

The Identity of the Coastal State – Reflections Following Two Judicial Pronouncements in the Chagos Archipelago Dispute

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Introduction

Although Seychelles is not party to the dispute revolving around the sovereignty over the Chagos Archipelago, it has close links with that territory. Indeed, Seychelles is also made up of archipelagos located in the same region within the Indian Ocean and, more importantly, a substantial number of Seychellois are Chagossians who were expelled from their ancestral land fifty years ago. In fact, the plight of those individuals was the only concern of the Seychelles government when, in its written submission to the International Court of Justice (ICJ) towards the Court's Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius ('the Advisory Opinion'), it requested that 'the unique perspectives and legitimate concerns of the Seychellois Chagossian community be taken into due consideration by the ICJ during its deliberations'.¹ It did so on the grounds that the members of that community still 'have genuine connections, interests and sentiments towards the Chagos islands' and, '[i]n the process of being removed from their homes and resettled elsewhere, the Seychellois Chagossians faced a myriad of indignities and disrespect for their fundamental human rights'. The actions that resulted in this state of affairs fit squarely within a centuries-old approach to the relationship between peoples. That approach was buttressed by an ocean legal regime based on a relationship between land and sea that is coming under strain as a result of climate and political changes. After sketching the background of the dispute between the United Kingdom and Mauritius, this contribution will outline the relevant elements of the Award made in 2015 and the Advisory Opinion expressed in February 2019. With reference to those two judicial pronouncements, the contribution will then engage with the issue of whether a dispute over the identity of a coastal State is a dispute concerning the interpretation or application of the 1982 UN Convention on the Law of the Sea ('the LOSC')² and, if so, what are the consequences for ocean governance.

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¹ <https://www.icj-cij.org/files/case-related/169/169-20180228-WRI-01-00-EN.pdf> [Accessed 13 June 2019].

² 1833 UNTS 3, (1982) 21 ILM 1261. Adopted: 10.12.1982; EIF: 16.11.1994.

Background of the dispute

The Chagos Archipelago is part of a ‘constellation of islands’ spread across the western Indian Ocean.³ Although it is very likely that the Archipelago was already known by Indian Ocean sailors for many centuries before, it only appeared on Portuguese maps by the middle of the sixteenth century.⁴ Two hundred years later, France claimed sovereignty over the uninhabited Archipelago, which was afterwards progressively settled.⁵ After the United Kingdom captured Mauritius in 1810, France agreed, in the Treaty of Paris of 1814, that the island and all its dependencies, including the Archipelago, would not be restored to France.⁶ Thereafter, the Archipelago was administered as a lesser dependency of the British colony of Mauritius until 1965, when it was detached from Mauritius to establish the British Indian Ocean Territory (BIOT).⁷ After becoming independent in 1968, Mauritius only turned its attention to the question of the Chagos Archipelago in 1982, when ‘the Mauritian Legislative Assembly established a select committee to conduct an investigation into the circumstances surrounding the excision of the Archipelago from Mauritius’.⁸ Since then, Mauritius has repeatedly asserted that the Archipelago is part of its territory while the United Kingdom has consistently responded by maintaining that the Archipelago is under British sovereignty.

The 2015 Award

The Award made on 18 March 2015⁹ is the outcome of arbitration proceedings initiated by Mauritius against the United Kingdom pursuant to Article 287 of the LOSC and in accordance with Article 1 of Annex VII to the Convention.¹⁰ Those proceedings were initiated after the United Kingdom had established a marine protected area (MPA)

³ Abraham, G. (2011). Paradise claimed: Disputed sovereignty over the Chagos Archipelago. *South African Law Journal*, 28(1), pp63-99, who explains that, ‘[l]ying at the tail end of the Chagos Laccadive Plateau, about 2,200 km north east of Mauritius, the Archipelago is made up of six island groups. In addition to the principal groups of Diego Garcia, the Salomons, and Peros Banhos, along the western edge of the Great Chagos Bank — a submerged atoll — there are a number of protuberances that are island groups in their own right: the Egmont Atoll of six islands; a group including Danger Island, Sea Cow Island and Eagle Island; a third group, consisting of the Trois Frères (or Three Brothers); and, finally, Nelson Island’, (at 64).

⁴ Abraham, G. (2011). Paradise claimed: Disputed sovereignty over the Chagos Archipelago. *South African Law Journal*, 28(1), pp63-99, (at 69-70).

⁵ Allen, S. (2014). *The Chagos Islanders and International Law*. London: Bloomsbury Publishing. At 76.

⁶ See article 8 of the Treaty, which is available at http://www.napoleon-series.org/research/government/diplomatic/c_paris1.html [Accessed 13 June 2019].

⁷ British Indian Ocean Territory Order 1965 (S.I. 1965/1920).

⁸ Allen, S. (2014). *The Chagos Islanders and International Law*. London: Bloomsbury Publishing. At 90.

⁹ The Award and all related documents are available at <https://pca-cpa.org/en/cases/11/> [Accessed 13 June 2019].

¹⁰ In terms of Article 287(5) of the LOSC, the dispute could only be submitted to arbitration in accordance with Annex VII because the parties had not accepted the same procedure for the settlement of the dispute. Mauritius ratified the LOSC in 1994 and the United Kingdom acceded to it in 1997.

around the Archipelago by means of BIOT Proclamation 1 of 2010 and their aim was to have the MPA declared unlawful under the LOSC. The part of the claim of Mauritius that is relevant for present purposes was that ‘the United Kingdom [was] not “the coastal State” (within the meaning of the 1982 Convention) and so [was] not entitled to declare an “MPA” (or indeed any other maritime zone) around the Chagos Archipelago’.¹¹

The Arbitral Tribunal did not deal with the merits of the claim because it considered itself to be without the jurisdiction to do so.¹² The Tribunal reached that conclusion after having decided that Mauritius’ submission was ‘properly characterized as relating to land sovereignty over the Chagos Archipelago’, with ‘[t]he Parties’ differing views on the “coastal State” for the purposes of the Convention [being] simply one aspect of this larger dispute’.¹³ The Tribunal then decided that, ‘where the “real issue in the case” and the “object of the claim” ... do not relate to the interpretation or application of’ the LOSC, ‘an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)’ of the LOSC on which the Tribunal’s jurisdiction was to be based.¹⁴

The Tribunal’s conclusion was only supported by three of the five arbitrators, the other two arbitrators differing with the majority’s finding both with regard to the characterization of the dispute and with regard to the Tribunal’s jurisdiction over it. The dissenting arbitrators were of the view that the dispute could not ‘be qualified as a dispute about the sovereignty of the Chagos Archipelago’.¹⁵ They were also of the view that it was permissible to decide incidentally about a sovereignty issue because the fact that it would ‘be necessary to consider the sovereignty issue by having recourse to general international law or specific international agreements [had been] anticipated in the Convention’ and the Tribunal had no authority to exclude such an issue.¹⁶

Having reached the conclusion that the Tribunal had jurisdiction, the dissenting arbitrators were able to engage with the merits of the case by focussing on what they considered to be the ‘central question: namely, as to whether the excision of the Chagos Archipelago was contrary to the legal principles of decolonization as referred to in UN General Assembly Resolution 1514 and/or contrary to the principle of self-determination’.¹⁷ They decided that this was the case because ‘[i]t is clearly stated in General Assembly Resolution 1514 that the detachment of a part of a colony (which in th[e] case [at hand] include[d] the dependency of the Chagos Archipelago) is contrary to international law’¹⁸ and Mauritius had not validly consented to the detachment, nor had

¹¹ Final Transcript 16:6-9.

¹² Paragraph 221 of the Award.

¹³ Paragraph 212 of the Award.

¹⁴ Paragraph 220 of the Award.

¹⁵ Paragraph 9 of the Dissenting and Concurring Opinion.

¹⁶ Paragraph 45 of the Dissenting and Concurring Opinion.

¹⁷ Paragraph 70 of the Dissenting and Concurring Opinion.

¹⁸ Paragraph 72 of the Dissenting and Concurring Opinion.

it acquiesced to it at a later stage.¹⁹ This means that, as far as the dissenting arbitrators were concerned, the United Kingdom was not the coastal State in the case of the Archipelago and it had therefore no authority to proclaim an MPA around it.

The 2019 Advisory Opinion

The Advisory Opinion expressed on 25 February 2019²⁰ is the outcome of proceedings in terms of Article 65 of the Statute of the ICJ initiated by a request made in Resolution 71/292²¹ adopted by the General Assembly of the United Nations on 22 June 2017 on the basis of Article 96(1) of the UN Charter. The two questions asked by the General Assembly were the following:

- (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?*

After concluding that there were ‘no compelling reasons for it to decline to give the opinion requested by the General Assembly’,²² the ICJ answered question (a) by stating 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’.²³ It then answered question (b) by stating that ‘the United Kingdom has an obligation to bring to an end 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’.²⁴

On 22 May 2019, the General Assembly welcomed the Opinion and demanded that the United Kingdom ‘withdraw its colonial administration from the Chagos Archipelago

¹⁹ Paragraph 79 of the Dissenting and Concurring Opinion.

²⁰ The Opinion and all related documents are available at <https://www.icj-cij.org/en/case/169> [Accessed 13 June 2019].

²¹ Available at <https://undocs.org/en/A/RES/71/292> [Accessed 13 June 2019].

²² Paragraph 91 of the Opinion.

²³ Paragraph 174 of the Opinion.

²⁴ Paragraph 182 of the Opinion.

unconditionally within a period of no more than six months ... , thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible'.²⁵ The resolution is not legally binding on the United Kingdom²⁶ and the latter has made it clear that it still considers itself bound by the Award.²⁷ As a result, whether the United Kingdom is the coastal State in the case of the Archipelago remains a live issue.

The place of the coastal State in the Law of the Sea

The coastal State has a central role in the Law of the Sea. Indeed, the latter divides the oceans into different maritime zones, each of which has its own legal regime consisting, except in the case of the high seas, in an attempt to carefully balance the claims of the coastal State with those of any other State. As a result, the legal regime governing many ocean activities is affected in one way or another by the territorial status of the nearby dry land as well as the position of the baselines from which the extent of the maritime zones is calculated. In fact, the very existence of the maritime zones other than the high seas at any specific location close to a coast is at stake. Indeed, should the dry land not be part of the territory of any State, there is no basis for the existence of those maritime zones²⁸ and the shores of that land are washed by the high seas. In other words, the legal framework of ocean governance is not primarily shaped by the characteristics of the marine space to which it applies, but by the existence of the maritime zones generated by land sovereignty.

The number and extent of those zones was increased by the LOSC in the process of overhauling the legal regime that was largely codified in the four 1958 Geneva Conventions and that played such a vital role in facilitating and supporting the colonial project. That system had as one of its two main building blocks the principle of freedom of the high seas, which still finds expression, admittedly in a somewhat tempered form, in Part VII of the LOSC. The increase was part of the strategy adopted to reduce the impact of the principle by curtailing its geographical scope of application. One of the bases of that curtailment was the second building block of the age-old regime, the principle of sovereignty. It is indeed the same premise that serves as the foundation of the legal regimes governing the territorial sea and the contiguous zone in Part II of the LOSC, as well as the continental shelf, in Part VI, upon which rest the new legal regimes governing the archipelagic waters, in Part IV, and the exclusive economic zone, in Part V; and which has a major impact on the provisions on straits used for international navigation, in Part III, the single article focussing on islands, in Part VIII, the two

²⁵ Paragraph 3 of Resolution 73/295, which is available at <https://undocs.org/en/A/RES/73/295> [Accessed 26 June 2019].

²⁶ Schermers, H.G. and Blokker, N.M. (2018). *International Institutional Law*. Leiden: Brill Nijhoff. At 798.

²⁷ Paragraph 9.14 of the Written Statement of the United Kingdom to the ICJ.

²⁸ See *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, Judgment of 20 February 1969, *ICJ Reports*, 1969, p3 at 51; *Maritime Delimitation and Terrestrial Questions between Qatar and Bahrain*, Merits, Judgment of 16 March 2001, *ICJ Reports*, 2001, p40 par 185.

articles dedicated to enclosed and semi-enclosed seas, in Part IX, and the provisions relating to the right of access of landlocked States to and from the sea as well as their freedom of transit, in Part X.

The downside of this strategy is that any contribution that the LOSC is able to make ‘to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked’,²⁹ is limited by the territorial outcomes of the colonial expansion that took place until the last century. This is particularly the case on the African continent, the parcelling out of which has resulted in half of the African States being either landlocked or suffering from various degrees of geographical disadvantage and, therefore, either having no EEZ or having EEZs disproportionately small compared with the size of their land territory. The transformative potential of the LOSC continues to be affected also, especially in the Indian Ocean, by the measures taken by colonial States to separate small insular features – and the maritime zones that they generate – from the colonial territories of which they were parts until then. It is against this background that the nature of the dispute over the identity of the coastal State having sovereignty over the Chagos Archipelago needs to be approached.

The nature of a dispute over the identity of a coastal State

In most ocean-related disputes, there is no disagreement on the identity of the coastal State concerned. The States involved in a specific dispute are indeed *ad idem* regarding the fact that the nearby coast is part of the territory of a State and regarding the identity of that State. For that reason, the disputes focus exclusively on ocean-related matters. When that is not the case and the parties make use of the LOSC dispute-settlement mechanisms, the 2015 Award illustrates the fact that difficulties may arise because, in terms of Article 288(1) of the LOSC, the adjudicative body chosen by the parties only has jurisdiction over disputes concerning the interpretation or application of the Convention, and the latter does not indicate clearly whether a dispute over a State’s title to coastal land is one of those disputes.

In order to reach a decision on this matter, the members of the adjudicative body must first establish the nature of the dispute that they are called upon to settle. In the Chagos arbitration, all the arbitrators agreed that they needed to approach that issue in accordance with the principles set out in the case law of the ICJ. They disagreed, however, on how to apply in the Award the jurisprudence that was summed up in the decision of the ICJ in the *Fisheries Jurisdiction* case.³⁰

²⁹ Fifth paragraph of the Convention’s preamble.

³⁰ *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, *ICJ Reports*, 1998, p432 at 447 par 29.

The nature of that disagreement has already been discussed at length elsewhere.³¹ In short, the ICJ has made it clear that ‘it is for the Applicant, in its Application, to present to the [adjudicative body] the dispute with which it wishes to seise the [body] and to set out the claims which it is submitting to it’.³² At the same time, the [body] has to determine for itself,³³ ‘having examined all of the relevant instruments, what was the subject of the dispute brought before it’³⁴ and, if necessary, ‘determine whether the applicant raised a rhetorical veil hiding a dispute over which the [body] does not have jurisdiction or the respondent raised a rhetorical veil hiding a dispute over which the [body] does have jurisdiction’.³⁵ The ICJ embarked upon such an exercise in the *Right of Passage over Indian Territory* case,³⁶ the *Nuclear Tests* case³⁷ and the *Fisheries Jurisdiction* case.

The lessons to be learnt are: (i) that the applicant needs to be very careful when it formulates its submissions so that it gives as little ground as possible to the adjudicators to agree with the respondent when the latter will almost inevitably argue that the dispute does not primarily concern the interpretation or application of the LOSC; (ii) that the applicant must continue to do so in its oral pleadings in the course of the hearings; (iii) that the adjudicative body can be expected to take into account relevant diplomatic exchanges and public statements made on behalf of the applicant’s government; (iv) that a distinction must be made between the nature of the applicant’s submission and the reasons given by the applicant to try and convince the adjudicative body that it should rule in its favour; and (v) that the characterisation of a dispute can turn out to be a process more open to unpredictability than one would wish.

The 2015 Award points to three aspects specific to disputes concerning the interpretation or application of the Convention that involves the identity of the coastal State. The first aspect revolves around the extent to which the applicant has, before the dispute was submitted to the adjudicative body, made a link between the dispute over sovereignty

³¹ See Vrancken, P. and Ntola, S.Y. (2014). Land Sovereignty and LOSC: The Chagos Marine Protected Area Arbitration (*Republic of Mauritius v United Kingdom*). *South African Yearbook of International Law*, 39, pp105-134.

³² *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, *ICJ Reports*, 1998, p432.

³³ *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, *ICJ Reports*, 1998, p 432 at 449 par 31, referring to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment of 16 March 2001, *ICJ Reports*, 1995, p40 at 24-25.

³⁴ *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, *ICJ Reports*, 1998, p432 at 448 par 29, referring to *Territorial Dispute (Libya v Chad)*, Judgment of 3 February 1994, *ICJ Reports*, 1994, p6 at 14-15 par 19 and 28 par 57.

³⁵ Vrancken, P. and Ntola, S.Y. (2014). Land Sovereignty and LOSC: The Chagos Marine Protected Area Arbitration (*Republic of Mauritius v United Kingdom*). *South African Yearbook of International Law*, 39, pp105-134 at 122.

³⁶ *Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment of 12 April 1960, *ICJ Reports*, 1960, p6.

³⁷ *Nuclear Tests (Australia v France)*, Judgment of 20 December 1974, *ICJ Reports*, 1974, p253.

and the actions taken by the ‘coastal State’, the sovereignty of which is challenged, with regard to the waters off ‘its’ coast. State practice in this regard is important because the Tribunal used, as one of the two bases for it to reach the conclusion that the dispute primarily concerned sovereignty, a comparison between, on the one hand, the ‘extensive record, extending across a range of fora and instruments, documenting the Parties’ dispute over sovereignty’ and, on the other hand, the fact that, ‘prior to the initiation of th[e] proceedings, there is scant evidence that Mauritius was specifically concerned with the United Kingdom’s implementation of the Convention on behalf of the BIOT’.³⁸ It is difficult to speculate what additional evidence the majority of the arbitrators expected, but annual notifications of Mauritius’ objections to the United Kingdom’s exercise of its jurisdiction in the waters around the Archipelago on the basis that it is the State exercising sovereignty over it, would have gone a long way towards weakening this element of the United Kingdom’s case.³⁹

The second aspect revolves around the consequences of a finding on the identity of the coastal State. Mauritius’ counsel ought to have been more circumspect when venturing into expressing an opinion on the legal consequences on the insular components of the Archipelago of a finding on the identity of the coastal State. Indeed, the fact that such an opinion was expressed was used by the Tribunal as the second basis for it to reach the conclusion that the dispute primarily concerned sovereignty.⁴⁰ This could have been easily avoided because there was no need to dwell on those consequences. Indeed, a dispute concerning the interpretation or application of the LOSC has no direct impact on the interpretation or application of international law as it applies on land. In other words, the settlement of a dispute by means of a settlement mechanism provided by Part XV of the LOSC has no binding effect on land.

The third aspect relates to whether jurisdiction over issues of land sovereignty was, or was not, contemplated by the drafters of the LOSC. This aspect is important because, after noting that ‘[t]he negotiating records of the Convention provide no explicit answer regarding jurisdiction over territorial sovereignty’, the Tribunal explained the lack of attention to this question by the fact that, in its view, none of the participants in the Third United Nations Conference on the Law of the Sea ‘expected that a long-standing dispute over territorial sovereignty would ever be considered to be a dispute “concerning the interpretation or application of the Convention”’.⁴¹ However, the Tribunal clearly erred in this regard because the LOSC does not ignore territorial sovereignty disputes when it lists in Article 298(1)(a)(i) as a dispute to which the applicability of section 2 of Part XV can be excluded, ‘any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory’.

³⁸ Paragraph 211 of the Award.

³⁹ Mauritius (2006). Maritime Zone Act, 2005 (Act 2 of 2005). *Law of the Sea Bulletin*, 62, pp52-60.

⁴⁰ Paragraph 211 of the Award.

⁴¹ Paragraph 215 of the Award.

The identity of the coastal State and Indian Ocean governance

The Tribunal, having reached the conclusion that it did not have jurisdiction to settle the sovereignty dispute, did not adjudicate on its merits. By contrast, the dissenting arbitrators having reached the opposite conclusion, they could turn their attention to the merits of the case.⁴² The correctness of their finding was confirmed by the ICJ in the 2019 Opinion.

The combined effects on Indian Ocean governance of the Opinion and the 2015 Award appear to be as follows. First, land and ocean must be kept apart in the sense that any attempt at using the LOSC dispute-settlement mechanisms to resolve a dispute that is primarily over land sovereignty will not succeed.⁴³ At the same time, it is possible to link land and ocean to resolve the ocean-governance aspects of a land-sovereignty dispute; provided that one is careful not to stray into the land-governance aspects of the dispute, one can rely on State practice that was also careful not to do so, and one succeeds in convincing the majority of the members of the adjudicative body that there is no obstacle in the LOSC to a linkage between land and ocean for this limited purpose. Once this is done and provided that an unlawful detachment of an insular feature from a colony and its incorporation into a separate administrative structure is found to have taken place, an adjudicative body will, in all likelihood, rule that the colonial State is not the coastal State for ocean-governance purposes.

The above has the potential of opening new political dispute-settlement options, which involve combinations of sovereignty, sovereign rights and freedoms different from the combination that the LOSC provides by default to govern the relationship between the coastal State and other States. This can only increase the prospects of peaceful and sustainable ocean governance in the region.

⁴² See paragraphs 70-80 of the Dissenting and Concurring Opinion.

⁴³ The Philippines demonstrated that they were well aware of this in the *South China Sea* arbitration proceedings, the documents of which are available at <https://pca-cpa.org/en/cases/7/> [Accessed 13 June 2019].

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