that Mauritius, three years later, held a general election where the people were not given the option of independence without detachment of the Chagos Archipelago.[2] These arguments are ultimately attempts to justify the unjustifiable. As Vanuatu will demonstrate, and ask the Court to affirm, customary international law required that there be no division of a colonial territory without the free and genuine consent of the people of that territory

1.6 Mr. President, Members of the Court, Vanuatu will focus on two specific issues on which Vanuatu considers that it is able to provide a unique and important perspective to assist the Court.

2. COMPETENCE OF THE COURT

2.1 Before dealing with these two core issues, there are two preliminary points on which Vanuatu wishes to make very brief submissions.

2.2 First, Vanuatu agrees with the views expressed to the Court by the vast majority of States and the African Union that this is an appropriate matter for an Advisory Opinion, and that the Court should exercise its discretion to accept this Request even if there may be a bilateral issue within the broader international concerns.[3] Indeed, the presence of Vanuatu in the Court is representative of this broader international concern.

2.3 I note the argument by the United Kingdom that the many decades since the General Assembly last considered the issue of the Chagos Archipelago is indicative of the lack of relevance to the General Assembly of this Opinion or of an acquiescence by the international community to the situation. The United Kingdom may have overlooked that it is extremely difficult for a small island State – such as Mauritius and Vanuatu - to bring a resolution to the General Assembly and to gain support for a request for an Advisory Opinion to this Court. It is a mark of considerable merit and determination by

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[2] Indeed, as late as 2009, it seems that Chagossians were called "Man Fridays" by senior British officials: *see R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3, para. 30.

[3] *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136.

the government of Mauritius that it finally managed to do so. It is also a clear acknowledgement by those large number of States who supported the request for an Advisory Opinion that the issue is of relevance and value to the General Assembly in its future actions and, vitally, that the views of small island States do matter in an inclusive international legal system.

3. CUSTOMARY INTERNATIONAL LAW

3.1 Second, Vanuatu agrees with the views expressed to the Court by the majority of States and the African Union that the right to self-determination was a rule of customary international law by 1965. As is explained persuasively by these States and the African Union, the evidence from considerable State practice and *opinio juris*, as confirmed in a number of Security Council and General Assembly Resolutions, and in the jurisprudence of the Court itself, supports this conclusion.[4]

3.2 Vanuatu also supports the conclusion that this customary international law was crystallised in Resolution 1514. Vanuatu asks the Court to confirm the view it expressed in its Advisory Opinion on *Western Sahara*, where it referred to Resolution 1514 as providing "*the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations*".[5] This basis was due to both State practice and *opinio juris*, contrary to the submission of the United States.[6]

3.3 The Court in that Opinion also noted that Spain, as the administering power of Western Sahara, "*has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory*".[7] This statement by the Court must apply equally to all administering powers,

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[4] *See, e.g.*, Written Statement of the African Union, paras. 74-128; Written Statement of Mauritius, paras. 6.20-6.38.

[5] *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, para. 57.

[6] Oral Submission of the United States, paras. 45-55.

[7] *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p.12, para. 30: "*… In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers. In the proceedings in the General Assembly, Spain did not oppose the reference*

including the United Kingdom because, like Spain, the United Kingdom abstained from voting on Resolution 1514, and no State voted against it. Vanuatu agrees with Belize that the Court cannot accept the argument by the United Kingdom that an abstention must indicate non-acceptance of the terms of the Resolution.[8]

4. TERRITORIAL INTEGRITY

4.1 Mr President, Members of the Court, Vanuatu now turns to its first main submission, being on the territorial integrity of colonial territory. It will submit that paragraph 6 of Resolution 1514 reflects the crystallization of customary international law in 1960; that State practice and *opinio juris* before the late 1950s confirm that it was not customary international law before this time; and that the only exception to this is where the people of the colonial territory freely and genuinely consent.

4.2 Paragraph 6 of Resolution 1514 provides:

> *"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".*[9]

4.3 The terminology of "territorial integrity" used in this Resolution is <u>completely distinct</u> from that used about territorial integrity in, for example, the 1970 General Assembly Resolution 2625 on the Declaration on Friendly Relations.[10] Resolution 1514 is solely about the territorial integrity of a <u>non-self-governing territory</u>. The Declaration on Friendly Relations is concerned with the territorial integrity of an <u>existing, independent</u>

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of the Western Sahara question as such to the Court's advisory jurisdiction: it objected rather to the restriction of that reference to the historical aspect of that question."

8 Oral submission of Belize, paras. 12-13. It is notable that the United Kingdom attempts to buttress this assertion by referring to the International Law Commission's Draft Conclusions on the Identification of Customary International Law, at paragraph 5 of the commentary to Conclusion 12. However, this draft is not yet agreed by the ILC and this draft was written by Sir Michael Wood, who is a member of the United Kingdom legal team before this Court.

9 General Assembly Resolution 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples" (A/RES/1514 (XV) of 14 December 1960), para. 6.

10 General Assembly Resolution 2625 (XXV) "Declaration on Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations" (A/RES/25/2625 (XXV) of 24 October 1970).

State**.** Therefore, the United Kingdom's and the United States' reference to Resolution 2625[11] is completely irrelevant to this Advisory Opinion.

4.4 The evidence that Resolution 1514 concerns the territorial integrity of a colonial territory rather than an independent State is three-fold:

4.4.1 First, the use of the non-State terminology of a 'country' aims at distinguishing between territorial integrity applicable to a State and the territorial integrity of non-self-governing territories. This follows from the context of Resolution 1514, which deals with decolonization.

4.4.2 Second, the title given to Resolution 1514 is the Declaration on the Granting of Independence to **Colonial Countries** and Peoples. Hence it is the "colonial countries" which are the subject of the words set out in paragraph 6.

4.4.3 Third, the French text of the Declaration uses the word "*pays*" rather than "*état*", when referring to the territorial integrity of countries, making it clear that it is not a State's territorial integrity in issue.

4.5 Accordingly, the people who had a right to self-determination under Resolution 1514 were territorially defined as being within the territorial unit in which they lived. It was this colonial territory that has territorial integrity.

4.6 Vanuatu agrees with the submissions of Mauritius that paragraph 6 of Resolution 1514 represents customary international law and is binding on all States.[12] Indeed, as they have shown, it has been accepted in State practice and *opinio juris*, as well as by key eminent jurists.[13] As James Crawford concluded in his seminal work on *The Creation of States in International Law*: "*Administering States are not at liberty to divide up or dismember those [colonial] territories in violation of self-determination*".[14]

4.7 The only comments by States at the time of the drafting of Resolution 1514 which could appear to offer an alternative view were those of Indonesia and Guatemala. Both

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11 Oral submission of the United States, paras. 60-61; Oral submission of the United Kingdom, para. 25.

12 Oral submission of Mauritius, para. 9.

13 Written submission of Mauritius, paras. 6.29-6.33.

14 James Crawford, *The Creation of States in International Law* (2nd ed. OUP, 2006), p. 645.

stances were clearly made to bolster their claims to neighbouring non-self-governing territories (West Papua and British Honduras/Belize, respectively). Their amendment was aimed at enabling them to reclaim separate colonial territories based on alleged pre-colonial ties and to refer to the territorial integrity of a State. It was rightly withdrawn.

4.8 Therefore, in Vanuatu's submission, there is no evidence to support the United States' submission that this attempt by Indonesia and Guatemala meant there was no agreed definition of paragraph 6.[15] Instead, in the final agreed text, the paragraph clearly only dealt with the territorial integrity of colonial territory and was passed without any vote against.

4.9 Accordingly, it is Vanuatu's submission that the customary international law requirement of not disrupting in whole or in part the territorial integrity of a colonial territory was confirmed as customary international law by Resolution 1514. From this time onward, there was an international legal obligation on every administering power of a colonial territory not to fragment or otherwise divide a colonial territory. This includes a binding international legal obligation on the United Kingdom in relation to the non-self-governing territory that included both Mauritius and the Chagos Archipelago.

4.10 Mr President, Members of the Court, Vanuatu submits, for clarification, that the territorial integrity of non-self-governing territories was <u>not</u> part of customary international law at the time of the United Nations Charter or in the decade immediately following. For example, the partition of India into two entities before they became independent States in 1947 and the retention of West Papua as a non-self-governing territory when Indonesia became a State in 1949, are both situations where the territorial integrity of a colony was divided during the process of independence. Both were accepted by the General Assembly as lawfully undertaken.[16]

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15 Written submission of the United States, paras 4.48-4.49.

16 *See* General Assembly Resolution 108 (II) "Admission of Yemen and Pakistan to Membership in the United Nations" (A/RES/108(II) of 30 December 1947) (admitting Pakistan as a new member of the United Nations); General Assembly Resolution 448(V) "Development of Self-Government in Non-Self-Governing Territories" (A/RES/448(V) of 12 December 1950) (on Indonesian independence). Indeed, General Assembly Resolution 448 of 29 June 1950 specifically mentions that West Papua (then called

4.11 By the late 1950s State practice shows a different picture.[17] As Belize set out, between 1957 and 1960, 18 colonies became independent and the number of member States of the United Nations increased by 25% in just three years,[18] so the State practice was intensive and consistent. By 1960 it was clear that customary international law prohibited the division of the territorial integrity of a non-self-governing territory without the full and free consent of the people of the colonial territory.

4.12 The United Kingdom, despite its considerable resources, was only able in its oral submission to provide just three possible situations involving the separation and integration by administering powers of colonial territories prior to their independence, and done without the consent by universal suffrage of the peoples of those territories. The United States could only find just two situations. In Vanuatu's submission, none of these are relevant to the situation before the Court. They all either occurred before Resolution 1514 was passed or did not involve a division of a territory where one part became independent and the other became a new colony, including with disapproval by the General Assembly.[19]

4.13 The United Kingdom also raises a fear in relation to the issue of *uti possidetis*.[20] It is the submission of Vanuatu that the territorial integrity of a non-self-governing territory should not be conflated with the principle of *uti possidetis*. *Uti possidetis* is a principle which concerns the maintenance of colonial boundaries at the time of independence of the colonial territory. It does not concern the lawful boundaries of a colonial territory

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Netherlands New Guinea) will remain a colony of the Netherlands after Indonesia's independence. The General Assembly noted "*the communication dated 29 June 1950 from the Government of the Netherlands in which it is stated that the Netherlands will no longer present a report pursuant to Article 73e on Indonesia with the exception of West New Guinea*" (emphasis added)**.** The Resolution also requests that the "*Special Committee on Information transmitted under Article 73 e of the Charter to examine such information as may be transmitted in the future to the Secretary-General [in relation to the non-self-governing territory of West New Guinea] and to report thereon to the General Assembly*". This explicitly recognises that the Netherlands had to continue reporting pursuant to Article 73e of the UN Charter on West New Guinea, recognising West New Guinea as a non-self-governing territory.

17 *See, e.g.*, Written Statement of the African Union, paras. 74-128; Written Statement of Mauritius, paras. 6.20-6.38.

18 Oral submission of Belize, para. 17.

19 General Assembly Resolution 2066 (XX) "Question of Mauritius" (A/RES/2066 (XX) of 16 December 1965) (regretting the administering power's failure to fully implement Resolution 1514 in relation to the Chagos Archipelago).

20 *See e.g.*, Written submission of the United Kingdom, para. 8.29 *et seq*, 9.18; Written Statement of Mauritius, para. 6.58.

before it becomes a State or otherwise exercises the right to self-determination. Accordingly, any application of *uti possidetis* to the boundaries of Mauritius on its independence in 1968 are not applicable, as that boundary was based on the unlawful fragmentation in 1965 of its colonial boundary by the United Kingdom, which was contrary to the territorial integrity of the colonial territory.

4.14 Returning to State practice, the United Kingdom resisted a division of a colonial territory prior to independence because of the lack of the free will of the people of a colonial territory. This happened during the process towards independence of Kenya (whose independence occurred on 12 December 1963) when the people of the Northern Frontier District of the colony of Kenya sought to join with the new State of Somalia. As Malcolm Shaw reports it in his book *Title to Territory in Africa*:

> *"The British Prime Minister, however, declared in April 1960, that 'Her Majesty's Government does and will not encourage or support any claim affecting the territorial integrity of French Somaliland, Kenya or Ethiopia. This is a matter which could only be considered if that were the will of the Governments* ***and the peoples*** *concerned'".*[21]

At the time of making this statement in April 1960, both French Somaliland and Kenya were non-self-governing territories. So when the British Prime Minister was demanding that the will of the peoples be considered it was the will of colonial peoples he was addressing. Thus the United Kingdom itself – just a few months before Resolution 1514 – was applying the customary international law rule of territorial integrity of a colonial territory and recognising that this rule was subject only to the freely expressed will of the people of the colonial territory.

4.15 Vanuatu also notes that, like the independence Constitution of Mauritius, the independence Constitution of Vanuatu was drafted with the assistance of its colonial powers, so it may not be surprising that the Mauritius Constitution of 1968, which was

[21] Malcolm Shaw, *Title to Territory in Africa* (OUP, 1986), p. 110 (emphasis added).

approved by the United Kingdom by Order in Council, did not extend its territory to the Chagos Archipelago.[22]

4.16 Vanuatu takes this opportunity to reject strongly the argument made by the United Kingdom that islands some distance from each other cannot form a State. Vanuatu is an archipelagic State. Many of its islands are a great distance from each other. Yet it remains a sovereign State.

4.17 Accordingly, it is Vanuatu's submission that it was a customary international law rule by 1960 that there is territorial integrity of a colonial territory. An administering power could not separate or integrate a colonial territory without first obtaining the free and genuine consent of the people of that colonial territory.

4.18 Indeed, the reason for including territorial integrity of a colonial territory as part of the right to self-determination was to protect the peoples of that territory from actions of the administering power that would divide or otherwise deal with the colonial territory against those peoples' interests. It was to make clear that the interests of the peoples of a colonial territory were more important than, and have legal protection over, the financial, military or other interests of the colonial power. Territorial integrity of a colonial territory cannot be sacrificed for the self-interests of a colonial power or of any other State.

4.19 Mr. President, Members of the Court, thank you for your attention. Ms Robinson will now make submissions by Vanuatu as to how the free and genuine consent of the people of a colonial territory is lawfully expressed, and make submissions in answer to Question (b).

MS JENNIFER ROBINSON

[22] United Kingdom, *The Mauritius Independence Order 1968 and Schedule to the Order: The Constitution of Mauritius* (4 Mar. 1968), at Section 4(1) of the Order and Section 2 of the Constitution; Written Comments of the Mauritius, para. 3.100.

5. FREE AND GENUINE WILL OF THE PEOPLE

5.1 Mr. President, Madam Vice-President and Distinguished Members of the Court, it is my honour to address you on behalf of Vanuatu.

5.2 Vanuatu has already shown that administering powers were, from 1960, prohibited from dividing or integrating non-self-governing territories without consulting the free will of the people.

5.3 Two pertinent questions flow from this rule of customary law: *first*, what did the obligation to consult require? *Second*, to whom was it owed? Vanuatu thanks Judge Gaja for the question about the relevance of the free will of the Chagossian people in the process of decolonisation, which squarely raises these issues. The free will of the people of Mauritius, including the Chagossians, was not only relevant in 1965, but was ***required*** by international law for the detachment to be lawful.

5.4 My submission will be in four parts: *first,* I will set out what the obligation to consult the free will of the people required of the United Kingdom in 1965 in respect of the detachment. *Second,* I will address who the relevant people were for the purposes of the consultation. *Third,* applying these principles to the facts, and to provide Vanuatu's answer Question (a), I will explain why the United Kingdom's failure to consult the free and genuine will of the people of Mauritius and the Chagos Archipelago meant that the detachment was unlawful. *Finally,* I will address the consequences of this failure in answer to Question (b).

5.5 First, on ***the content of the obligation to consult the free will***. The relevant law is found in Resolutions 1514 and 1541 of 1960. Paragraph 5 of Resolution 1514 provides:

> *"Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations,* ***in accordance with their freely expressed will and desire****,*

without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."[23]

5.6 As this Court confirmed in the *Western Sahara* Opinion, "*the application of the right to self-determination requires a free and genuine expression of the will of the people concerned*."[24] In that case, this Court also confirmed that Resolution 1541 "*give[s] effect to the essential feature of the right to self-determination as established in Resolution 1514 (XV)*".[25]

5.7 Resolution 1541 – passed the day after Resolution 1514 – set no procedural requirements for colonies declaring independence, but it did set out procedural requirements about how the will of the people is to be determined where the people of the colonial territory are presented with a status which does not amount to full independence. Principle IX requires that:

> *"The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage"*.[26]

5.8 Where a colony is divided – as in this case – with one part becoming independent and the other remaining a colony or being integrated with the colonial power, the risk of continued colonial subjugation is clear. This is to be distinguished from a situation where the colony declares independence with its territorial integrity intact. The distinct procedural requirements in Resolution 1541 for division or integration reflect the need to ensure that, in circumstances such as those in this case, the people must be given a full informed, free and genuine choice before accepting a status less than independence.

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[23] General Assembly Resolution 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples" (A/RES/1514 (XV) of 14 December 1960), para. 5 (emphasis added).

[24] *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, para. 55.

[25] *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12, para. 57.

[26] General Assembly Resolution 1541 (XV) "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter" (A/RES/1541 (XV) of 15 December 1960). See also Principle VII which requires that free association "*should be the result of a free and voluntary choice...expressed through informed and democratic processes.*"

5.9 Vanuatu agrees with Belize that the requirement to consult the free will of the people in Resolution 1514, and the concomitant procedural requirements in Resolution 1541, reflected customary international law in 1960.[27]

5.10 State practice from the late 1950s shows that plebiscites or elections – based on universal suffrage – were organised or supervised in non-self-governing territories before their division or integration with other States.[28] Indeed, as the Netherlands pointed out: this State practice was "*practically uniform*".[29] By 1968, as Mauritius pointed out, UN supervised plebiscites were "*routinely used"* to ascertain the will of the people.[30]

5.11 Despite this, the United Kingdom claims there was no such requirement. In the alternative, the United Kingdom ventures that a plebiscite was not required and a general election would suffice. There is of course ample State practice where colonies have declared independence, with their territorial integrity intact, after the government had won the general election on a mandate of independence. However, it was unable to provide even one example of State practice where the people of a colonial territory had agreed to division – with one part becoming independent and the other remaining a colonial territory – on the basis of a mandate from a general election.

5.12 But what ***is*** clear from State practice in the late 1950s and 1960s is that there must be a vote, based on universal suffrage, and which must allow a free and genuine choice about the division of a colonial territory.

5.13 In this regard, Vanuatu wishes to raise its concern that the United States, in attempting to argue that there was no such rule of customary international law, has incorrectly cited the case of West Papua. In 1962 West Papua was a non-self-governing territory known as Netherlands New Guinea. The United States cites this case as an example of State

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27 Oral submission of Belize, paras. 9-27.

28 Written Statement of Mauritius, para. 6.44. *See also* Written Statement of Mauritius, para. 6.59 ("*By 1968, for example, U.N.-supervised plebiscites had been routinely used to ascertain the wishes of a people in case of both the merger and division of the territory of former colonies*.")

29 Written Statement of the Netherlands, para. 3.29.

30 Written Statement of Mauritius, para. 6.59 ("*By 1968, for example, UN-supervised plebiscites had been routinely used to ascertain the wishes of a people in case of both the merger and division of the territory of former colonies*.")

practice where the political status of a non-self-governing territory changed without a prior attempt to ascertain the freely expressed will of the people of the territory.[31]

5.14 Mr President, members of the Court, Vanuatu wishes to clarify that the 1962 Agreement under which Netherlands New Guinea was transferred from the Netherlands – first, to the administration of the United Nations and then to Indonesian administration, **required** that the inhabitants of West Papua would have the opportunity to exercise their freedom of choice on whether to integrate with Indonesia or become independent. [32] That agreement, noted by the General Assembly in Resolution 1752,[33]**required –** consistent with the customary international law Vanuatu has set out – that the free will be ascertained by universal suffrage of the territory's inhabitants, in accordance with international practice.[34]

5.15 Turning to my second point and Judge Gaja's question: ***who were the relevant people to be consulted in relation to the detachment of the Chagos Archipelago***?

5.16 It was accepted by the Court in the *East Timor Case* that it was an *erga omnes* principle that the peoples of a non-self-governing territory are "peoples" for the purposes of the right to self-determination.[35] In 1965, at the time of detachment, the relevant territorial

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31 Written Statement of the United States, para. 4.71; Written Comments of the United States, para. 3.39.

32 *See Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)*, 15 August 1962, 437 UNTS 273. The Treaty states in Article XVIII that one of its aims is "*to give the people of the territory the opportunity to exercise freedom of choice*", which would be based on "(d) the *eligibility of all adults, male and female, not foreign nationals to participate in the act of self-determination to be carried out in accordance with international practice*".

33 General Assembly Resolution 1752 (XVII) "Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)" (A/RES/1752 (XVII) of 21 September 1962). The General Assembly "takes note" of the agreement between the Netherlands and Indonesia.

34 The US acknowledges that the vote was not conducted in accordance with democratic process: *see* Written submission of the United States, para. 4.71 and in particular, fn. 180.

35 *Case Concerning East Timor (Portugal v. Australia),* Judgment, I.C.J. Reports 1995, p. 90, para. 29: "*In the Court's view, Portugal's assertion that the right of the peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court.*" *See also, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53 (stating that, following agreement of the UN Charter, "…the subsequent development of international law in regard to non-self governing territories, as enshrined in the Charter of the United Nations, made the principles of self-determination applicable to all of them") and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* pp. 31-33, paras. 54-59 (stating that "[t]he principle of self-determination as a right of peoples, and its applicable for the purpose of

unit for the purposes of self-determination was the non-self-governing territory of Mauritius, including the Chagos Archipelago. The United Kingdom was obliged to consult the free will of the inhabitants of Mauritius and the Chagos Archipelago – that is, all Mauritians in the territorial unit, including the Chagossians.

5.17 Turning to my third point. ***Given these established rules of customary international law, did the United Kingdom comply with the obligations to consult the free will of the Mauritian people in relation to the division of the territory***?

5.18 The United Kingdom's primary argument is that, in 1965, it had the absolute power and discretion to excise off a part of a non-self-governing territory and forcibly remove its population without any regard to the will of the people. As Vanuatu has shown, this is not correct as a matter of customary international law. The General Assembly at that time agreed, as was made clear by Resolution 2066 in 1965.[36]

5.19 In the alternative, the United Kingdom ventures that it was sufficient to hold a general election, *three years* after detachment ***and*** where independence without detachment was not an option.

5.20 The United Kingdom's argument was eloquently put but was an exercise in attempting to justify the unjustifiable. As Vanuatu has set out and asks the Court to affirm, the customary international law requirement that the United Kingdom consult the free will of the people required far more.

5.21 Vanuatu emphasises that customary international law required more than a consultation on division or integration based on universal suffrage. It also requires that there be a "*free and genuine choice*". This requires a democratic vote, impartially conducted, which is free from coercion. It also requires that the options available to the people – whether independence or division or integration – are clearly put to them and that consultation offers a genuine choice between those options.

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bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (WV)").

[36] General Assembly Resolution 2066 (XX) "Question of Mauritius" (A/RES/2066 (XX) of 16 December 1965) ("Regretting that the administering Power has not fully implemented Resolution 1514 (XV) with regard to [Mauritius]").

5.22 Mr President, members of the Court, what option did the Mauritian electorate really have at the 1968 general election? Their option was to vote for the party promising independence *with detachment* or to vote for those parties who wished that Mauritius remain a British colony. Becoming independent, with Mauritius having its territorial integrity intact, was not an option. This cannot be considered a free and genuine choice on the division of their territory.

5.23 Therefore, Vanuatu submits that – in answer to Question (a) – the process of decolonisation was not lawfully completed.

5.24 Mr President, members of the Court. As a consequence, the Court need not, in this case, determine the contested factual question of whether there was coercion or duress involved in securing the consent of Mauritian representatives to the detachment during the independence negotiations. This factual background is important in showing the stark power imbalance between an administering power and colonial peoples struggling for their independence, which underlines the need for the procedural protections in Resolution 1541. This factual finding is not relevant because the question is ***not*** whether or not the government of Mauritius or its representatives consented at various points or not.

5.25 The relevant question as to whether the detachment was lawful *according to the right to self-determination* was whether the United Kingdom complied with its obligation to provide the people of Mauritius and the Chagos Archipelago a free and genuine choice as to the future of the territory. It clearly did not.

5.26 This brings me to my last point in relation to Question (b) on the consequences of this. The United Kingdom, as the administering State, is responsible for the internationally wrongful act of detaching the Archipelago. The payment of compensation to some Chagossians did not address this wrong and does not relieve the United Kingdom of its obligations to Mauritius. The people of Mauritius continue to hold the right to self-determination in relation to the entire territory, including the Chagos Archipelago. The

United Kingdom is required to cease forthwith its unlawful administration of the Chagos Archipelago and return it to Mauritius.[37]

5.27 Vanuatu also emphasises that all States have the obligation to refrain from any action that deprives people of their right to self-determination. A military base for the defence purposes of two States, no matter how powerful, cannot override the human right of Mauritius and the Chagossians to self-determination. Nor is there any evidence before this Court that those defence purposes cannot be served, in accordance with international law, after the restitution of the territory to Mauritius.

5.28 This Court has the power to assert the applicable legal principles relevant to decolonisation and support the General Assembly's efforts to this end. Accordingly, Vanuatu urges the Court to answer the questions put to it by the General Assembly. Vanuatu draws the Court's attention to the importance of this case for those peoples around the world who remain under colonial rule in breach of their free and genuine wishes for their colonial territory. This is an obligation which Vanuatu takes very seriously because, as Vanuatu's founding father Walter Lini said: "*until all of us are free, none of us are*".

5.29 Mr. President, Distinguished Members of the Court, that concludes the Republic of Vanuatu's oral submission. Thank you for your patient attention.

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[37] *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras 150-151; *Rainbow Warrior Arbitration*, 30 April 1990, XX RIAA p. 215, para. 114. *See also* U.N. General Assembly, 22nd Session, *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Agenda Item 23*, U.N. Doc. A/6700/Add.8* (11 Oct. 1967), para. 194.