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The implication of the United Nations bodies to settle the Franco-Comorian dispute over the island of Mayotte

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Abstract:

The territorial dispute which opposes the Union of Comoros and the Republic of France over the island of Mayotte is a conflict of 42 years, old enough to see some progress to its solution, if not, at least the determination of both States to solve this "fraternal dispute". Or, except for the "fanfare" played by the French government and their bad faith, there is not a single step promising the end of this Franco-Comorian dispute. Many propositions have been given to the French authorities by the Comorian side, in vain, and the issue of Mayotte still getting worse over the years. In fact, the only progress that one can notice here is the consistency of a "Mayotte française" engaged by France, in defiance of international law and the Comorian sovereignty over this island. Consequently, the State of Comoros does not have much manoeuvres than to abandon its old policy of "deaf dialogue" and seize the UN babies to settle the question of Mayotte. The purpose of this article is to analyse the role of the UN babies to end solve this problem.

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Key words: Dispute Resolution, Forum Prorogatum, International Court of Justice, UN General Assembly, UN Security Council

1. INTRODUCTION

6 July 2018, the Union of Comoros will celebrate its 43 years of independence, once again partially due to the illegal occupation of the Comorian island of Mayotte by France since 1975. In fact, during the referendum of self-determination of the archipelago of Comoros in 22 December 1974, the island of Mayotte voted against independence and the French government decided to partially recognise the independence of Comoros – the three islands that voted in favour of independence become the new Comorian independent State, while Mayotte remains under French administration. This exceptional decolonisation of Comoros, will create the most important situation of contradiction that can be observed both in French decolonisation law and in the relationship between international law and national law. Consequently, France continues to exercise its sovereignty over Mayotte, in defiance of international law principles and norms. Since, the Comorian State continuously struggles to regain its sovereignty over the island of Mayotte, which sovereignty has been recognised to Comoros by the international community and at the same level, they condemn France on its policy to dismember the Comorian State.

We must notice that the French attitude to solve the territorial dispute which opposes it with Comoros, can only be understood as to deceive this latter. Time to time, both governments organise meetings in order to find a way out to their dispute although, we must question ourselves to the interest of such meetings. Over 42 years of meetings after meetings, dialogues after dialogues, not a single progress has been found, nor a compromise to give hope. In fact, the only

undeniable progress that one can observe in this issue is the consistency of the thesis of a "*Mayotte française*". The French authorities engage themselves in whatever they can to keep Mayotte under their sovereignty, on the one hand, and they play a "malicious diplomacy" to show to the rest of the world their desire to solve the problem of Mayotte, on the other hand. It is about time that the Comorian government take the courage to face the "bad faith" of the French government when it comes to the settlement of their territorial dispute.

The purpose of this article is to demonstrate the possibility that may have the State of Comoros to bring the Franco-Comorian territorial dispute before the United Nations bodies to be settled. In reality, the role of United Nations bodies in the settlement of the Franco-Comorian dispute over Mayotte is very decisive, special to the Comorian State. There is no doubt, the international community (most of the UN States-Members) support the claim of Comoros on Mayotte. We have seen their solidarity when it comes to the territorial integrity of Comoros. The question here is how the State of Comoros can, from this opportunity, involve the UN bodies in its conflict with France?

2. REQUEST OF AN ADVISORY OPINION BEFORE ICJ

Combining the meaning of the article 96 of the UN Charter and the article 65 of the ICJ Statute, the UNGA – alike the UN Security Council and other organs of the United Nations and specialised agencies – have been recognised the right to request the Court an advisory opinion on any legal question. Article 96 of the UN Charter is written as:

> "a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the

> Court on legal questions arising within the scope of their activities".

And the article 65 of the ICJ Statute as:

> "1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
> 2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question".

From these two articles, at least two legal conditions must be met before asking an advisory opinion. The first condition is that the request must emanate from the UNGA, the UNSC, or their authorised body. This is what we call for example jurisdiction *ratione personae*. The second condition is that the request for an advisory opinion must be related to a "legal question" as mentioned in both articles cited above. This is what we call jurisdiction *ratione materiae*. In this respect, in *the legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court in its advisory opinion cited its findings in the Application of Review of Judgement no.273 of the United Nations Administrative Tribunal Case, held that:

> "It is…a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ"[1].

In addition, in its advisory opinion in the 1996 Legality of Treat or Use of Nuclear Weapons Case, the Court stated that:

[1] ICJ, Reports, 1982, para. 21, pp. 333-334.

> "For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be "authorized by or in accordance with the Charter of the United Nations to make such a request"[2].

From these cases, it is a *sine qua non* conditions to respect these two mentioned conditions in the risk for the Court to decline to render an advisory opinion.

As for the case of Mayotte, the UN General Assembly present an infallible opportunity to address the issue to the International Court of Justice for an advisory opinion. As we have mentioned it above, the UNGA in a large majority support the position of Comoros over Mayotte and continuously condemn France in its policy to dismember the territory of the archipelago of Comoros. It is therefore a logical consequences that any procedure engaged by the Comorian government to introduce such a demand in the General Assembly, will be supported by this latter. It is very interesting to note that the majority of the United Nations Member-States are born from decolonisation, or know the consequences of colonisation. This fact can be translated to the reason why they stand for the eradication of the colonialism plague by supporting all countries victim of the colonisation system, particularly when the country is victim of uncompleted decolonisation. We refer ourselves to the case of dismemberment of colonial territory when accessing into independence. The most recent example is the claim of Mauritius over the archipelago of Chagos, known as the "British Indian Ocean Territory".

23 September 2016, during the 71st session of the UNGA, the Mauritian representative, ANEROOD JUGNAUTH pleaded for the decolonisation of his country by denouncing the illegal occupation of the United Kingdom in the Mauritian territory of Chagos. He also indicated the intention of Mauritius to request an advisory opinion from the International Court of

[2] ICJ, Reports, 1996, para. 11, p. 232.

Justice and the reasons for it, considering that the separation of the Mauritius archipelago in 1965 is a violation of international law and United Nations Resolution 1514. Thus, the Mauritian representative solicited the support of the Assembly by declaring that:

> "We believe that this Assembly has a duty to help the decolonisation process of Mauritius. Our country thinks that an advisory opinion of the International Court of Justice on the Chagos Archipelago will undoubtedly help the United Nations General Assembly to assume its responsibilities"[3].

22 June 2017, at the 88th meeting of its 75th session, the UNAS adopted the Resolution 71/292, requesting the International Court to give an advisory opinion "On the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965"[4]. It is very interesting to see the whole debate during on the adoption of this Resolution. Many arguments were giving to support and oppose the adoption of such Resolution[5]. Finally the Resolution was adopted by 94 votes, 15 votes against and 65 abstentions.

From this Resolution, we can notice a kind of solidarity among the African Countries and the non-alignment movement to help all countries to get full and complete sovereignty over their territory. This is what the on behalf of the "Group of African States", RAYMOND SERGE BALÉ (Congo), introduced the draft resolution and explained that this text intends to contribute to the "total" decolonisation of Africa[6]. Consequently,

[3] Zinfos974, "Devant l'ONU, l'Ile Maurice défend la "décolonisation" des Chagos", Saturday 24 September 2016, See more details at: https://www.zinfos974.com/Devant-l-ONU-l-Ile-Maurice-defend-la-decolonisation-des-Chagos_a105560.html [Last accessed online 01.03.2018]. [Translation mine].

[4] See more at: http://www.icj-cij.org/files/case-related/169/169-20170623-REQ-01-00-EN.pdf [Last accessed online 01.03.2018].

[5] See the opinions available at: https://www.un.org/press/fr/2017/ag11924.doc.htm [Last accessed online 01.03.2018].

[6] See more the debate on the draft resolution S/11967 of February 1976, UN press release at: https://www.un.org/press/fr/2017/ag11924.doc.htm [Last accessed online 01.03.2018].

the General Assembly became the institution in which the weak Nations can expect to see, at least, denounce the misconduct of France, and confirm the sovereignty of the State of Comoros over Mayotte's island by reminding France of its obligation to respect the territorial integrity of the Comorian State.

Concerning the "legal question" – the second condition to ask an advisory opinion from the ICJ – the case of Mayotte does correspond without any doubt to this condition. The Court has explained is "legal question" in the Western Sahara Case of 1975 that legal questions are:

> "Framed in terms of law and rais[ing] problems of international law…are by their very nature susceptible of a reply based on law…[and] appear…to be questions of a legal character".

This Court's explanation of the legal question is in concordance with the questions that we have suggested above as to know:

> "the legal consequences of the maintaining the French sovereignty in the Comorian island of Mayotte since 6 July 1975" or "the legal consequences of the organisation of referendum of departmentalisation of the island of Mayotte in accordance of international law". The legal characteristic of these questions cannot easily be questioned.

Although an advisory opinion in itself is not binding on the parties to the conflict, such an opinion is highly regarded as coming from the most distinguished legal body in the international level. Even if an advisory opinion does not create law, it does summarise the existing law, which can be for instance considered as customary law. Thus, it is indisputable that opinion of the Court on the consequences of French acts in Mayotte will have considerable impacts on the French policy in Comoros. This is exactly the reason why Mauritius has opted to this procedure by demanding an advisory opinion from the Court. For the representative of Mauritius, an advisory opinion from the Court will certainly help in the dispute settlement

which opposes the State of Mauritius and the United Kingdom. It is therefore in the hands of the Comorian government to choose the way to adopt to end the issue of Mayotte.

3. SEIZING THE UNITED NATIONS SECURITY COUNCIL

Extraordinary, there is a general opinion which argues that the State of Comoros can never introduced an action against France in the UN Security Council because of the position that has France in it, with the *Yalta Formula* (veto power). This opinion is well demonstrated in 1976 when Comoros initiated an action in the Security Council against France's illegally occupation of Mayotte. In fact, relaying on the article 2 § 4 of the Charter, Comoros seized in 30 January 1976 the Security Council of the United Nations in accordance with article 24 of the Charter. The UNSC spent three days examining the complaint of the young Comorian State, reflecting in our view of the interest shown by the members of the international community of States to the Comorian claims, specially the Security Council member. After three days of intense debate, a draft resolution was presented[7]. Initiated by the States of Benin, Guyana, Libyan Arab Republic, Panama and the United Republic of Tanzania, the said draft resolution asked France to abandon the referendum project in the island of Mayotte in 8 February 1976 and respect the territorial integrity and the political independence of the Comorian State, as one can read among six (6) points of the draft resolution that the Security Council:

> "Calls upon the Government of France to respect the impendence, sovereignty, unity and territorial integrity of the Comorian State and to refrain from taking any action which may jeopardize the independence, sovereignty, unity and territorial integrity of the Comorian State"[8].

[7] See the draft resolution available at: http://repository.un.org/bitstream/handle/11176/70313/S_11967-EN.pdf?sequence=2&isAllowed=y [Last accessed online 01.03.2018].

[8] *Ibid*. point 3.

But this draft resolution could not be adopted because of the *Yalta Formula* that has France, a permanent member of the said Security. A vote by show of hands was proceeded on the draft resolution S/11967 of 5 February 1976. Eleven (11) votes in favour: Benin, China, Guyana, Japan, Libyan Arab Republic, Pakistan, Panama, Romania, Sweden, Union of Soviet Socialist Republics, United Republic of Tanzania. One (1) vote against: France. Three (3) abstaining: Italy, United Kingdom of Great Britain and Northern Ireland, United States of America[9]. This precedent situation has contributed into some extent to the belief that the State of Comoros cannot complain before the Security Council and for cause, the French veto power. But this is not what the article 27 § 3 of the United Nations Charter says. In fact, the provision of this article promote balance between parties in dispute under the Security Council, specially if a State holder of *Yalta Formula* is involved in or a party to the dispute. We do understand that any negative vote from the Five Permanent Member-States will be translated to the failure of the adoption of a resolution under the Security Council. The article 27 § 3 of the UN Charter provides that:

> "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to the dispute shall abstain from voting".

According to this Charter provision, State party to a dispute under the scrutiny of the UNSC shall obligatory abstain from voting in decisions under chapter VI of the Charter. Such abstention is called "*obligatory abstention*"[10]. This obligatory abstention was – in the first years of the establishment of the

[9] See paragraph 247, UNSC Official Records, 1888th meeting of 6 February 1976 on the debate on the draft resolution S/11976.

[10] Enrico Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27 (3) of the UN Charter?", Heidelberg Journal of International Law, 2015, vol. 75, no 1, p. 217.

United Nations – consistently honoured and recalled when situations required. We can cite some examples to the application of the obligatory abstention under the UNSC. In 1960, during the conclusions regarding the dispute between Argentina and Israel over the kidnapping of ADOLF EICHMANN, the Argentina's representative referring to the provision article 27 § 3 of the UN Charter, states:

> "My delegation does not wish to enter into a legal or procedural analysis of the application of that wording to the case we are considering, but for reasons of tact, which I am sure the Council will understand, my delegation requests the President, and through him, the Council for permission not to take part in the vote"[11].

This Argentina request from obligatory abstention was accepted by the Council President – Chinese presidency at that time – who said that:

> "The representative of Argentina had a perfect right to refrain from participation in the vote"[12].

Again, in 1978, upon the debate of the US decision to allow the President of Southern Rhodesia to enter the US territory, in conflict with the Security Council Resolution 253 (1968), the US representative stated that he would abstain "*since we are party to this particular matter and acting in the spirit of Article 27(3) of the Charter*"[13]. These practices among others[14] clearly demonstrate the obligatory abstention of a party in dispute during the vote under UNSC. This being said, one may ask to know why France voted against the draft resolution S/11967

[11] See paragraph 51, UNSC Official Records, 868th meeting of 23 June 1960.
[12] *Ibid*. Paragraph 52.
[13] UNSC Official Records, 2090th meeting of 10 October 1978, paragraph 31.
[14] See an abridged history from 1946 to 2003 provides by Security Council Report April 2014 where parties to dispute abstain from vote. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/article_27_3_and_parties_to_a_dispute.pdf [Last accessed online 02.03.2018].

concerning the situation of the island of Mayotte? Did not France vote in non-compliance with the article 27 § 3 of the Charter? The fact is that the questionable vote of France was raised after the vote by the initiator of the draft. As the representative of Libyan Arab Republic said:

> "I do not want at this late hour [after the vote] to raise any problems or provoke any discussions of juridical or procedural nature. However, my delegation would like to place on record, as our colleague from Benin has also done, that in our humble view, in accordance with Article 27, paragraph 3, of the Charter, if our understanding and interpretation of that Article is correct, France is not entitled to cast a positive or negative vote since France is a party to the dispute under discussion, and the subject of the draft resolution sponsored by Benin, Guyana, the Libyan Arab Republic, Panama and the United Republic of Tanzania"[15].

It is admirable that during the discussion concerning the French vote, the President of the Security Council – American presidency at that time – says that:

> "It is perhaps sufficient for me simply to say that, had the question of the right of France to vote been raised in a timely way, which is to say before the vote, the President of the Council believes that the right of France to participate in the voting would have been sustained"[16].

As the President stated, we notice that the vote of France – and by ricochet, to all States participating under Security Council discussion – will obligatory abstain from vote when the State (France in our case) in question is a party to the dispute. And for cause, one cannot be party and judge, as the maxim says: "*Nemo iudex in causa sua*" which means "*no-one should be a judge in their own cause*". This maxim was invoked in the advisory opinion on Interpretation of article 3 § 2 of the treaty

[15] See paragraph 269, UNSC Official Records, 1888th meeting of 6 February 1976 on the debate on the draft resolution S/11976.
[16] *Ibid*. Paragraph 293.

of Lausanne of the PCIJ between Turkey and Iraq[17]. It is a principle of natural justice that no person can judge a case in which they have an interest. But it is also remarkable to note that the provision of the article 27 § 3 is not automatic. It is for the concerned party to invoke it.

4. FORUM PROROGATUM

There would be a great contradiction between the goal of the UN and *the raison d'être* of the Court if by lack of consent, as specified in the ICJ Statute, the parties could not bring their dispute before the Court. It is in this context that was born the doctrine of *forum prorogatum*[18]. This doctrine is nowhere in the UN Charter nor in the ICJ Statute where implied consent or *forum prorogatum* is mentioned. Similarly, we can find the idea of this doctrine under the Rules of the Court of July 1978, referred as "*deferred consent*"[19]. The article 38 § 5 provides that:

> "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case"[20].

[17] Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne (1925 PCIJ. Series B. No. 12).

[18] Professor Sienho Yee has much covered this concept. See Sienho Yee, "*forum prororatum in the international Court*", German Yearbook of International Law, 1999, vol. 42, p. 147; idem "*Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice*", in G. Goodwin-Gill and S. Talmon (eds.), The Reality of International Law: Essays in Honour of Ian Brownlie, Clarendon Press, 1999, p. 565; idem, "*Forum Prorogatum and the Advisory Proceedings of the International Court"*, The American Journal of International Law, 2001, vol. 95, no 2, p. 381.

[19] Amos Enabulele,Bright Bazuaye, *Teachings on Basic Topics in Public International Law*, Amos Enabulele, 2014, p. 419, in note 103.

[20] See the Rules of Court of 1978, available at: http://www.icj-cij.org/en/rules [Last accessed online 15.05.2016].

By this article, an applicant State can file a case ahead of the consent of the respondent State. If the respondent State consents, a *forum prorogatum* is created as the consent would have a retrospective effect to validate the case from the date it was filed. However, the Court has established *forum prorogatum* as, arguably, the fourth basis of jurisdiction, and had on that basis assumed jurisdiction over States in a number of cases[21]. In *Armed Activities on the Territory of the Congo Case*, the Court emphasised the established state of the rule when it affirmed that the rule was fully settled both in its case-law and that of the PCIJ[22].

The doctrine of *forum prorogatum* was first relied upon the PCIJ in the *Mavrommatis Jerusalem Concessions Case* (Greece / Great Britain)[23] and through the Rights of Minorities in Upper Silesia (Minorities Schools) Case. In this Case, the Permanent Court explained how the jurisdiction of the Court can be based on the consent of parties:

> "The Court's jurisdiction depends on the will of the Parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it"[24].

The Court has crystallised this doctrine of *forum prorogatum* into a well-developed branch of jurisdiction, creating an alternative strand of jurisdiction to those expressly provided in the article 36 of its Statute.

In the International Court of Justice, the recourse of *forum prorogatum* becomes more relevant. The first case concerning this doctrine in the ICJ is the Corfu Channel Case, in 1949. In this case, Great Britain unilaterally submitted an application before the Court against Albania. This latter then

[21] Amos Enabulele,Bright Bazuaye, *Teachings on Basic Topics in Public International Law*, Amos Enabulele, op.cit., p. 419.
[22] *Ibid*.
[23] PCIJ, Reports, 1925, Series A, No. 5.
[24] PCIJ, Reports, 1928, Series A, No. 15, p. 22.

accepted jurisdiction of the Court which decided that it has jurisdiction in this case. Later on, the *forum prorogatum* road thus occasionally been used. On 9 December 2002, the Republic of Congo filed an application against the Republic of France, accusing France of violating the principle of sovereign equality and the criminal immunity of a foreign head of State. For the Republic of Congo, France is attempting to prosecute a Congolese minister and to seek to examine the President of Congo as a witness. By a letter dated on 8 April 2003, France consented explicitly to the jurisdiction of the Court to entertain the application pursuant to article 38 § 5[25]. Most recently, on 9 January 2006, Djibouti introduced an application against France before the ICJ, based on the doctrine of *forum prorogatum*[26].

By the precedent fact of use the doctrine of *forum prorogatum*, the State of Comoros may also file an application before the ICJ against France based on the illegal occupation of the Comorian territory of Mayotte. Without inventing ourselves, we may reach two beneficial interests to the Comorian State: in the one hand, Comoros can influence France to accept the jurisdiction of the Court to the issue of Mayotte. And on the other hand, in case of France' declination, Comoros can clear demonstrate that France does not want to settle peacefully their dispute relating to the island. It is notable to recognise that France is proud for having a great commitment for the respect of international law and principle. In the hearing on the Republic of Congo's request for provisional measures concerning the Certain Criminal Proceedings in France Case (Republic of Congo / France)[27] , Mr. RONNY ABRAHAM, the Agent of France, in giving the reasons why

[25] ICJ Press Release 2003/14 (11 April 2003), in Sienho Yee, *Towards an International Law of Co-Progressiveness*, Martinus Nijhoff Publishers, 2004, p. 86, note 5.
[26] See *Certain Questions of the Mutual Assistance in Criminal Matters Case* (Djibouti / France), ICJ, Reports, 177, 2008.
[27] ICJ Press Release 2003/14 (11 April 2003).

France's acceptance of the Congo's invitation, proudly affirm their commitment to the international law. He said:

> "If my country [the Republic of France] has thus consented to your jurisdiction on the dispute whose object is defined in the application, it is first to solemnly manifest the importance it attaches to the scrupulous observance of international law, in all fields and in all circumstances, to the principle of good faith in international relations, to the requirement of research, as far as possible, of the most appropriate modes of peaceful settlement of disputes between States"[28].

In many occasion France calls out to respect the international law and principle, although there is a great contradiction between the attitude of France in condemning other powers States (Russia, China, and sometimes United States) and what she is doing in other weak States, let just note the case of Comoros.

5. CONCLUSION

It has been a long time since the territorial dispute between Comoros and France over Mayotte persists. Forty-two years of conflict and not a single progress has been made as for its solution. Negotiations after negotiations, dialogues after dialogues, creation of Comities one after another, all these so called "program to end the dispute over Mayotte" failed, and for cause, the lack of determination – or saying the "malicious diplomacy" – of France to solve this issue. In this level, the State of Comoros may open another "battlefront" against France in this question of Mayotte by using the United Nations bodies under its different institutions.

[28] ICJ Verbatim Record CR 2003/21 (28 April 2003), 7, para. 5.

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