INTERNATIONAL COURT OF JUSTICE

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

(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION)

WRITTEN STATEMENT

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

15 FEBRUARY 2018

TABLE OF CONTENTS

PART THREE: THE LEGAL ISSUES ARISING FROM THE QUESTIONS

CHAPTER I

INTRODUCTION

1.1 The United Kingdom of Great Britain and Northern Ireland ('United Kingdom') submits this Written Statement, in accordance with the Court's Order of 14 July 2017[1], so as to furnish information on the questions submitted to the Court in General Assembly resolution 71/292, adopted on 22 June 2017, and to assist the Court.

1.2 There is a longstanding bilateral dispute between the United Kingdom and the Republic of Mauritius ('Mauritius') over the Chagos Archipelago, in particular as to sovereignty. This is the central issue behind the Request for an advisory opinion. Mauritius has long sought to establish the contentious jurisdiction of an international court or tribunal, including the International Court of Justice, with respect to its sovereignty dispute with the United Kingdom. Most recently, Mauritius has sought to have precisely the same disputed issues that are now brought to the fore in the Questions asked in the current Request considered in arbitral proceedings brought against the United Kingdom under the United Nations Convention on the Law of the Sea (hereafter, the *Chagos Arbitration*)[2]. It is only after having failed in securing jurisdiction and/or obtaining the answers that it wished, that Mauritius has presented the dispute before the General Assembly as a matter of decolonization.

1.3 It does not appear possible (or intended) for the Court to engage with the Request without making determinations on or directly concerning the longstanding bilateral dispute. Unless that is somehow incorrect, the United Kingdom's position is that the Court should exercise its discretion and decline to answer the Request for reasons of judicial propriety. In particular, "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent"[3].

---

[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for an Advisory Opinion), Order of 14 July 2017*, paras 1 and 2.

[2] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* ('*Chagos Arbitration'*). See further Chapter VI below, in particular as to the Award dated 18 March 2015 (**UN Dossier No. 409**).

[3] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at p. 25, paras. 32-33, referring to *Interpretation of Peace Treaties, Advisory Opinion, First Phase, I.C.J. Reports 1950*, p. 65, at p. 71.

1.4 Even if this were a suitable matter for an advisory opinion, and it is not, Mauritius cannot get around the basic fact that its elected representatives agreed to the detachment of the Chagos Archipelago[4] in the years leading up to independence, and likewise that Mauritius subsequently reaffirmed its consent post-independence. It was only after many decades that Mauritius came up with detailed legal argument – in particular in the contentious proceedings brought against the United Kingdom in the *Chagos Arbitration*[5] – to the effect that the consent given in 1965 to detachment (the 1965 Agreement[6]) was not valid due to duress or other reasons. Moreover, as an entirely separate matter, the rules of customary international law that Mauritius now relies upon did not exist at the relevant time, i.e. in the mid-1960s.

1.5 The Request also refers in its Question (b) to the Chagossians, albeit (notably) only those of Mauritian origin[7]. The United Kingdom fully accepts that it treated the Chagossians very badly at and around the time of their removal and it deeply regrets that fact. The United Kingdom likewise regrets not putting before the United Nations in the 1960s a complete picture as to the number of second and third generation inhabitants of the Chagos Archipelago once the relevant facts were known to it.

1.6 It is nonetheless the case that the legal claims of the very great majority of the Chagossians in Mauritius to compensation and/or resettlement have been settled pursuant to the 1982 Agreement with Mauritius and the multiple individual payments that followed. As the European Court of Human Rights recognised in its 2012 Decision, receipt of such payment has resulted in a full and final settlement and renunciation of all such claims, including with respect to resettlement[8]. The 1982 Agreement did not, however, mark the end of the United Kingdom's consideration (on a voluntary basis)

[4] The term 'Chagos Archipelago' is used in this Written Statement to refer to the islands that now form the British Indian Ocean Territory, which under British law is a British Overseas Territory. Use of the term 'Chagos Archipelago' and the related term 'Chagossian' has no implications for the legal status of the islands or the nationality of the Chagossians (sometimes also referred to as *Ilois*).

[5] See further Chapter VI below.

[6] The "1965 Agreement" was defined in the *Chagos Arbitration* as: "The agreement between the United Kingdom and the Mauritius Council of Ministers in 1965 to the detachment of the Chagos Archipelago." The formation of the 1965 Agreement is discussed in some detail in Chapter III below.

[7] There are Chagossians resident in the United Kingdom and in the Seychelles.

[8] See further under Chapter IV below, including with respect to the 1982 Agreement.

of the resettlement of the Chagossians. Such was considered most recently in great detail in 2012-2016, but was ultimately rejected on grounds of feasibility, ongoing defence and security interests and cost to the United Kingdom taxpayer. Instead, the United Kingdom committed to a package of approximately £40 million to support improvements in the livelihoods of Chagossians in the communities where they now live.

1.7 The present Chapter describes the process leading to the current Request for an advisory opinion (General Assembly resolution 71/292) (**Section A**). It then looks at the main issues before the Court in light of the Questions that have been asked in the Request (**Section B**), that is to say, first and foremost, whether the Court should exercise its discretion so as not to respond to the Request (**(i)**)[9]; and as a secondary matter, and whilst not in any way accepting their suitability for consideration, the issues that arise on the substance of the two Questions, should the Court decide to respond notwithstanding the strong arguments against this (**(ii)**). Lastly, this Chapter sets out the organisation of this Written Statement (**Section C**).

A. Process leading to the Request for an advisory opinion

1.8 On 17 May 2016, the then Prime Minister of Mauritius, Sir Anerood Jugnauth, announced to the Mauritian Parliament that if the United Kingdom did not, by the end of June 2016, agree a precise date by which "the Chagos Archipelago be returned by the United Kingdom to the effective control of Mauritius", Mauritius would "take appropriate action at the international level, including at the United Nations"[10].

1.9 On 14 July 2016, Mauritius wrote to the Secretary-General requesting the inclusion in the provisional agenda of the seventy-first session of the General Assembly of an item entitled "*Request for an advisory opinion of the International Court of Justice on the*

[9] The United Kingdom has refrained from choosing a person to sit as a judge *ad hoc* in these proceedings, though it reserves the right to do so were Mauritius to choose a judge *ad hoc*. This is entirely without prejudice to the United Kingdom's position that for the Court to give an opinion in response to the present Request would be a circumvention of the fundamental principle of international law that a State cannot be required to submit its legal disputes to an international court or tribunal without its consent.

[10] Mauritius Prime Minister Sir A Jugnauth Speech, Mauritian Parliamentary Records, 17 May 2016 **(Annex 1)**.

legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", and enclosed an explanatory memorandum[11].

1.10 The General Committee recommended that the proposed agenda item be included on the agenda of the seventy-first session of the General Assembly on 16 September 2016, on the understanding that there would be no consideration of the item by the General Assembly before June 2017, and that thereafter it might be considered upon notification by a Member State[12]. In other words, it would not be discussed for some eight months, until June 2017, so that the States directly concerned (Mauritius and the United Kingdom) could resolve the matter bilaterally[13]. The General Assembly adopted this recommendation at its second meeting on 16 September 2016[14].

1.11 Following three rounds of bilateral talks, on 1 June 2017 Mauritius wrote to the President of the General Assembly, saying that:

> In accordance with your expectations, Mauritius has engaged in good faith in talks with the United Kingdom. However, these talks have not been successful. Mauritius has therefore no choice but to ask for the consideration of item 87 by the General Assembly at the earliest date possible.[15]

1.12 Upon receipt of Mauritius' request, the President of the General Assembly convened a plenary meeting for 22 June 2017[16]. In the period leading up to the meeting of the Assembly, Mauritius circulated various lobbying documents to UN Member States,

---

[11] Letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations to the Secretary-General (A/71/142 of 14 July 2016) **(UN Dossier No. 1)**.

[12] Report of the General Committee, "Organization of the seventy-first regular session of the General Assembly, adoption of the agenda and allocation of items" (A/71/250 of 14 September 2016), para. 73 (**UN Dossier No. 2)**.

[13] This was explained by the representative of Congo, when he introduced the draft resolution on 22 June 2017: "The item was included by consensus by the General Assembly on its agenda following an understanding between Mauritius and the United Kingdom, facilitated by the President of the General Assembly, to defer, at the request of the United Kingdom, the consideration of the item until June 2017 in order to allow time to the concerned delegation to reach a solution on the completion of the decolonization of Mauritius. Unfortunately, there has been no progress in this discussion since neither party wished during the talks to focus on the central issue of decolonization, which is so essential to the successful outcome of the process." General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a m. (A/71/PV.88), p. 5 **(UN Dossier No. 6)**.

[14] General Assembly, verbatim record, 71st Session, 2nd Plenary Meeting, Friday, 16 September 2016, 3 p m. (A/71/PV.2), p. 6 (**UN Dossier No. 3)**.

[15] Letter dated 1 June 2017 from the President of the General Assembly addressed to all Permanent Representatives and Permanent Observers to the United Nations **(UN Dossier No. 4)**.

[16] *Ibid*.

from which the bilateral nature of the dispute is readily apparent, and likewise Mauritius' aim to use the advisory opinion jurisdiction in order to further its claim to sovereignty over the Chagos Archipelago[17].

1.13 On 22 June 2017, a draft resolution, drafted by Mauritius[18], was introduced by Congo (on behalf of the States Members of the United Nations that are members of the Group of African States)[19]. In the brief debate prior to the vote, Mauritius' aim was once again made clear. In introducing the draft resolution on behalf of the African Members, Congo said that the purpose of the request for an advisory opinion was to enable Mauritius "to exercise its full sovereignty over the Chagos Archipelago"[20]. The spokesperson for the Non-Aligned Movement said that Mauritius was "committed to taking all measures necessary to affirm the territorial integrity of the Republic of Mauritius and its sovereignty over the Chagos Archipelago"[21].

1.14 Following a brief debate, the draft resolution was adopted without change, as resolution 71/292 of 22 June 2017[22]. It was adopted by a recorded vote: 94 votes in favour[23], 15

[17] Letter from Permanent Mission of the Republic of Mauritius to the United Nations, 5 June 2017 (**Annex 2**); Mauritius Aide Mémoire, May 2017 (**Annex 3**).

[18] A virtually identical draft was attached to Mauritius's lobbying note of 15 June 2017: Mauritius Note Verbale No.10/2017(1197/28) to British High Commission Port Louis, 15 June 2017 (**Annex 4**).

[19] General Assembly draft resolution on "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965," 71st Session, Agenda Item 87 (A/71/L.73 of 15 June 2017; A/71/L.73/Add.1 of 22 June 2017) (**UN Dossier No. 5**).

[20] General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88), p. 5 (Congo) (**UN Dossier No. 6**).

[21] *Ibid.*, p. 9 (Venezuela) (**UN Dossier No. 6**).

[22] General Assembly Resolution 71/292 "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965" (A/RES/71/292 of 22 June 2017) (**UN Dossier No. 7**).

[23] **In favour**: Algeria, Angola, Argentina, Azerbaijan, Bahamas, Bangladesh, Belarus, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Botswana, Brazil, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Guatemala, Guinea, Guinea Bissau, Guyana, India, Jordan, Kenya, Kiribati, Lebanon, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mali, Marshall Islands, Mauritania, Mauritius, Mozambique, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Republic of Moldova, Rwanda, Sao Tome and Principe, Saudi Arabia, Serbia, Seychelles, Sierra Leone, South Africa, South Sudan, Sudan, Swaziland, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, United Republic of Tanzania, Uruguay, Vanuatu, Venezuela (Bolivarian Republic of), Vietnam, Yemen, Zambia, Zimbabwe.

against[24] and 65 abstentions[25]. Nineteen Member States neither voted nor abstained[26]. Thus less than half the Members of the United Nations supported the resolution; and 80 voted against or abstained.

1.15 A considerable number of UN Members placed on record, in the debate or in explanation of vote, their doubts and objections concerning the propriety of making the request for an advisory opinion. They included those abstaining as well as those voting against. These statements included the following:

> **Australia**
>
> In Australia's view, however, the vote raised a more specific question, namely, whether it is appropriate to request the International Court of Justice to render an advisory opinion on very specific issues that directly concern the rights and interests of two nations, Mauritius and the United Kingdom. On that question, Australia's long-standing position is that it is not appropriate for the advisory opinion jurisdiction of the Court to be used to determine the rights and interests of States arising in a specific context.[27]

> **Canada**
>
> Canada supports the International Court of Justice and the important role it can play in the peaceful settlement of disputes. But it is a fundamental principle and key to the effectiveness of the Court's work that the settlement of contentious cases between States through the International Court of Justice requires the consent of both parties. Seeking the referral of a contentious case between States through the General Assembly's power to request an advisory opinion circumvents that fundamental principle, in our view.[28]

---

[24] **Against**: Afghanistan, Albania, Australia, Bulgaria, Croatia, Hungary, Israel, Japan, Lithuania, Maldives, Montenegro, New Zealand, Republic of Korea, United Kingdom of Great Britain and Northern Ireland, United States of America.

[25] **Abstaining**: Andorra, Armenia, Austria, Bahrain, Barbados, Belgium, Bosnia and Herzegovina, Brunei Darussalam, Canada, Chile, China, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Grenada, Iceland, Indonesia, Iraq, Ireland, Italy, Jamaica, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Luxembourg, Malta, Mexico, Micronesia (Federated States of), Mongolia, Myanmar, Netherlands, Norway, Oman, Palau, Panama, Paraguay, Poland, Portugal, Qatar, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, Turkey, Tuvalu. (A/71/PV.88), pp. 17-18 (**UN Dossier No. 6**).

[26] Antigua and Barbuda, Cambodia, Dominica, Georgia, Haiti, Honduras, Iran, Laos, Libya, Monaco, Morocco, Senegal, Somalia, Suriname, Tajikistan, Tonga, Turkmenistan, Ukraine, Uzbekistan.

[27] General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88), p. 18 (**UN Dossier No. 6**).

[28] *Ibid*., p. 20.

Croatia

At the same time, with regard to bilateral disputes between States, we believe in the proper application of international law and the use of appropriate avenues for addressing such disputes. In that connection, as the jurisprudence within the architecture of applicable international law must be stable and predictable, so must also be the ways of reaching such international recourses. It is for that reason that we shall vote against the draft resolution before us (A/71/L.73) and continue to support the pursuit of direct talks in good faith between Mauritius and the United Kingdom on all outstanding issues.[29]

France

The situation at the heart of draft resolution A/71/L.73, submitted by the Group of African States, is a bilateral dispute, for which we can only hope for a solution. … A sovereignty dispute between States, which is the case here, should be resolved in accordance with the principle of the concerned States' consent to court adjudication. We must all be attentive to respecting a principle that the International Court of Justice has considered to be fundamental.[30]

Germany

In our view, the dispute between Mauritius and the United Kingdom is bilateral in character. We welcome the fact that both parties are willing to settle the issue peacefully, as provided for in the Charter of the United Nations. We note, however, that one party to the dispute has expressly not agreed to involve the International Court of Justice in this matter, which is in conformity with the Court's Statute.[31]

Israel

Israel is of the view that the resolution seeks to refer a bilateral dispute to the International Court of Justice. In our view, it is inappropriate to have recourse to the advisory opinion mechanism in order to involve the International Court of Justice in a territorial dispute that is essentially bilateral in nature. The underlying approach reflected in the resolution represents, in our view, a misuse of the advisory opinion provision under Article 96 of the Charter of the United Nations and undermines the principal distinction between the jurisdiction of the Court in contentious cases and its advisory jurisdiction — a distinction that should be maintained for the sake of the United Nations and the International Court of Justice itself.[32]

[29] *Ibid*., p. 16.
[30] *Ibid*., pp. 16-17.
[31] *Ibid*., p. 18.
[32] *Ibid*., p. 21.

Mexico

My delegation abstained in the voting on resolution 71/292, because we consider that, regardless of the opinion that could be issued by the Court, the solution to this case must, in fact, be found at the bilateral level.[33]

Myanmar

Myanmar has always been a steadfast advocate of decolonisation. We stand by, in good faith, the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples. However, we believe that the ongoing bilateral negotiations represent the best way to avoid confrontation and to bring a mutually accepted solution to Mauritius and the United Kingdom.[34]

New Zealand

New Zealand is a strong supporter of the international rule of law and the peaceful settlement of international disputes through recourse to international courts and judicial mechanisms. However, we do not believe that the advisory jurisdiction of the International Court of Justice offers a useful method for clarifying the issues in this case. While advisory opinions can provide valuable guidance to the United Nations organ requesting the opinion, we do not see the jurisdiction as appropriate in this dispute.[35]

Sweden

While issues of decolonization and the right to self-determination are of concern to the international community, bilateral disputes over sovereignty should be dealt with in accordance with article 36 of the Statute. For those reasons Sweden abstained in the voting on resolution 71/292 just adopted.[36]

United Kingdom

Despite the terms of the draft resolution, this is not a matter of decolonization. Mauritius became independent in 1968 through mutual agreement between the Council of Ministers of Mauritius and the United Kingdom Government. In separate talks with the Council of Ministers, Mauritius had earlier accepted the detachment of the Chagos archipelago — an agreement that Mauritius continued to respect until the 1980s. The General Assembly has not discussed this matter for decades.

….

I must underline again that this is a bilateral dispute between two States, the United Kingdom and Mauritius. Both the United Kingdom and Mauritius have excluded disputes with other Commonwealth States from their acceptance of the compulsory jurisdiction of the International Court of Justice. The draft resolution is therefore a back-door route to the Court. The General Assembly is being used to cut across the

[33] *Ibid*., p. 19.
[34] *Ibid*., p. 21.
[35] *Ibid*., p. 19.
[36] *Ibid*., p. 19.

principle that States are not obliged to have their bilateral disputes submitted for judicial settlement without their consent. Doing so would set a dangerous precedent, and it would be an obstacle to bilateral discussions, which are the right way to resolve this dispute.[37]

United States of America

The draft resolution before us today (A/71/L.73) seeks to place before the International Court of Justice a bilateral territorial dispute concerning sovereignty over the Chagos archipelago, which the United Kingdom administers as the British Indian Ocean Territory. By pursuing the draft resolution, Mauritius seeks to invoke the Court's advisory opinion jurisdiction not for its intended purpose but rather to circumvent the Court's lack of contentious jurisdiction over this purely bilateral matter. ….

Were Mauritius's request to proceed, it would undermine the Court's advisory function and circumvent the right of States to determine for themselves the means by which to peacefully settle their disputes. Any State currently engaged in efforts to resolve a bilateral dispute should vote against the draft resolution in recognition of the risk that supporting it suggests that any such dispute could be referred to the Court in this manner, without a State's consent, when the other party does not like how talks are proceeding. Establishing such a precedent is dangerous for all States Members of the United Nations. It could lead to the normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when a State directly involved has not consented to the jurisdiction of the International Court of Justice.[38]

B. The main issues raised by the Request

1.16 In resolution 71/292, the General Assembly requested the Court to render an advisory opinion on the following two Questions:

> (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

[37] *Ibid*., p. 11, p. 16.
[38] *Ibid*., p. 13, p. 16.

implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?".[39]

(i) Whether the Court should exercise its discretion not to respond to the Request for an advisory opinion

1.17 For the reasons set out in this Written Statement[40], the United Kingdom considers that the Court should decline to respond to this Request for an advisory opinion.

1.18 The Request concerns a dispute that has arisen "independently in bilateral relations"[41]. At its most simple level, and leaving to one side the disputed issues as to the content of customary international law in the 1960s, the dispute is over whether Mauritius did or did not consent to detachment of the Chagos Archipelago in the 1965 Agreement or subsequently. That is a uniquely bilateral matter given that the relevant consent is to be found in the bilateral 1965 Agreement and the subsequent exchanges of the United Kingdom and Mauritius, both before and after independence. Indeed, it will only be through Mauritius asserting in these proceedings, as it asserted in the recent *Chagos Arbitration*[42], that the 1965 Agreement was not based on its valid consent that there could be any debate as to the Questions raised in the Request.

1.19 In the years following the independence of Mauritius in 1968 there was no challenge to the United Kingdom's sovereignty over the Chagos Archipelago, while Mauritius *qua*

---

[39] In French, the questions read:
a) « Le processus de décolonisation a-t-il été validement mené à bien lorsque Maurice a obtenu son indépendance en 1968, à la suite de la séparation de l'archipel des Chagos de son territoire et au regard du droit international, notamment des obligations évoquées dans les résolutions de l'Assemblée Générale 1514 (XV) du 14 décembre 1960, 2066 (XX) du 16 décembre 1965, 2232 (XXI) du 20 décembre 1966 et 2357 (XXII) du 19 décembre 1967 ? » ;
b) « Quelles sont les conséquences en droit international, y compris au regard des obligations évoquées dans les résolutions susmentionnées, du maintien de l'archipel des Chagos sous l'administration du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, notamment en ce qui concerne l'impossibilité dans laquelle se trouve Maurice d'y mener un programme de reinstallation pour ses nationaux, en particulier ceux d'origine chagossienne ? ».

[40] See, in particular, Chapter VII below.

[41] Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at para. 47, referring to *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 25, para. 34.

[42] See further under Chapter VI below.

sovereign State reaffirmed the Agreement entered into by its representatives in 1965[43]. It was only from the early 1980s that the dispute arose, and independently so, in the bilateral relations of the United Kingdom and Mauritius. Various attempts have since been made by Mauritius to secure contentious jurisdiction over the dispute, which it now seeks to have addressed by the Court through the means of an advisory opinion.

1.20 The Request appears to have been carefully framed so as to avoid making an express reference to sovereignty, and does not expressly seek an opinion as to which State is entitled to or should retain or acquire sovereignty and when. Nevertheless, it is very difficult to read the Request in any way other than as requiring an opinion from the Court on these long-disputed issues, including through Question (b) as to the legal consequences of the current UK administration.

1.21 Thus, and unless the Court is somehow able to interpret and respond to the Questions without going into the long-disputed bilateral issues, in particular over sovereignty, to give an advisory opinion in response to this Request would not be consistent with judicial propriety. This would circumvent the principle of international law that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. To abandon that principle in this case would be inconsistent with both the language of Article 65(1)[44] and the Court's jurisprudence.

(ii) The issues that arise on the substance of the two Questions, should the Court nonetheless decide to respond

1.22 **Question (a)** reads as follows:

> 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?

[43] Paras. 3.38-3.50 below.

[44] Article 65(1) of the ICJ Statute reads "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."

1.23 The United Kingdom repeats its position, outlined above, that the Court should decline to respond to this Request for an advisory opinion. If (*quod non*) the Court were to seek to answer this Question, whether reformulated or not, it should conclude that the process of decolonization of Mauritius was lawfully completed when Mauritius gained its independence on 12 March 1968. The representatives of Mauritius had agreed to the detachment of the Chagos Archipelago three years earlier, in the 1965 Agreement. That consent was continuing as at the moment of independence in 1968. The relevant territory of Mauritius was thus as it existed at that moment of independence in 1968, namely without the former Lesser Dependency of the Chagos Archipelago. No rule of international law binding on the United Kingdom precluded that result.

1.24 **Question (b)** reads as follows:

> 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?

1.25 Having concluded in response to Question (a) that the process of decolonization of Mauritius was lawfully completed when Mauritius gained its independence on 12 March 1968, Question (b) falls away. At most, if it were to address this question (*quod non*), the Court should conclude that there are no international legal consequences arising from the United Kingdom's continued administration of the Chagos Archipelago, other than the rights and obligations that flow from any State's sovereignty over territory and any additional rights and obligations that may flow from international agreements to which the UK is a party, notably the 1965 Agreement as interpreted by the Award of 18 March 2015 in the *Chagos Arbitration*[45].

[45] **UN Dossier No. 409**.

C. Organisation of the Written Statement

1.26 Following the present Chapter, the Written Statement is divided into three Parts. **Part One** deals with relevant facts; **Part Two** with the Court's discretion not to give the advisory opinion. It is respectfully submitted that the Court's consideration of the Request should stop there. **Part Three** looks further at the legal issues to which the Questions put by the General Assembly give rise.

1.27 **Part One**, on the facts, is divided as follows:

Chapter II describes the geography of the Chagos Archipelago, its constitutional position as a Lesser Dependency of Mauritius from its cession by France in 1814 to 1965, and its constitutional position as the British Indian Ocean Territory thereafter.

Chapter III sets out the constitutional development of Mauritius from 1814 to its independence on 12 March 1968, and also describes both the circumstances surrounding Mauritius' agreement in 1965 to the detachment of the Chagos Archipelago and how the United Kingdom and Mauritius reaffirmed the 1965 Agreement by their conduct post-1968.

Chapter IV describes the removal of the Chagossians in the period 1969-1973, and thereafter in terms of the extensive litigation commenced by the Chagossians in the English courts as well as before the European Court of Human Rights. The most recent consideration of resettlement – in 2012-2016 – is also described.

Chapter V contains a brief account of the bilateral dispute, which commenced in the 1980s, concerning in particular sovereignty over the Chagos Archipelago.

Chapter VI introduces the *Chagos Arbitration*, brought by Mauritius against the United Kingdom under Annex VII of the United Nations Convention on the Law of the Sea, and the Arbitral Tribunal's Award of 2015[46]. This Arbitral Tribunal was faced

[46] Award in the matter of the Chagos Marine Protected Area Arbitration before an arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland, 18 March 2015 ('*Chagos Arbitration* Award'*)* **(UN Dossier No. 409)**.

with all of, and determined certain of, the issues that Mauritius seeks to raise in the present proceedings, including in particular as to the international law nature of the 1965 Agreement as from the date of independence.

1.28 **Part Two** addresses the Court's discretion whether or not to give the opinion that has been requested. It comprises a single Chapter (**Chapter VII**), and concludes that the Court should decline to respond to the Request for an advisory opinion on grounds of judicial propriety. In particular, and unless the Court could somehow avoid making determinations relevant to the bilateral dispute, to respond to the Request would be to circumvent the fundamental principle of international law that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.

1.29 **Part Three** concerns the legal issues to which the Questions in the Request give rise, and are included to assist the Court should it, notwithstanding the strong arguments against, decide to respond to one or both Questions.

Chapter VIII considers the issues raised by Question (a). After considering the terms of the Question, it explains that Mauritius' Council of Ministers validly consented to the detachment of the Chagos Archipelago in the 1965 Agreement, and it was in these circumstances that the process of decolonization was completed upon the independence of Mauritius in 1968. The Chapter then explains that, even if there had been no consent, and even if self-determination had constituted a right under international law in 1965, it would not have prohibited detachment of the Chagos Archipelago. There was no consensus as to the meaning of the reference to territorial integrity in paragraph 6 of General Assembly resolution 1514 (XV), and that paragraph did not reflect any rule of customary international law in existence at the relevant time. In any event, the right to self-determination under international law had not crystallized by 1968.

Finally, **Chapter IX** considers the issues raised by Question (b), although these would fall away if Question (a) is answered correctly. It examines the intent behind Question (b), and the scope of the Question; it considers the relevance for Question (b) of the 2015 Award in the *Chagos Arbitration*; and the Chapter then sets out the United Kingdom's position on the correct response to Question (b).

1.30 The Written Statement ends with the United Kingdom's Conclusions.

PART ONE: THE FACTS

CHAPTER II

GEOGRAPHY AND CONSTITUTIONAL HISTORY OF THE CHAGOS ARCHIPELAGO

2.1 This Chapter begins by briefly describing the geographical location of the Chagos Archipelago and Mauritius (**Section A**). The Archipelago was a French Dependency that was ceded to Great Britain by treaty in 1814 (**Section B**), and was thereafter under British administration as a Lesser Dependency of Mauritius (**Section C**). In 1965 the British Indian Ocean Territory was established (**Section D**).

A. Geography of the Chagos Archipelago and of Mauritius

2.2 The Chagos Archipelago and Mauritius are each located in the Indian Ocean. They are separated, at the nearest point, by nearly 1,000 nautical miles of ocean. The Chagos Archipelago is located at approximately 1,150 nautical miles (approximately 2,150 kilometres) from the main island of Mauritius[47].

(i) The Chagos Archipelago

2.3 Under British constitutional law, the Chagos Archipelago is now a British Overseas Territory called the British Indian Ocean Territory ('BIOT'). It comprises a group of islands, also referred to as the Chagos Islands or Chagos Archipelago, located in the middle of the Indian Ocean, almost equidistant from the coast of the African mainland to the west and south-east Asia to the east (**Figure 1**). The nearest points to the west and to the east are the coasts of Somalia and Sumatra (Indonesia), both about 1,500 nautical miles distant. The Chagos Archipelago lies about 1,000 nautical miles south of the Indian sub-continent.

[47] For a brief account of the geography of Mauritius and the Chagos Archipelago, see *Chagos Arbitration* Award, paras. 54 and 55 and Maps 1 and 2 included within the Award (**UN Dossier No. 409**).

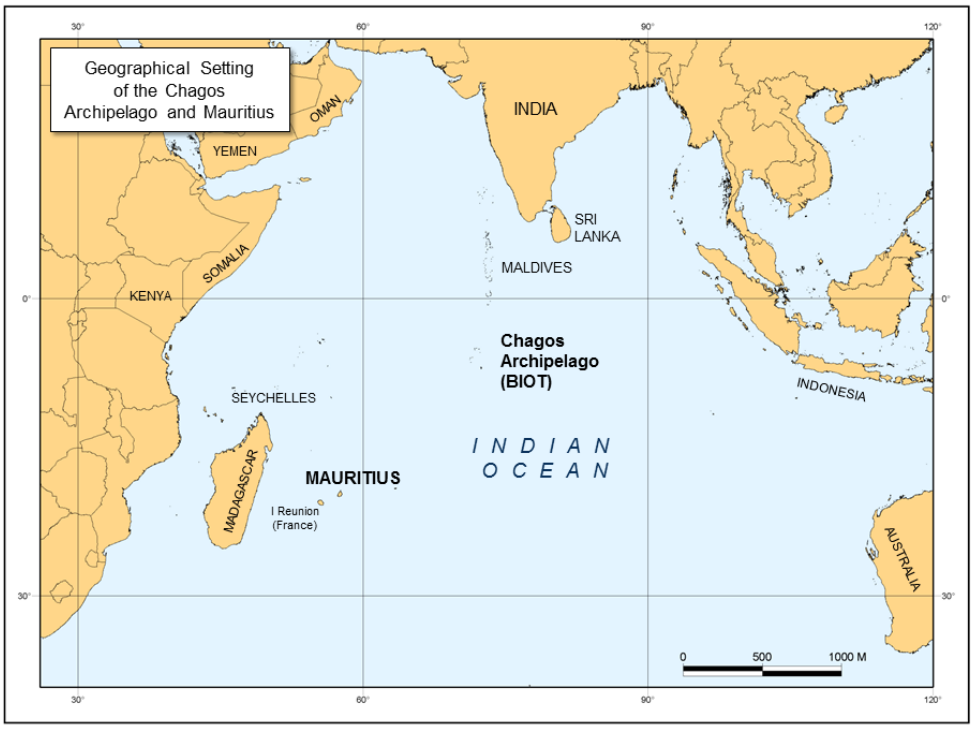


Figure 1

2.4 The Chagos Archipelago comprises a number of coral atolls, located in the middle of the Indian Ocean, some of which are above sea-level and form islands. The largest island of the Chagos Archipelago, Diego Garcia, is situated in the south-east of the Archipelago. This has an area of about 12 square miles, which accounts for more than half of the Archipelago's total land area of approximately 24 square miles. Diego Garcia consists of a long ribbon-like structure around the edge of an atoll, about 15 miles by 7 miles, enclosing a lagoon. (**Figure 2**).

2.5 The Chagos Archipelago is one of the most isolated island groups in the world. The distance between the nearest point of the Republic of Mauritius, the island of Agalega, and Diego Garcia is some 962 nautical miles. Agalega itself is an isolated island, some 580 nautical miles from the Island of Mauritius.

Figure 2

2.6 The BIOT has a territorial sea of 12 nautical miles, and since 2004 an Environment (Protection and Preservation) Zone extending 200 nautical miles from baselines. In

April 2010, a Marine Protected Area ('MPA') was proclaimed, which extends 200 nautical miles around the islands of the Archipelago[48]. The MPA was the subject of the *Chagos Arbitration*, which is described in **Chapter VI** below. The 200 nautical miles maritime zones of Mauritius and the BIOT do not overlap, as can be seen on **Figure 3**. The Chagos Archipelago has a continental shelf, which to the south extends beyond 200 nautical miles from baselines.

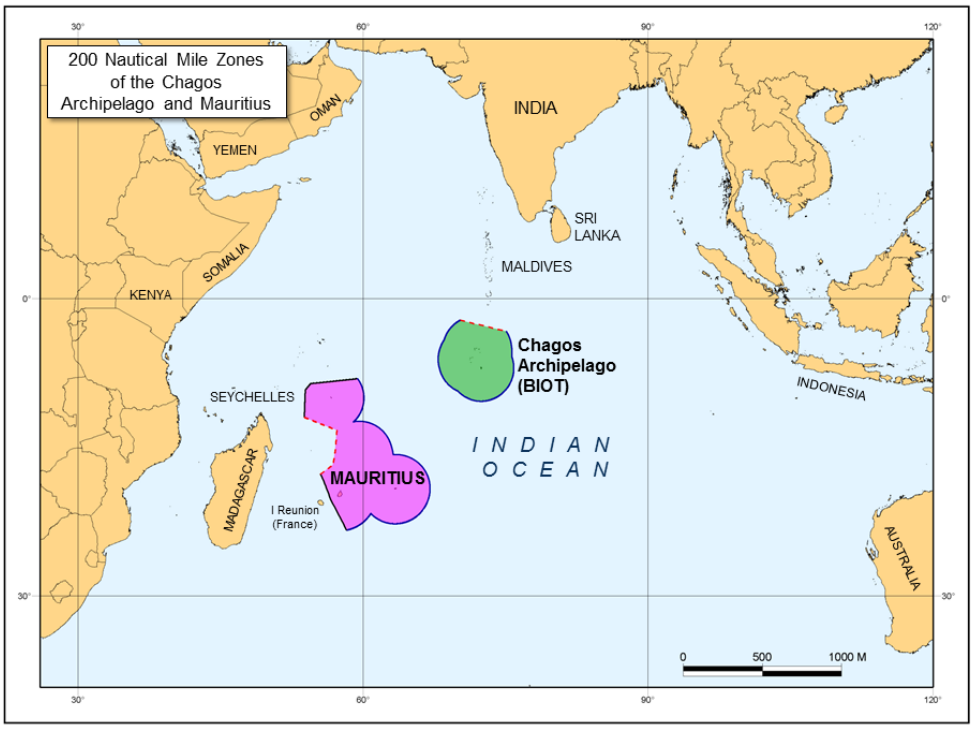


Figure 3

(ii) Mauritius

2.7 The Republic of Mauritius lies in the south-western part of the Indian Ocean about 400 nautical miles east of Madagascar and over 2,500 nautical miles from south-east Asia.

[48] Proclamation No. 1 of 17 September 2003 establishing the Environment (Protection and Preservation) Zone for the British Indian Ocean Territory – Submitted with the United Kingdom's 12 March 2004 deposit of the list of geographical coordinates of points pursuant to article 75, paragraph 2 of UNCLOS, Illustrative Map and List of Coordinates (**UN Dossier No. 421)**; Illustrative Map of the Environment (Protection and Preservation) Zone – Submitted with the United Kingdom's 12 March 2004 deposit of the list of geographical coordinates of points pursuant to article 75, paragraph 2 of UNCLOS (**UN Dossier No. 422)**; List of Coordinates for the British Indian Ocean Territory Environment (Protection and Preservation) Zone: Submitted with the deposit dated 12 March 2004 (**UN Dossier No. 423**).

In addition to the main island, the Island of Mauritius, the territory of Mauritius includes the islands of Cargados Carojos Shoals (the St Brandon Group of 16 Islands and Islets); Rodrigues Island; and Agalega. Pursuant to Section 111 of its Constitution (as amended with effect from 1992), Mauritius also claims Tromelin Island.

2.8 The Island of Mauritius lies some 1,150 nautical miles southwest of the Chagos Archipelago (measured from Egmont Island), and some 95 nautical miles from the French territory of Réunion (see **Figure 1**). It is of volcanic origin, and is almost entirely surrounded by coral reefs.

B. Cession to the United Kingdom (1814)

2.9 The Chagos Archipelago was explored and named by the Portuguese in the sixteenth century. France then occupied the Archipelago in the eighteenth century, and administered it as a Dependency of the *Île de France*, as Mauritius was then known.

2.10 The United Kingdom occupied the Island of Mauritius in 1810, during the Napoleonic Wars. The 'treaty of capitulation', signed on 3 December 1810, marked the surrender of the *Île de France* and all its Dependencies (including the Chagos Islands). The Island of Mauritius remained under British military occupation until 1814, when France ceded the *Île de France* and its Dependencies (the latter including the Chagos Archipelago), to United Kingdom by the Treaty of Paris of 30 May 1814[49].

2.11 Article VIII of the Treaty of Paris provided, in relevant part:

> His Britannic Majesty … engages to restore to His Most Christian Majesty … the Colonies, Fisheries, Factories, and Establishments of every kind which were possessed by France on the 1st of January, 1792, in the Seas and on the Continents of America, Africa and Asia; with the exception, however, of the Islands of Tobago and St. Lucie, and of the Isle of France and its Dependencies, especially Rodrigue and les Séchelles, which several Colonies and Possessions

[49] Definitive Treaty of Peace and Amity between his Britannic majesty and his most Christian majesty (of France), concluded at Paris on 30 May 1814, 1 British and Foreign State Papers 151 (**UN Dossier No. 445**). The Treaty was concluded in French. Treaties in the same terms were concluded on the same day between France and Austria, Prussia and Russia respectively.

> His Most Christian Majesty cedes in full right and Sovereignty to His Britannic Majesty, ….

C. British administration of the Chagos Archipelago as a Lesser Dependency (1814-1965)[50]

2.12 The geographical reality provides an explanation of the history of the Chagos Archipelago, and the arrangements made for its governance over the last two centuries.

2.13 From the date of the cession by France in 1814 until 8 November 1965, when the Chagos Archipelago was detached from the (then) colony of Mauritius, the Archipelago was administered by the United Kingdom as a Dependency of Mauritius.

2.14 Roberts-Wray discusses the terms 'dependency' and 'dependent territory' in his 1966 book:

> … it should perhaps be mentioned that one dependent territory may be placed under the authority of another of which it does not form part, and that the former is then usually called a Dependency of the latter. For example, Ascension Island, Tristan da Cunha and other Islands are Dependencies of St. Helena. In drafting, all such cases can be dealt with in general terms. Thus, at the foot of the First schedule to the Visiting Forces (British Commonwealth) (Application to Colonies, etc.) Order in Council, 1940, which contained a list of dependent territories to which the order applied, was the following sentence: "Reference in this Schedule to any territory of which there are dependencies shall be construed as including a reference to such dependencies.[51]

2.15 As the status of Dependency was an administrative convenience the nature of the relationship with its administering overseas territory was, by definition, variable. In the British context, Dependencies could be, and often were, detached or attached as between one colony and another by exercise of the Royal Prerogative.

2.16 In both French and British practice, the attachment of a remote and less developed island or territory to a nearby overseas territory was an established constitutional

[50] For brief references to the administration of the Chagos Archipelago as a Dependency of Mauritius, see *Chagos Arbitration,* Award, 18 March 2015, paras. 61-62 (**UN Dossier No. 409**).

[51] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 61 (**Annex 5**). The definition of 'Dependency' given in the Oxford English Dictionary is: "a country or province subject to the control of another of which it does not form an integral part".

administrative arrangement. The Dependency was usually placed under the authority of a larger territory that had full administrative and judicial capacity to exercise effective authority over it.

2.17 The Chagos Islands were administered - purely as a matter of convenience - as a Dependency of Mauritius, continuing the French practice before 1810. From time to time there were administrative re-arrangements, the most important of which was the detachment of Seychelles from Mauritius to form a separate colony in 1903. As a Dependency, the Chagos Archipelago was very loosely administered from Mauritius. Contact between the two territories was minimal, largely due to the great distance separating them, some 2,150 kilometres. The islands were privately owned with the land given over to the production of copra, from which coconut oil is extracted. There was no other commercial activity to attract settlers from Mauritius. The islands had no economic relevance to Mauritius, other than as a supplier of coconut products.

2.18 The sole sustainable economic activity of any significance on the Chagos Archipelago was the operation of the coconut plantations. The plantation managers were also appointed by the Government in Mauritius both as 'Peace Officers', with limited criminal jurisdiction and police powers, and as 'Civil Status Officers', with responsibility for recording births, marriages and deaths.

2.19 During the nineteenth century and the first half of the twentieth century, the Chagos Archipelago and the Mauritian island of Agalega were collectively known as the 'Oil Islands' (because of the coconut oil that they produced). Together with St. Brandon, the islands constituted the Lesser Dependencies of Mauritius (as distinguished from the larger Dependency of Rodrigues Island).

2.20 In 1852, by Ordinance the Governor of Mauritius was empowered:

> to extend to the Seychelles Islands and other Dependencies of Mauritius any laws and regulations published in this Colony [that is, published in Mauritius], under such restrictions and modifications as in the aforesaid laws and regulations as the Governor may deem fit, according to the local circumstances of the said Dependencies.[52]

[52] Mauritius and Dependencies, Ordinance No. 20, 2 June 1852 (**Annex 6**).

2.21 The 1852 Ordinance was replaced by an Ordinance of 1853, which empowered the Governor in his Executive Council, rather than the Governor, to extend the laws and regulations, but which was otherwise identical[53].

2.22 Notwithstanding the legislative authority of the Governor in Council, *jouissance*-holders continued to hold wide administrative powers in the Oil Islands and were little troubled by the Government in Mauritius until 1859-60, when two Special Commissioners toured the Chagos Archipelago and other islands. However, by 1865 *jouissance*-holding was virtually at its end. The *jouissance*-holders were given an option to buy their freeholds at a price determined by the amount of coconut oil produced in the previous year, and nearly all did so. A District Magistrate from Mauritius was appointed to the Lesser Dependencies in 1872 and regular visits began in 1875.

2.23 In 1875, the Governor of Mauritius, and its Dependencies, with the advice and consent of the Council of Government thereof, enacted a new Ordinance, the long title of which was:

> To appoint a Police and Stipendiary Magistrate for the smaller Dependencies commonly called "Oil Islands" and those other Islands, Dependencies of Mauritius, in which there are or may be Fishing Stations, and to appoint permanent Officers of the Civil Status for those Islands.

2.24 The Ordinance provided that the Magistrate "should have summary jurisdiction, and should from time to time visit the aforesaid Dependencies to administer justice"[54]. The Magistrate was to "make a return of all Judgments and Convictions by him given or awarded in each Dependency separately"[55]. Schedule A to the 1875 Ordinance enumerated the "Dependencies to which this Ordinance applies" as the islands or groups of islands of Diego Garcia, Six Islands, Danger Island, Eagle Island, Peros Banhos, Coevity, Salomon Islands, Agalega, St.-Brandon Islands, Juan de Nova, Trois Frères and Providence.

[53] Mauritius and Dependencies, Ordinance No. 14, 23 March 1853 (**Annex 7**).
[54] Mauritius and Dependencies, Ordinance No. 41, 31 December 1875, Preamble (**Annex 8**).
[55] *Ibid.*, Section 2.

2.25 It is clear from the terms of this Ordinance that the Stipendiary Magistrate of the listed Islands was separate from the Stipendiary Magistrate of Port Louis, with his own jurisdiction and applicable law[56]. Express provision was made for cases where his decisions could be executed in Mauritius[57], and the Ordinance distinguished throughout between Mauritius and the Dependencies[58]. Had the Dependencies been an integral part of Mauritius, it would not have been necessary expressly to apply the Ordinance to them.

2.26 The Government in Mauritius reviewed administrative arrangements in the Lesser Dependencies in the light of the visiting magistrates' reports. As a result, the Lesser Dependencies Ordinance was enacted in 1904 "To provide for the Government of and the Administration of Justice in the Lesser Dependencies"[59]. The 1904 Ordinance provided for the appointment of District and Stipendiary Magistrates for the Lesser Dependencies[60], with the rights, duties, powers and jurisdiction defined by the Ordinance[61]. Like the 1875 Ordinance, the 1904 Ordinance distinguished between Mauritius and the Islands, and also between the Islands and Seychelles (with which, however, there remained special connections even after the formation of the separate colony of the Seychelles in 1903).

2.27 The administration of the Lesser Dependencies of Mauritius underwent few changes in the twentieth century. Day-to-day administration was in the hands of the plantation managers, who continued to hold wide powers.

2.28 During this period, the Mauritian Dependency of Seychelles was established as a separate colony. By Letters Patent dated 27 December 1888, "separate provision" was made "for the Government of the Seychelles Islands". An Administrator was appointed to administer the Government of the Seychelles whenever the Governor of Mauritius was absent from the Seychelles. Then in 1903, the Dependency of Seychelles was established as a separate colony, comprising the island of Mahé and certain other

[56] *Ibid.*, Sections 8, 9, 10 and 14 ("concurrent jurisdiction with the District Magistrate of Port Louis").
[57] *Ibid.*, Sections 12 and 15.
[58] For example, *ibid*, Section 20.
[59] The Lesser Dependencies Ordinance, Ordinance No. 4, 18 April 1904 (**Annex 9**).
[60] *Ibid.*, Section 3(1).
[61] *Ibid.*, Section 3(2).

islands that had formerly been within the Lesser Dependencies of Mauritius[62]. It would seem that, having regard to its size and geographic location, it was considered appropriate that Seychelles should become a separate colony at that date.

2.29 The distinction between Mauritius and its Dependencies was maintained up to and including in the last Mauritius Constitution before the detachment of the Chagos Archipelago[63]. On that occasion, in order to ensure that the Constitution applied to the Dependencies, it was necessary to be explicit that, for the purposes of the Constitution, Mauritius was also to include its Dependencies, which included the Chagos Archipelago[64].

D. The British Indian Ocean Territory: establishment and constitutional evolution

2.30 On 8 November 1965, an Order in Council was made under which the Chagos Archipelago ("being islands which immediately before the date of this Order were included in the Dependencies of Mauritius"), together with the Farquhar Islands, the Aldabra Group and the Island of Desroches ("being islands which immediately before the date of this Order were part of the Colony of Seychelles"), formed a separate British Overseas Territory under the name "British Indian Ocean Territory"[65].

2.31 This was effected under the Colonial Boundaries Act 1890. The Constitution of the British Indian Ocean Territory, set out in the same Order in Council, was made under the Royal Prerogative. Under the Constitution, there was a Commissioner, with power to make laws "for the peace, order and good government" of the Territory. There were Royal Instructions which prohibited the enactment of certain laws and regulated aspects of the manner in which enactments were framed.

[62] In 1908, Coetivy was also detached from Mauritius and annexed to Seychelles. And in December 1921 Farquhar was annexed to the Seychelles. From that date until 1965, the Lesser Dependencies of Mauritius consisted of the Chagos Islands, Agalega and St. Brandon.
[63] Mauritius (Constitution) Order 1964, 26 February 1964 (**Annex 10**).
[64] *Ibid.*, Section 90.
[65] British Indian Ocean Territory Order 1965 (S.I. 1965 No.1920) (**Annex 11**), as amended by the British Indian Ocean Territory (Amendment) Order 1968 (S.I. 1968 No. 111) (**Annex 12**).

2.32 On 10 November 1965, the Secretary of State for the Colonies, Mr. Anthony Greenwood, informed the House of Commons of the establishment of the BIOT in a Written Answer:

> With the agreement of the Governments of Mauritius and Seychelles new arrangements for the administration of certain islands in the Indian Ocean were introduced by Order in Council made on 8th November. The islands are the Chagos Archipelago, some 1,200 miles north-east of Mauritius, and Aldabra, Farquhar and Desroches in the Western Indian Ocean. Their populations are approximately 1,000, 100, 172 and 112 respectively. The Chagos Archipelago was formerly administered by the Government of Mauritius and the other three islands by that of Seychelles. The islands will be called the British Indian Ocean Territory and will be administered by a Commissioner. It is intended that the islands will be available for the construction of defence facilities by the British and United States Governments, but no firm plans have yet been made by either Government. Appropriate compensation will be paid.[66]

The United Kingdom also informed the General Assembly's Fourth Committee about the establishment of the BIOT, on 16 November 1965[67].

2.33 As a British Overseas Territory, the BIOT had (and has) a constitution and government distinct from that of the United Kingdom. The Governor of the Seychelles was appointed as the first BIOT Commissioner.

2.34 The 1965 Order was revoked and replaced in 1976 by the British Indian Ocean Territory Order 1976, which made new provision for the administration of the BIOT and for the return from the BIOT to Seychelles of the Aldabra Group of islands, Desroches and Farquhar[68]. The 1976 Order was amended in 1981, to make new provision for the appointment of the Commissioner of the Territory and enabling the Supreme Court of the Territory to act in certain circumstances outside the Territory[69]. It was further amended in 1984 and 1994, chiefly in connection with court procedure[70].

---

[66] House of Commons Debate 10 November 1965, vol. 730 col.-2W (**Annex 13**).

[67] United Nations General Assembly, Twentieth Session, Official Records, Fourth Committee 1558th Meeting, UN Doc. A/C.4/SR.1558 (extract), 16 November 1965 (**Annex 14**).

[68] British Indian Ocean Territory Order 1976 (S.I. 1976/893) (**Annex 15**).

[69] The British Indian Ocean Territory (Amendment) Order 1981 (**Annex 16**).

[70] The British Indian Ocean Territory (Amendment) Order 1984 (**Annex 17**) and the British Indian Ocean Territory (Amendment) Order 1994 (**Annex 18**).

2.35 The British Indian Ocean Territory (Constitution) Order 2004 made new provision for the constitution and administration of the BIOT[71]. It revoked the British Indian Ocean Territory Orders 1976 to 1994. Under the new Constitution, which remains in force, there is a Commissioner, appointed by Her Majesty the Queen, who exercises executive authority and who may make laws (Ordinances) for the peace, order and good government of the Territory. The Territory has a Supreme Court and a Magistrates' Court established by Ordinance. There is also a Court of Appeal established by Order in Council. Final appeal lies to the Judicial Committee of the Privy Council.

2.36 The BIOT Administration consists of the Commissioner, who reports to Her Majesty the Queen through the Secretary of State for Foreign and Commonwealth Affairs, the Deputy Commissioner, an Administrator (who is also the Director of Fisheries), Deputy and Assistant Administrators, General Counsel, Principal Legal Adviser, an Environment Officer and the Chief Science Adviser to the BIOT Administration. The Commander of British Forces, resident on Diego Garcia, acts as the British Representative of the Commissioner and Magistrate, and reports to the BIOT Commissioner. The British Representative has a staff of about 40 on Diego Garcia covering policing, customs and immigration functions.

E. Conclusions

2.37 The Chagos Archipelago is some 2,150 kilometres distant from Mauritius across the Indian Ocean. It was administered from Mauritius as a Dependency from 1814 until the establishment of the BIOT, on 8 November 1965[72].

2.38 The Chagos Archipelago was 'attached' to Mauritius for purely administrative purposes. While included for some purposes within the definition of the 'Colony of Mauritius', it was in law and in fact quite distinct from Mauritius. Thus, when it was intended that particular laws should extend to the Chagos Archipelago, this was done expressly.

[71] British Indian Ocean Territory (Constitution) Order 2004 (**Annex 19**). For a description of the current BIOT Constitution, see I. Hendry, S. Dickson, *British Overseas Territory Law* (2011), pp. 301-310 (**Annex 20**).
[72] See the reference in the British Indian Ocean Territory Order in Council 1965 to "islands which immediately before the date of this Order were included in the Dependencies of Mauritius" (**Annex 11**).

2.39 On 8 November 1965, the Chagos Archipelago became the British Indian Ocean Territory, a British overseas territory established by Order in Council, and has been administered as such since that day.

CHAPTER III

THE DETACHMENT OF THE CHAGOS ARCHIPELAGO AND THE INDEPENDENCE OF MAURITIUS

3.1 This Chapter describes the events leading up to, and following, the detachment of the Chagos Islands to form the British Indian Ocean Territory on 8 November 1965. It does so against the background of Mauritius' moves to independence (**Section A**). It then sets out the events leading up to the consent to detachment by the Mauritius Council of Ministers on 5 November 1965 following the Lancaster House meeting of 23 September, and subsequent confirmation of the 1965 Agreement prior to independence (**Section B**). **Section C** shows that the 1965 Agreement on detachment was accepted and reaffirmed by Mauritius for a significant period following independence.

A. Mauritius moves to independence

3.2 Mauritius became independent on 12 March 1968. However, the moves that eventually led to independence had begun long before, with important electoral and constitutional reforms in 1947. The process started in earnest in 1953 when the Legislative Council of Mauritius, by a small majority, passed a resolution calling for a greater measure of self-government. The Secretary of State for the Colonies asked the Governor to hold local consultations[73]. When agreement could not be reached among the various political parties, a further series of meetings was held in London, which resulted in the 1957 London Agreement. Under the 1957 Agreement a ministerial system of government was introduced[74], 40 single member constituencies were created[75], and universal suffrage was introduced. The Governor continued to nominate up to 12 other members, after consultation with the Legislative Council, in order to ensure representation of special interests that had no prospect of obtaining representation through election. In the General Election of 1959 the Mauritius Labour Party won a large majority of seats, and formed a coalition government with the Muslim Committee of Action[76].

[73] S.A. de Smith, Mauritius: Constitutionalism in a Plural Society, 31 Modern Law Review (1968) pp. 601-622 ('de Smith'), p. 605 (**Annex 21**).
[74] Nine members of the elected Legislative Council were represented in the Executive Council in proportion to party representation.
[75] De Smith, p. 605 (**Annex 21**).
[76] De Smith, p. 606 (**Annex 21**).

3.3 The only significant change that was made at the 1961 Constitutional Review Conference was the creation of the post of Chief Minister[77]. Further constitutional change was deferred until after the next General Election, which was held in 1963 and in which the Mauritius Labour Party lost its absolute majority[78]. By July-August 1964, an all-party coalition had been formed, led by the Chief Minister, renamed Premier, Sir Seewoosagur Ramgoolam[79]. The appointed Constitutional Commissioner, Professor S. A. de Smith, visited in July-August 1964 to explore the foundations of an appropriate constitutional scheme.

3.4 The decisive Constitutional Conference took place in London in September 1965. There was no consensus among the four main political parties as to whether independence was desirable. As recorded by Professor de Smith:

> the central issues facing the conference were the determination of ultimate status and the constitutional framework to be adopted for self-government and the next and final step forward. The Mauritius Labour Party and the Independent Forward Bloc advocated independence. The Muslim Committee of Action was not opposed in principle to independence but strongly urged the introduction of better constitutional safeguards for Muslim interests. The Parti Mauricien Social Démocrate… opposed the principle of independence and supported the principle of free association with the United Kingdom; it demanded a referendum on the question of independence or association. In the event, Mr Anthony Greenwood, the Secretary of State announced on the last day of the conference his view that it was right that Mauritius should be independent… [A] General Election would be held under a new electoral system which would be introduced after an Independent Electoral Commission had reported. If the newly elected Legislative Assembly then so resolved, Her Majesty's Government would, in consultation with the Government of Mauritius, fix a date for independence after six months of internal self-government. By the time the Secretary of State's announcement was made, the members of the Parti Mauricien delegation had walked out of the conference. After the announcement, they were joined by the two Independents.[80]

3.5 Thus, the United Kingdom Secretary of State for the Colonies publicly announced on the last day of the Constitutional Conference, 24 September 1965, that Her Majesty's

---

[77] The 1961 Constitutional Conference is summarised in the Command Paper, Mauritius Constitutional Conference 1965, Presented to Parliament by the Secretary of State for the Colonies by Command of her Majesty October 1965, Cmnd. Paper 2797, paras. 1-2 (**Annex 22**).

[78] De Smith, p. 607 (**Annex 21**).

[79] De Smith, p. 607 (**Annex 21**).

[80] De Smith, pp. 607-608. (**Annex 21**). See also Mauritius Constitutional Conference 1965 paras. 6, 12-17 (**Annex 22**).

Government's view was that Mauritius should become independent. The Secretary of State for the Colonies noted that, in his view, a referendum would only prolong uncertainties and "harden and deepen communal divisions" and was not therefore in the best interests of Mauritius. The Mauritian leaders themselves did not want a referendum (with the exception of the Parti Mauricien). The two parties in favour of independence[81] represented 61.5% of the voters and a third party was in favour provided certain conditions in the electoral system were met; that the closer association with the United Kingdom sought by the Parti Mauricien did not rule out independence; and that the constitution could contain every possible safeguard against abuse of power, which discussions at the Conference had shown would command general acceptance[82].

3.6 As was common practice, there was a pre-independence General Election for the Legislative Assembly on 7 August 1967. Pro-independence parties were in the majority, and later in August the new Legislative Assembly passed a resolution requesting the United Kingdom Government to implement the decisions taken in London in 1965. Mauritius became an independent State on 12 March 1968[83], pursuant to the UK Mauritius Independence Act 1968[84].

B. The 5 November 1965 Agreement by the Mauritius Council of Ministers to the detachment of the Chagos Archipelago

3.7 On 5 November 1965, the Mauritius Council of Ministers agreed to detachment in return for certain undertakings by the United Kingdom Government (1965 Agreement). The various stages are described in more detail in **subsections (i) - (iv)** below. The 1965 Agreement was preceded by a series of exchanges between British officials and Mauritian Ministers beginning in July 1965 and continuing in the margins of the Constitutional Conference in London in September 1965 **(i)**; by the Lancaster House

[81] The Mauritius Labour Party and the Independent Forward Bloc.

[82] The Muslim Committee of Action, which represented 7.1% of the votes (para. 5 of the Report on the Mauritius Constitutional Conference 1965 (**Annex 22**).

[83] Mauritius became an independent State within the Commonwealth. Her Majesty Queen Elizabeth II (in right of Mauritius) was Head of State until 12 March 1992, when Mauritius became a republic, with a President as Head of State. The events between the Secretary of State's announcement and Mauritius' independence are summarised in de Smith (**Annex 21**).

[84] Mauritius Independence Act 1968 (1968 c. 8), Section 1(1) (**Annex 23**).

meeting on 23 September 1965 and its follow-up, culminating in the agreed record of the meeting, which embodied the 'in principle' agreement of the Mauritian representatives to detachment **(ii)**; and by further exchanges, in Port Louis, between the Governor and the Council of Ministers in October leading to the Agreement on 5 November 1965 **(iii)**. Some two years later, in August 1967, the Mauritius electorate and the newly elected Legislative Assembly voted for independence, aware of the geographical implications of the 1965 Agreement **(iv)**.

3.8 Before turning to the details it is noted that, in recent years, Mauritius has sought to portray the detachment of the Chagos Archipelago as closely linked to the grant of independence – to the point of saying that the consent of Mauritius' democratically elected Council of Ministers to detachment was a precondition to the grant of independence[85]. That is a wholly inaccurate portrayal, invented by Mauritius many years after the relevant events[86]. On the true facts, as developed further below:

a. Mauritius' representatives were first informed of the wish to retain the Chagos Archipelago and have a military facility there in July 1965, and communicated that they were not ill-disposed to this.

b. Mauritius' representatives agreed in principle to detachment at meetings in the margins of the Constitutional Conference held in London in September 1965. Detachment was agreed to – in principle – in return for various financial and other undertakings from the United Kingdom.

c. At the Constitutional Conference, agreement was reached on independence for Mauritius. The United Kingdom policy in favour of independence was publicly announced on 24 September 1965.

[85] Mauritius Memorial, *Chagos Arbitration*, para. 6.27, available at https://www.pcacases.com/web/sendAttach/1796; Mauritius Reply, paras. 2.30-2.36, available at https://www.pcacases.com/web/sendAttach/1799.

[86] Mauritius did not raise the legal argument of duress until its Memorial in the *Chagos Arbitration*, filed in 2012 (see para 1.4 above).

d. During October 1965, Mauritian representatives asked for, and received, further undertakings in exchange for agreement to the detachment, after the United Kingdom had publicly committed itself to the independence of Mauritius.

e. The issue of detachment was considered by Mauritius' Council of Ministers in November 1965. The matter was debated; detachment was approved. Thus, agreement was reached between the United Kingdom and the Mauritius Council of Ministers to the detachment of the Chagos Archipelago (the 1965 Agreement)[87] many weeks after the United Kingdom policy in favour of independence had been publicly announced. There is no basis whatsoever for saying that there was any form of duress or that consent to detachment was not validly and freely given.

f. The General Election that took place in Mauritius almost two years later, in August 1967, was won, on a very high turn-out, by those in favour of independence, and the vote for independence in the newly-elected Mauritius Legislative Assembly that same month, took place at a time when the detachment of the Chagos Archipelago was a matter of public record; the Mauritius electorate and their elected representatives thus voted in 1967 for independence without the Chagos Archipelago.

3.9 In addition, as described in **Section C** below, Mauritius' agreement to the detachment of the Chagos Archipelago was reaffirmed post-independence, when it was a sovereign independent State and a full member of the international community.

(i) Detachment is raised with Mauritius Ministers beginning in July 1965

3.10 The plans for a military facility in the Chagos Archipelago were raised with Mauritius in July 1965. On 19 July 1965, the Governor of Mauritius was instructed to communicate the proposals for the detachment of the Chagos Archipelago to the Mauritian Ministers[88]. The Governor of Mauritius reported back on the first reaction of

[87] See the definition of the 1965 Agreement used by the Tribunal in the Award in the *Chagos Arbitration*, at p. (vii) (**UN Dossier No. 409**).
[88] Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965 (**Annex 24**).

Ministers on 23 July 1965. According to his report, "while not ill–disposed, they asked for time to consider further"[89].

3.11 The Premier (Sir Seewoosagur Ramgoolam) and Mr Duval (leader of the Parti Mauricien Socialiste Démocrate) expressed dislike of detachment[90], and the Premier raised the question of "mineral or other valuable rights that might arise in future". A week later, however, they advised the Governor that they were "sympathetically disposed to the request" but that, in view of the likely public opinion, they would prefer a long-term lease, e.g., for 99 years. Ministers also asked for safeguards for mineral rights and preference for Mauritius if fishing or agricultural rights were ever granted. Likewise, they sought meteorological, air and navigational facilities, provision for defence, and British help in obtaining sugar and other trade concessions from the United States[91].

3.12 On 13 August 1965, the Governor reported to the Mauritian Council of Ministers that there were objections to the proposal for a lease. The Ministers renewed the suggestion that the matter be discussed in London[92] at the forthcoming Constitutional Conference. This was done, despite the fact that British officials repeatedly expressed the preference to keep the matters of independence and negotiations over defence matters separate[93]. For example, on 3 September 1965, the Colonial Secretary said to Premier Ramgoolam:

> that it was unfortunate that discussions on the UK/US defence proposals came at the same time as the conference; he said that it would be necessary to discuss these separately and in parallel and not let them get mixed up with the conference. Sir Seewoosagur Ramgoolam agreed.[94]

3.13 It should also be noted that the Mauritian Ministers considered that it was in Mauritius' own interests that facilities were made available in the Indian Ocean, thus abandoning

---

[89] Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965 (**Annex 25**).
[90] *Ibid*.
[91] Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965 (**Annex 26**).
[92] As recorded in Mauritius Telegram No. 188 to the Colonial Office, 13 August 1965 (**Annex 27**).
[93] United Kingdom record of Colonial Secretary meeting with Lord Taylor, Sir S Ramgoolam and Mr A.J. Fairclough, 10:00am, 3 September 1965 (**Annex 28**); United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965 (**Annex 29**).
[94] United Kingdom record of Colonial Secretary meeting with Lord Taylor, Sir S Ramgoolam and Mr A.J. Fairclough, 10:00am, 3 September 1965 (**Annex 28**).

any doubts on the utility of the base initially expressed in July 1965. At a meeting in London on 13 September 1965, various Mauritian Ministers expressed support for the proposal because of Mauritius' own defence needs[95]. At the 20 September meeting, Sir Seewoosagur Ramgoolam stated that he "fully understood the desirability of this, not only in the interests of Mauritius, but in those of the whole Commonwealth", a view endorsed by other Ministers[96].

3.14 The discussions with the Mauritian Ministers focused on negotiating the best financial outcome for Mauritius. As stated in the *Chagos Arbitration* Award:

> Over the course of three meetings, the Mauritian leaders pressed the United Kingdom with respect to the compensation offered for Mauritian agreement to the detachment of the Archipelago, noting the involvement of the United States in the establishment of the defence facility and Mauritius' need for continuing economic support (for example through a higher quota for Mauritius sugar imports into the United States), rather than the lump sum compensation being proposed by the United Kingdom. The United Kingdom took the firm position that obtaining concessions from the United States was not feasible; the United Kingdom did, however, increase the level of lump sum compensation on offer from £1 million to £3 million and introduced the prospect of a commitment that the Archipelago would be returned to Mauritius when no longer needed for defence purposes.[97]

3.15 In the 20 September 1965 meeting, Premier Ramgoolam expressed his agreement with the following statement made by a Mauritian Minister, Mr. Mohamed:

> If only the U.K. were involved then they would be willing to hand back Diego Garcia to the U.K. without any compensation; Mauritius was already under many obligations to the U.K. But when the United States was involved as well they wanted something substantial by way of continuing benefit. They were prepared to forego lump sum compensation but continuity was essential and the most important thing was the U.S. sugar quota.[98]

---

[95] Mr Mohamed (leader of the Muslim Committee of Action party) "said he recognised that Mauritius must in her own interests make facilities available…". Mr Paturau (an Independent) "also said he recognised the necessity for defence facilities of this sort and felt that Mauritius should agree; they could not remain in a void in the Indian Ocean..." United Kingdom record of the meeting on "Mauritius - Defence Matters", 13 September 1965 (**Annex 30**).

[96] United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965, p. 8 (**Annex 29**).

[97] *Chagos Arbitration* Award, para. 73 (**UN Dossier No. 409**).

[98] United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965, p. 8 (**Annex 29**).

3.16 At the end of that meeting, the Secretary of State for the Colonies summarised the attitude of the Mauritian Ministers, noting that the focus of the discussion reflected that there were no reservations, in principle, to the detachment of the Chagos Archipelago, just matters of negotiating the best financial outcome for Mauritius[99].

(ii) The 23 September 1965 meetings

3.17 When Mauritius first raised a detailed legal argument of duress in 2012, it placed great emphasis on the meeting between Premier Ramgoolam and the British Prime Minister on the morning of 23 September 1965. Thus, in the *Chagos Arbitration*, Mauritius asserted that during this meeting, the United Kingdom's Prime Minister conditioned independence on the detachment of the Chagos Archipelago[100]. It claimed that in the meeting:

> the grant of independence to Mauritius was conditional on the Mauritian Ministers' purported "agreement" to detachment. This purported "agreement" … was obtained under conditions amounting to duress, and in no way reflected a true expression of the wishes of the people of Mauritius.[101]

3.18 Given the extensive series of contacts outline above, it is remarkable that Mauritius, in its narrative (for example in the *Chagos Arbitration*), has placed such great weight on a bilateral meeting between the British Prime Minister and the Mauritian Premier on the morning of 23 September 1965 and on an internal briefing note prepared by British officials for this meeting[102]. By focusing on that single meeting, Mauritius apparently seeks to distract attention from the whole series of contacts involving many Mauritian representatives of which that meeting was but a stage. It distorts the nature of the briefing note and what actually transpired at the meeting. Most importantly, this was not the meeting at which Mauritius agreed to detachment; that happened some six

[99] *Ibid*.
[100] Mauritius Memorial, *Chagos Arbitration*, paras. 6.26-6.27, available at https://www.pcacases.com/web/sendAttach/1796; Mauritius Reply, paras. 1.23, 2.52. *Chagos Arbitration*, para. 6.27, available at https://www.pcacases.com/web/sendAttach/1799
[101] Transcript, Day 2, *Chagos Arbitration*, p. 79, lines 18-21 (MacDonald), available at https://www.pcacases.com/web/sendAttach/1572.
[102] Mauritius Memorial, *Chagos Arbitration*, paras. 3.25, 6.26, available at https://www.pcacases.com/web/sendAttach/1796; Mauritius Reply, *Chagos Arbitration*, paras. 1.23, 2.50, available at https://www.pcacases.com/web/sendAttach/1799.

weeks later, in Port Louis, when on 5 November 1965 the Council of Ministers gave its agreement.

3.19 Mauritius' allegation of duress is inconsistent with both the documentary record and the timing of the key events. The United Kingdom considers the details of the record below, but the obvious point – to which Mauritius has no answer – is that the United Kingdom position on independence was announced many weeks before Mauritius' Council of Ministers debated the issue of detachment of the Chagos Archipelago and agreed to it.

3.20 In fact, when Premier Ramgoolam met separately on the morning of 23 September 1965 with the British Prime Minister, Harold Wilson, a range of matters were discussed, albeit including the proposal for detachment. Given the weight Mauritius has attached to this meeting, it is necessary to describe it in some depth.

3.21 Independence and detachment were treated as separate issues, as is clear from the Colonial Secretary's minute to the Prime Minister of 22 September 1965[103]. The briefing note prepared for the Prime Minister by the Colonial Secretary also makes it clear that the Colonial Secretary was in fact in favour of moving directly to independence rather than having a referendum on a choice between independence and free association (which was what the Parti Mauricien Social Démocrate were seeking). The Colonial Secretary's minute stated that "I hope we shall be as generous as possible and I am sure we should not seem to be trading independence for detachment of the Islands. …. Agreement is therefore desirable …the ideal would be for us to be able to announce that the Mauritius Government had agreed ..."[104].

3.22 The United Kingdom considered independence to be the most desirable outcome of the Constitutional Conference. As is the case in many diplomatic interactions, that position was not initially conveyed at the outset for legitimate reasons. A key reason for not conveying certainty as to Her Majesty's Government's position as regards

[103] Colonial Office note for the Prime Minister's Meeting with Sir S Ramgoolam, 22 September 1965 (**Annex 31**).
[104] *Ibid*.

independence lay in the terms of the Constitution: it might have been necessary to press the Mauritian Premier "to the limit to accept maximum safeguards for minorities"[105].

3.23 It is also clear from the record of the meeting between the United Kingdom's Prime Minister and the Premier of Mauritius on 23 September 1965 that the latter sought support for independence from the British Government to strengthen his political position against the Parti Mauricien, which did not want independence. He also sought to extract as much value as possible from the agreement on detachment (as had already been indicated to the Governor in July and at the meeting on 20 September 1965). The Prime Minister wished to secure the agreement of the Council of Ministers to detachment, even though, as a matter of law, it was considered that detachment could be effected without agreement.

3.24 Contrary to the assertions of Mauritius, the "overriding purpose" of the 23 September meeting was not "to compel Sir Seewoosagur Ramgoolam to agreement to the detachment" and "frighten him with hope"[106]. Mauritius seeks to distract attention from what actually occurred and was said in the meeting between the two leaders. The following extracts from the record of the 23 September 1965 meeting reflect the complete absence of duress:

> **Sir Seewoosagur Ramgoolam** said that the conference was going reasonably well. […] He himself felt that Independence was the right answer; the other ideas of association with Britain worked out on the lines of the French Community simply would not work. […]
>
> **The [UK] Prime Minister** said that he knew that the Colonial Secretary, like himself, would like to work towards Independence as soon as possible, but that we had to take into consideration all points of view. He hoped that the Colonial Secretary would shortly be able to report to him and his colleagues what his conclusion was. He himself wished to discuss with Sir Seewoosagur a matter which was not strictly speaking within the Colonial Secretary's sphere: it was the Defence problem and in particular the question of detachment of Diego Garcia. This was of course a completely separate matter and not bound up with the question of Independence. It was, however, a very important matter for the British position east of Suez. Britain was at present undertaking a very

[105] "The Premier should not leave the interview with certainty as to H.M.G.'s decision as regards independence, as during the remaining sessions of the Conference it may be necessary to press him to the limit to accept maximum safeguards for minorities".

[106] Mauritius Reply, *Chagos Arbitration*, paras. 2.48, 2.50, available at https://www.pcacases.com/web/sendAttach/1799.

comprehensive Defence Review, but we were very concerned to be able to play our proper role not only in Commonwealth defence but also to bear our share of peacekeeping under the United Nations: we had already made certain pledges to the United Nations for this purpose.

Sir Seewoosagur Ramgoolam said that he and his colleagues wished to be helpful.

The [UK] **Prime Minister** went onto say that he had heard that some of the [Mauritian] Premier's colleagues, perhaps having heard that the United States was also interested in these defence arrangements, and seeing that the United States was a very rich country, were perhaps raising their bids rather high. […]

Sir Seewoosagur Ramgoolam said that they were very concerned on Mauritius with their population explosion and their limited land resources. They very much hoped that the United States would agree to buy sugar at a guaranteed price and perhaps let them have wheat and rice in exchange. […]

The Prime Minister said that Britain would of course continue with certain aid and development projects. […] While he could make no commitment at the moment, the Prime Minister thought that we might be able to talk to the Americans about providing some of their surplus wheat for Mauritius. As for Diego Garcia, it was a purely historical accident that it was administered by Mauritius. Its links with Mauritius were very slight. In answer to a question, Sir Seewoosagur Ramgoolam affirmed that the inhabitants did not send elected representatives to the Mauritius Parliament. Sir Seewoosagur reaffirmed that he and his colleagues were very ready to play their part.

The Prime Minister went on to say that, in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be independence and detachment by agreement, though he could not of course commit the Colonial Secretary at this point.

Sir Seewoosagur Ramgoolam said that he was convinced that the question of Diego Garcia was a matter of detail; there was no difficulty in principle. [107]

3.25 A second meeting on defence matters was held on the afternoon of 23 September 1965 at Lancaster House. The Mauritian delegation, comprising the Premier, Mr Bissoondoyal, Mr Paturau and Mr Mohamed, provisionally agreed to detachment on the understanding that the Secretary of State would recommend the following:

[107] United Kingdom record of a conversation between the Prime Minister and the Premier of Mauritius at No.10 Downing Street, 10:00am, 23 September 1965 (**Annex 32**).

(i) negotiations for a defence agreement between Britain and Mauritius;
(ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;
(iii) compensation totalling up to £3m. should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
(iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;
(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;
(vi) the British Government would use their good offices with the U.S Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:
  (a) Navigational and Meteorological facilities;
  (b) Fishing Rights;
  (c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers.
(vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.
(viii) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government[108].

3.26 The Premier "said that this was acceptable to him and Mr Bissondoyal and Mr Mohamed in principle but he expressed the wish to discuss it with his other ministerial colleagues"[109]. Mauritius' agreement was subject to the consent of the full Council of Ministers being secured on the return of the Premier to Mauritius, and a list of principal conditions, which were drawn up at the meeting.

3.27 In its negotiations with the United Kingdom, Mauritius secured important tangible benefits, in particular commitments on external defence and internal security. Instead of its preference for a long-term lease of e.g. 99 years in return for various benefits[110], which was not acceptable to the United Kingdom, Mauritian Ministers secured an

[108] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**) the list includes points that were added to the record in the days following the meeting, at the request of the Premier (see para. 3.29 below).
[109] *Ibid*.
[110] As recorded in Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965 (**Annex 26**.); United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965, pp. 2-3 (**Annex 29.**)

undertaking that the territory would be returned to Mauritius when no longer needed for defence purposes[111]. This was given at the initiative of the Mauritian Premier who suggested it to the Governor on 23 July 1965[112], and raised it again at the second meeting on "Mauritius – Defence Matters" on 20 September 1965[113].

3.28 The public announcement by the British Government on 24 September 1965, at the end of the Constitutional Conference, of the decision to move to independence was made six weeks before Mauritius' in-principle agreement to the detachment was affirmed by the Council of Ministers on 5 November 1965. The move to independence was endorsed by the Mauritian electorate in the General Election of 7 August 1967, and by the newly elected Legislative Assembly later that month. The United Kingdom thus publicly committed itself to independence well before the Mauritian representatives made an equivalent commitment to give their consent to detachment. The claim that independence was conditioned on detachment is not based on fact.

(iii) Further exchanges in October and the Agreement of 5 November 1965

3.29 Sir Seewoosagur Ramgoolam took the list of conditions back to his hotel to mull them over with Mr Mohamed, the leader of the Muslim Committee of Action, the Labour Party's political ally. They added various conditions in a manuscript letter of 1 October 1965[114]:

> (vii) navigational and meteorological facilities;
> (viii) fishing rights;
> (ix) use of air strip for emergency landing and if required for the development of the other islands;
> (x) any mineral or oil discovered in or near the islands should revert to the Mauritian Government.

[111] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**).
[112] Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965 (**Annex 25**).
[113] United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965, p. 8. (**Annex 29**).
[114] Sir S Ramgoolam manuscript letter, 1 October 1965 (**Annex 34**).

These conditions, in amended form, became paragraphs 22(vi) and 22(viii) in the final record of the 23 September meeting[115].

3.30 On 6 October 1965, the Colonial Office wrote to the Governor, sending the finalised record of paragraphs 22 and 23 of the 23 September meeting, and seeking confirmation that the Mauritius Government was willing to agree to the detachment of the Chagos Archipelago on the conditions set out in the final record of the discussion at Lancaster House[116].

3.31 After debate, the Council of Ministers confirmed their agreement to detachment on 5 November 1965, subject to certain further understandings recorded in the Minutes of Proceedings of the Meeting[117] and in a telegram from the Governor to the Secretary of State for the Colonies of the same date[118].

3.32 Thus, after consent to detachment of the Chagos Archipelago was given in principle at the Constitutional Conference, it was discussed in earnest on several occasions by the Mauritian representatives during the six weeks following the conclusion of the 1965 Constitutional Conference and the public commitment of the United Kingdom to the independence of Mauritius. In-principle consent was repeated with newly added conditions in the letter by the Premier on 1 October and finally given definitively by the decision of the Council of Ministers of 5 November.

(iv) The 1967 General Election and the Legislative Assembly's vote for independence

3.33 The detachment of the Chagos Archipelago by Order in Council on 8 November 1965 was announced in the United Kingdom Parliament on 10 November[119], and to the

[115] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**).
[116] Colonial Office Telegram, No. 423 to the Governor of Mauritius, 6 October 1965 (**Annex 35**).
[117] Report of the Mauritius Select Committee on the Excision of the Chagos Archipelago, Appendix P (Extract from Minutes of Proceedings of the Meeting of the Council of Ministers held on 5 November 1965), 1 June 1983, p. 63 (**Annex 36**).
[118] United Kingdom Telegram No. 247 to the Colonial Office, 5 November 1965 (**Annex 37**).
[119] See para. 2.32 above.

United Nations on 16 November 1965[120]. On 21 December 1965, an exchange took place in the Mauritius Legislative Assembly, in which Mr Duval asked a series of questions about detachment which were answered by Mr Forget (on behalf of the Premier and the Minister of Finance) [121].

3.34 As de Smith records, the Parti Mauricien left the Government because it was dissatisfied with the amount of compensation received:

> Shortly after the conference the Chagos Archipelago was detached from Mauritius, and together with some islands from the Seychelles group was constituted as a new colony, the British Indian Ocean Territory. It was contemplated that this territory might be used for strategic purposes. The Government of Mauritius received £3 million by way of compensation. The Ministers belonging to the Parti Mauricien then went into opposition, ostensibly on the ground that the compensation was inadequate.[122]

3.35 Detachment was a matter of public record. It was effected by law, duly published, announced in the UK Parliament, announced at the United Nations, raised in the Mauritius Legislative Assembly, and controversy over the level of compensation led one political party to leave the coalition. As Mauritius moved towards independence in 1968, it was thus public knowledge that detachment had taken place and that the Chagos Archipelago would not be part of the territory of the independent Mauritius.

3.36 As was common practice, there was a pre-independence election for the Legislative Assembly on 7 August 1967, almost two years after the Agreement on detachment of the Chagos Archipelago and the establishment of the BIOT. There was no particular controversy over detachment during the General Election or within the Legislative Assembly when it voted for independence.

3.37 In sum, events between detachment on 8 November 1965 and independence on 12 March 1968 demonstrate the following:

---

[120] United Nations General Assembly, Twentieth Session, Official Records, Fourth Committee 1558th Meeting, UN Doc. A/C.4/SR.1558 (extract), 16 November 1965 (**Annex 14**).
[121] Debate in Mauritius Legislative Assembly, 21 December 1965 (**Annex 38**).
[122] De Smith, p. 609 (**Annex 21**).

a. Any concerns about moving forward to independence came from Mauritian politicians, not from the United Kingdom Government: the Parti Mauricien Social Démocrate did not want independence and its goal at the Constitutional Conference was to secure a referendum.

b. The elected representatives of Mauritius agreed to detachment in principle, in return for a series of undertakings by the British Government, in particular the undertaking to return the Chagos Archipelago to Mauritius when it was no longer needed for defence purposes.

c. The Mauritius Council of Ministers[123] gave their agreement to the detachment of the Chagos Archipelago on 5 November 1965. This agreement was given in Port Louis some six weeks after the discussions in London on 23 September, and six weeks after the Secretary of State for the Colonies had already announced Her Majesty's Government's position that Mauritius should become independent[124]. This was freely given and well-considered consent to detachment by the elected representatives of Mauritius.

d. The policy of Mauritius' independence had been announced on 24 September 1965, the last day of the Constitutional Conference, well before the agreement to detachment by the Council of Ministers on 5 November 1965[125]. If the Council of Ministers had refused on 5 November 1965 to agree to detachment on the terms negotiated by the party leaders in September in London, the move towards independence would not have come to a halt.

e. Detachment was not challenged during the General Election of August 1967 or in the subsequent debate and vote for independence in the newly elected Legislative Assembly.

[123] For a full explanation on the nature and composition of the Council of Ministers see Transcript, Day 10, *Chagos Arbitration*, p. 1219, line 5- p. 1224, line 17 (Wood), available at https://www.pcacases.com/web/sendAttach/1580

[124] As confirmed in the Command Paper, Mauritius Constitutional Conference 1965, para. 20 (**Annex 22**).

[125] And even then, on 5 November, the Council of Ministers subjected their consent to the terms set out in paragraph 22 of the Lancaster House minutes to further understandings.

C. Reaffirmation of detachment by Mauritius post-independence

3.38 Mauritius reaffirmed the detachment of the Chagos Archipelago on multiple occasions from its independence in 1968 until the 1980s, including through its own laws and constitution. Mauritius became an independent State on 12 March 1968[126], pursuant to the Mauritius Independence Act 1968[127]. Section 5(1) of the 1968 Act provided:

> In this Act, and any amendment made to this Act in any other enactment, "Mauritius" means the territories which immediately before the appointed day constitute the Colony of Mauritius.

3.39 These territories did not include the Chagos Archipelago, which had been detached to form part of the BIOT on 8 November 1965.

3.40 The Constitution of Mauritius of 1968 (the Constitution that came into force upon Independence on 12 March 1968) was set out in the Schedule to the Mauritius Independence Order 1968[128]. Section 1 of the Independence Constitution provided that "Mauritius shall be a sovereign democratic State". Section 2 provided that the Constitution "is the supreme law of Mauritius". Section 111, paragraph 1 of the Constitution, mirroring the language of section 3(1) of the Independence Act, provided that:

> "Mauritius" means the territories which immediately before 12th March 1968 constituted the colony of Mauritius.

The Chagos Archipelago was not part of the colony of Mauritius on 12 March 1968, a fact not in dispute. The Constitution thus excluded the Archipelago from Mauritius. Mauritius did not consider the Chagos Archipelago part of its territory, thus affirming, now as a sovereign State, its acceptance of the 1965 Agreement.

[126] Mauritius became an independent State within the Commonwealth. Her Majesty Queen Elizabeth II (in right of Mauritius) was Head of State until 12 March 1992, when Mauritius became a republic, with a President as Head of State.
[127] Mauritius Independence Act 1968 (1968 c. 8), Section 1(1) (**Annex 23**).
[128] The Mauritius Independence Order 1968 (**Annex 39**).

3.41 Mauritius reaffirmed its consent in its bilateral exchanges with the United Kingdom. For example, on 19 November 1969, the Prime Minister of Mauritius wrote to the British High Commissioner in Port Louis, recalling that detachment:

> was made on the understanding, *inter alia, that the benefit of any minerals or oil discovered on or near the Chagos Archipelago would revert to the Government of Mauritius.*[129]

Accordingly, the Prime Minister informed the High Commissioner that Mauritius will "vest in its ownership any minerals or oil that may be discovered" and intends to issue licenses for exploration near the Chagos Archipelago[130].

3.42 The position taken on this issue by Mauritius was contested by the United Kingdom[131]. However, the Tribunal in the *Chagos Arbitration* rightly noted in its Award that eventually the two Parties were able to see eye to eye on this issue, thus reaffirming the 1965 Agreement:

> Notwithstanding this initial disagreement over the interpretation of the undertaking, Mauritius subsequently accepted the British position on the content of the oil and minerals undertaking in 1973.[132]

3.43 Mauritius reaffirmed the agreement on several occasions when it accepted payments of the sums agreed upon in 1965 from the United Kingdom. For example, in a letter from the Prime Minister of Mauritius to the British High Commissioner in Port Louis in 1972, the former stated the following:

> I confirm that the Mauritius Government accepts payment of £650,000 from the Government of the United Kingdom (being the cost of the scheme for the resettlement of persons displaced from the Chagos Archipelago) in full and final discharge of your Government's undertaking, given in 1965, to meet the cost of resettlement of persons displaced from the Chagos Archipelago since 8 November, 1965, including those at present still in the Archipelago. Of course, this does not in any way affect the verbal agreement giving this country all the

[129] Mauritius Note Verbale No. 51/69 (17781/16/18) from the Office of the Prime Ministers (External Affairs Division) to the British High Commission Port Louis, 19 November 1969 (emphasis added) (**Annex 40**).
[130] *Ibid*.
[131] United Kingdom Speaking Note, Pacific Indian Ocean Department (FCO) Visit of Sir S Ramgoolam, Prime Minister of Mauritius, 4 February 1970, 2 February 1970 (**Annex 41**).
[132] *Chagos Arbitration Award*, para. 431 **(UN Dossier No. 409**).

> sovereign rights relating to minerals, fishing, prospecting and other arrangements.[133]

The Prime Minister in this letter thus expressly acknowledged and reaffirmed the receipt of benefits under the 1965 Agreement.

3.44 In another letter confirming payment in 1973[134], the Mauritian Prime Minister stated that

> The payment does not in any way affect the verbal agreement on minerals, fishing and prospecting rights reached at the meeting at Lancaster House on the 23rd September, 1965, and is in particular subject to: …
>
> (IV) Mauritius reserving to itself:
> (a) Fishing rights
> (b) Use of air strip for emergency landing for refuelling civil aircraft without disembarkation of passengers.
> (V) the rights of prospection and the benefit of any minerals or oil discovered in or near the Chagos Archipelago reverting to the Mauritius Government.
> (VI) the return of the islands to Mauritius without compensation, if the need for use by Great Britain of the islands disappeared.[135]

Here, the Prime Minister was even more explicit in reaffirming the Agreement, listing key terms of the 1965 Agreement, as Mauritius understood them.

3.45 On 26 June 1974, the Prime Minister of Mauritius made a statement in the Legislative Assembly, which included the following:

> By an Order in Council in 1965, dated 8th November, Her Majesty the Queen ordered that the British Indian Ocean Territory be constituted consisting of certain islands included in the dependencies of Mauritius and of other territories.
>
> The Government of Mauritius was nevertheless informed, after we had discussed in England, that this had taken place, and we gave our consent to it. It was done like this, but the day it is not required it will revert to Mauritius... That is the position. Even if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought

[133] Mauritius letter from Prime Minister Sir S Ramgoolam to British High Commission, Port Louis, 4 September 1972 (**Annex 42**).
[134] Mauritius letter from Prime Minister Sir S Ramgoolam to British High Commission, Port Louis, 24 March 1973 (**Annex 43**).
[135] *Ibid*.

> fit and proper. This in principle was agreed even by the P.M.S.D. who was in Opposition at the time; and we had consultations, and this was done in the interest of the Commonwealth, not of Mauritius only.[136]

3.46 At a press conference on 24 September 1975 Prime Minister Ramgoolam publicly stated that the British had paid for sovereignty over the Chagos Archipelago and now could do what they liked with it[137].

3.47 In June 1980, Tromelin, disputed between Mauritius and France, was added to the territory of Mauritius by the Legislative Assembly via the Interpretation and General Clauses Act. At the time, the Assembly made a deliberate decision not to add the Chagos Archipelago to the Act[138]. The opposition objected to this omission in a debate on 26 June 1980, recognizing that it demonstrated that Mauritius did not consider the Chagos Archipelago as part of its territory:

> Because we think, on this side of the House, that in the definition of "State of Mauritius", wherein we are now adding the word "Tromelin", we believe that we should have gone further and added "Chagos Archipelago" … we believe that we will not be doing a good service to our country and to the generations that will be coming, if we ourselves to-day, commit that mistake of omitting, from the description of the "State of Mauritius", the Chagos Archipelago.[139]

3.48 The very next day, on 27 June 1980, as he was leaving for London on his way to an Organisation of African Unity ('OAU') Summit, the Prime Minister of Mauritius made a statement to the press that included the following:

> Diego Garcia was excised by the British Government by an Order in Council before our independence in 1968. Actually, the whole procedure took place in 1965. This was a very important decision to take. We were consulted and we agreed to give away Diego Garcia and the British Government paid us £3 million in compensation.
>
> …. As a result of the excision, Diego Garcia became part of what is known as the British Indian Ocean Territories. And Great Britain has sovereignty over it,

[136] Mauritius Legislative Assembly, Committee of Supply, 26 June 1974, cols 1946-1947 (footnotes omitted) (**Annex 44**).
[137] United Kingdom record of Anglo-US Talks on Indian Ocean (Extracts), 7 November 1975 (**Annex 45**).
[138] Debate in Mauritius Legislative Assembly (extracts), 26 June 1980 (**Annex 46**).
[139] *Ibid.*, pp. 3317-3319.

> …. And the day Great Britain doesn't need Diego Garcia, Diego Garcia will be returned to us without compensation. ….
>
> Last night, a request was made in the Assembly that we should include Diego Garcia as a territory of the State of Mauritius. If we had done that we would have looked ridiculous in the eyes of the world, because after excision, Diego Garcia doesn't belong to us. ….
>
> … Since Diego Garcia was passed over to the British Government, it has become one of the fortresses for the advancement of peace in the world, by the building up of deterrent forces on that island by the United States.[140]

3.49 Later in 1980, in a debate of the Mauritius Legislative Assembly on 25 November, the following exchange with the Prime Minister was recorded:

> Mr Boodhoo: Was the excision of these islands a precondition for the independence of this country?
> Prime Minister: Not exactly.
> Mr Bérenger: Since the Prime Minister says today that his agreement was not necessary for the "excision" to take place, can I ask the Prime Minister why then did he give his agreement which was reported both in Great Britain and in this then – Legislative Council in Mauritius?
> Prime Minister: It was a matter that was negotiated, we got some advantage out of this and we agreed[141].

Here, again, the Prime Minister reaffirmed that Mauritius' representatives consented to detachment and that there was an Agreement between the parties.

3.50 The Chagos Archipelago was not part of the territory of Mauritius under Mauritian law for over 14 years following independence. It was only in July 1982, following the defeat of the Labour Party Government in the General Election of June 1982, that the Legislative Assembly enacted the Interpretation and General Clauses (Amendment) Act, which purported to include the Chagos Archipelago within the territory of Mauritius, and to do so with retrospective effect. And it was not until 1992 that the Constitution of Mauritius included the Archipelago within its definition of the territory of Mauritius. The 1992 Constitution included in section 111 the following definition of "Mauritius":

---

[140] United Kingdom Telegram No.124 from British High Commission, Port Louis to Foreign and Commonwealth Office, 28 June 1980 (**Annex 47**).

[141] Debate in Mauritius Legislative Assembly, 25 November 1980 (**Annex 48**).

(1) In this Constitution … 'Mauritius' includes –
(a) the Islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including Diego Garcia and any other island comprised in the State of Mauritius;
(b) the territorial sea and the air space above the territorial sea and the islands specified in paragraph (a);
(c) the continental shelf; and
(d) such places or areas as may be designated by regulations made by the Prime Minister, rights over which are or may become exercisable by Mauritius.

D. Conclusions

3.51 The discussions on 23 September 1965 between Mauritian representatives and the United Kingdom resulted in an in-principle agreement to the detachment of the Chagos Archipelago. It was a freely negotiated package that expressed the consent of Mauritius to the detachment of the Chagos Archipelago from Mauritius in exchange for what was then a considerable sum of money, trade advantages, specified rights and undertakings.

3.52 Six weeks later, following additional undertakings requested by Mauritius, on 5 November 1965 the Mauritius Council of Ministers agreed to the detachment, resulting in the 1965 Agreement. This was many weeks after the United Kingdom had announced its position in favour of independence. Thus, while the consent of the Mauritius representatives to detachment was still pending, the United Kingdom had already committed itself publicly to a specific course of action, i.e., Mauritian independence. The people of Mauritius further expressed their acceptance of the detachment by voting for independence – with the detachment of the Chagos Archipelago a matter of public record – in the pre-independence elections in August 1967, as did the Legislative Assembly later that August.

3.53 Over a significant period after independence, Mauritius confirmed its acceptance of detachment in its domestic politics. Internationally, Mauritian Ministers reaffirmed the 1965 Agreement on several occasions, at the highest level.

CHAPTER IV

THE CHAGOSSIANS: REMOVAL, LITIGATION, AND CONSIDERATION OF RESETTLEMENT

4.1 Question (b) in the Request raises the issue of the resettlement of the Chagossians, albeit that the express reference is solely from a Mauritian perspective, i.e. a putative Mauritian resettlement "of its nationals, in particular those of Chagossian origin".

4.2 This Chapter first outlines the facts concerning the removal of the Chagossians in the late 1960s and early 1970s (**Section A**), before turning to the legal proceedings that have followed that removal at the domestic level and before the European Court of Human Rights (**Section B**). It then turns to the most recent study and consideration given by the United Kingdom to the resettlement of the Chagossians in the Chagos Archipelago, and the decision to introduce a significant (approximately £40 million) package to support improvements in the livelihoods of Chagossians in the communities where they now live (**Section C**). Some brief conclusions are then set out (**Section D**).

4.3 The United Kingdom has stated on many occasions, and hereby reiterates, its deep regret for the way that the Chagossians were treated. The manner in which the Chagossian community was removed from the Chagos Archipelago, and the way the Chagossians were treated thereafter, was wrong; it is accepted and deeply regretted that, at and around the time of the removal, there was a callous disregard of their interests.

A. The removal of the Chagossians

4.4 The facts relating to the removal of the Chagossians from the Chagos Archipelago have been set out in very considerable detail in the cases that have been brought by Chagossians before the English courts, in particular in *Chagos Islanders v Attorney General and the BIOT Commissioner*[142]. The facts, in outline, are as follows.

a. On 30 December 1966, by an Exchange of Notes, the United Kingdom and United States Governments agreed that the islands should be available to meet

[142] See *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at paras. 3-49 and Appendix A, paras. 56-405. (**Judgments Volume, Tab 3**).

their various defence needs for an initial period of 50 years, and thereafter for 20 years, unless either Government gave notice to terminate the agreement[143]. Following this Exchange of Notes, on 8 February and 22 March 1967, Ordinances were made that enabled the compulsory acquisition of the land (principally coconut plantations) then held by Chagos Agalega Company Limited[144].

b. In 1967 and 1968, a number of plantation workers, including Chagossians, left the Archipelago to travel to Port Louis in Mauritius – on leave, on the expiry of their employment contracts or for medical reasons. When these people later sought to return to the Chagos Archipelago, they were refused passage and were unable to do so[145].

c. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971 (No 1 of 1971), making it unlawful to enter or remain in the territory without a permit and allowing the Commissioner to make an order directing a person's removal from the territory. In July and September 1971, the main evacuation of Diego Garcia took place, with some Chagossians being taken to other islands within the Archipelago (the Salomon Islands and Peros Banhos). Others were taken to Mauritius via Mahé in the Seychelles[146].

d. In the second half of 1972, the Chagossians on Salomon were removed, and evacuation of Peros Banhos commenced. The last Chagossians were removed from Peros Banhos in April-May 1973:

> In October 1972, a UK/US Exchange of Notes agreed to the construction of a limited naval base at Diego Garcia. It was no longer economic for Moulinie & Co to run copra production on Peros Banhos; the management fee which they received from BIOT was too small. Paul

[143] Exchange of Notes constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the "British Indian Ocean Territory", 30 December 1966, 603. *U.N.T.S*, 273 (No. 8737) ('1966 Exchange of Notes') (**Annex 49**).
[144] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at paras. 18-21 (**Judgments Volume, Tab 3**).
[145] *Ibid.*, para. 26.
[146] *Ibid.*, paras. 34, 36-39.

Moulinie and the BIOT Administrator, Mr Todd, sought closure and an evacuation in March or April 1973.

On 27th April 1973, the "*Nordvaer*" left Peros Banhos for Mauritius carrying 26 men, 27 women and 80 children, but on arrival at Port Louis, they refused to disembark: they had nowhere to go, no money and no employment. They received an offer of accommodation in the Dockers Flats area of Port Louis and a small sum of money.

On 26th May 1973, the "*Nordvaer*" left Peros Banhos for Mauritius via the Seychelles; it arrived on 13th June 1973 carrying 8 men, 9 women and 47 children or infants, according to the shipping list. This was the last of the population; the plantations closed. [147]

e. In September 1972, a payment of £650,000 was agreed between the United Kingdom and Mauritius Governments in discharge of the United Kingdom's obligation to meet the cost of resettlement of those displaced from the Archipelago. The payment was made to Mauritius in March 1973[148].

f. It was only in 1977-1978 that individual sums were passed on by Mauritius to Chagossian families (in total 595 families), by which time the value of the original sum had been substantially reduced by rampant inflation in Mauritius[149].

4.5 The Chagossians have been paid substantial compensation by the United Kingdom for the way they were treated, as further explained in **Section B** below. The issue of whether the wrongs done to the Chagossians could or should be remedied through resettlement on one or more islands of the Archipelago has been the focus of active consideration and reconsideration, both by the UK Government and in proceedings before the UK courts (see **Sections B and C** below).

[147] *Ibid.*, paras. 47-49.

[148] Mauritius letter to British High Commissioner, 4 September 1972 (**Annex 42**).

[149] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at paras. 43 and 51; for more details, see Appendix A of the judgment, paras. 406-421 (**Judgments Volume, Tab 3**).

B. Litigation before the UK courts and the European Court of Human Rights

4.6 In total, nine cases have been brought before the UK courts in respect of the Chagos Archipelago – either claiming damages for civil wrongs, or challenging the UK Government's policies in respect of the Archipelago, notably on the question of resettlement. One application has been brought before the European Court of Human Rights ('ECtHR')[150]. Further, there have been various claims before the Mauritian courts concerning payments from the Trust Fund set up by Mauritius pursuant to the treaty between the Governments of the UK and Mauritius of 7 July 1982 (the 1982 Agreement – see further under **sub-section (i)** below)[151].

4.7 The cases can usefully be divided into two groups: (i) claims for damages and declaratory relief by Chagossians with respect to their removal from the Archipelago, and (ii) claims for judicial review with respect to legislation and governmental decisions affecting the Chagossians.

(i) The claims for damages and declaratory relief

4.8 The first claim brought by Chagossians in the UK courts was issued by Michel Vencatessen in February 1975 (*Vencatessen v Attorney General*). It was a claim for damages for intimidation, deprivation of liberty and assault, in connection with Mr Vencatessen's removal from the Chagos Archipelago in 1971[152]. The claim was not formally brought as a group action but, in subsequent negotiations which were extended to encompass a series of meetings with representatives of the Chagossians in Mauritius, Mr Vencatessen came to be seen as acting on behalf of the Chagossians as a whole[153].

---

[150] For a summary, see *Chagos Arbitration,* Award, paras. 92-98 (**UN Dossier No. 409**).

[151] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius concerning the Ilois, Port Louis, 7 July 1982, with amending Exchange of Notes, Port Louis, 26 October 1982, Cmnd. 8785, 1316 UNTS 128 ('1982 Agreement') (**Annex 50**).

[152] See generally, *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at paras. 54-84 (**Judgments Volume, Tab 3**).

[153] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, at paras. 12-13 (**Judgments Volume, Tab 5**).

4.9 The claim was eventually stayed by agreement of the parties on 8 October 1982. This followed a lengthy negotiation in which the United Kingdom had offered significant sums[154] in settlement of all the claims of the Chagossians in Mauritius, leading to conclusion of the 1982 Agreement. Pursuant to Article 1 of the 1982 Agreement, the two States agreed as follows:

> The Government of the United Kingdom shall *ex gratia* with no admission of liability pay to the Government of Mauritius for and on behalf of the Ilois and the Ilois community in Mauritius in accordance with Article 7 of this Agreement the sum of £4 million which, taken together with the payment of £650,000 already made to the Government of Mauritius, shall be in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against the Government of the United Kingdom by or on behalf of the Ilois.[155]

4.10 Article 2 in turn defined the claims settled pursuant to Article 1 as follows:

> The claims referred to in Article 1 of this Agreement are solely claims by or on behalf of the Ilois arising out of:
>
> (a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago (hereinafter referred to as "the events"); and
>
> (b) any incidents, facts or situations, whether past, present or future, occurring in the course of the events or arising out of the consequences of the events.

[154] In negotiations in March 1982, the UK Government's opening offer had been £2.5 million based on 426 families or 1,150 people who had left Chagos for Mauritius after the creation of BIOT. The sum was calculated by reference to the cost of a plot of land, the building of a house, and a capital sum for the establishment of a business. The sum finally agreed, following a recommendation from the lawyers advising the Chagossians, was £4 million. See *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at paras. 69-71 (**Judgments Volume, Tab 3**). The Chagossians received advice from two eminent firms of English solicitors (Messrs. Bindmans and Messrs. Sheridans) and from two leading barristers (John MacDonald QC and Louis Blom-Cooper QC).

[155] 1982 Agreement (**Annex 50**). Note that the "Ilois" is another term used to describe the Chagossians. The Ilois are defined in the 1982 Agreement as "the Ilois who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965".

4.11 Pursuant to Article 6, the £4 million was to be – and was in fact – paid by the United Kingdom into a Trust Fund established by Act of Parliament of Mauritius[156]. The 1982 Agreement further established:

a. in Article 4, a best endeavours obligation on Mauritius concerning the signature by individual members of the Chagossian community of renunciations with respect to the claims referred to in Article 2;

b. in Article 5, an indemnity by the Trust Fund, and ultimately Mauritius, with respect to any claims made against the United Kingdom by Chagossians notwithstanding the settlement effected pursuant to Article 1[157].

4.12 Thus the settlement was broad in scope, was concluded with Mauritius, and comprised the settlement of claims on behalf of, as well as by, the Chagossians that had gone to Mauritius. Substantial payments were subsequently made out of the Trust Fund to the very great majority of individual Chagossians in Mauritius to cover *inter alia* the purchase of property in Mauritius: just over £4 million was disbursed by the Trust Fund during 1983 and 1984 to 1,344 Chagossians[158]. As a matter of Mauritian law[159], the Trust Fund was permitted to and did require a renunciation of claims against the United Kingdom before making such payments, in the following form:

> In consideration of the compensation paid to me by the Ilois Trust Fund and of my settlement in Mauritius ... I renounce to all claims, present or future, that I may have against the government of the United Kingdom, the Crown in the right of the United Kingdom, the Crown in right of any British possession, their

[156] The Ilois Trust Fund Act 1982 (**Annex 51**).

[157] Article 5 provides in relevant part:
"Should any claim against the Government of the United Kingdom (or other defendant referred to in Article 3 of this Agreement) be advanced or maintained by or on behalf of any of the Ilois notwithstanding the provisions of Article 1 of this Agreement, the Government of the United Kingdom (or other defendant as aforesaid) shall be indemnified out of the Trust Fund established pursuant to Article 6 of this Agreement against all loss, costs, damages or expenses which the Government of the United Kingdom (or other defendant as aforesaid) may reasonably incur or be called upon to pay as a result of any such claim. … If any claim of the kind referred to in this Article is advanced, whether before or after 31 December 1985, and the Trust Fund does not have adequate funds to meet the indemnity provided in this Article, the Government of Mauritius shall, if the claim is successful indemnify the Government of the United Kingdom as aforesaid." (**Annex 51**).

[158] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, para. 80 (**Judgments Volume, Tab 3**).

[159] See *Permal v The Ilois Trust Fund*, Mauritius Law Reports [1984] 65 at 71 (**Judgments Volume, Tab 1**).

> servants, agents or contractors ...., in respect of any one or more of the following –
>
> (a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, my departure or removal from there, loss of employment by reason of the termination of contract or otherwise, my transfer and settlement in Mauritius and my preclusion from returning to the Chagos Archipelago;
>
> (b) any incidents, facts or situation, whether past, present or future, occurring in the course of anyone or more of the events hereinbefore referred to or arising out of the consequences of such events.[160]

4.13 It is understood that only 12 persons refused to sign these renunciation forms[161].

4.14 The settlement effected by the 1982 Agreement with Mauritius and the payments/renunciations that followed were at issue in *Chagos Islanders v Attorney General and the BIOT Commissioner.* This was a group action brought in the UK courts in April 2002 by Chagossians (comprising 5,023 claimants[162]) claiming damages for various torts and restoration of property rights arising out of their removal from the Chagos Archipelago. The claimants sought: (i) compensation and restoration of their property rights, in respect of their unlawful removal or exclusion from the Chagos Archipelago; and (ii) declarations of their entitlement to return to all of the islands of the Chagos Archipelago and to measures facilitating their return.

4.15 One issue for the court was whether the claim was an abuse of process in light of the multiple renunciation forms that had been signed by Chagossians following the 1982 Agreement[163]. This and other preliminary issues were considered at a 37-day hearing, at which live evidence was taken from fifteen Chagossians, including as to whether they had understood what they were doing in signing the forms renouncing their claims after receipt of payments from the Trust Fund. The claim was struck out, the court holding in a lengthy (340 page) judgment on 9 October 2003 *inter alia* that, in light of the final settlement put in place by the 1982 Agreement and agreed to at the individual

[160] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, para. 647 (**Judgments Volume, Tab 3**). Example Ilois renunciation form, 1983-84 (**Annex 52**).
[161] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, para. 80 (**Judgments Volume, Tab 3**).
[162] *Ibid.*, para. 99.
[163] *Ibid.*, para.124.

level through the multiple renunciations, the claim was an abuse of process[164]. That finding was subsequently reviewed, and approved, by the Court of Appeal at a hearing on whether to grant permission to appeal (permission was refused)[165].

4.16 Proceedings were then commenced by a large group of Chagossians (1,786 in number) before the ECtHR. The Chagossians claimed that their rights under Articles 4, 6, 8 and Article 1, Protocol 1 of the European Convention on Human Rights had been violated as a result of: (i) the decision-making process leading to their removal from the Chagos Archipelago; (ii) a refusal to compensate; and (iii) the manner in which they were removed from the Chagos Archipelago[166].

4.17 In its decision of 11 December 2012, the ECtHR declared the application inadmissible. This was *inter alia* because the applicants were not 'victims' within the meaning of the European Convention: their claims had been settled through implementation of the 1982 Agreement[167]. The ECtHR stated:

> The heart of the applicants' claims under the Convention is the callous and shameful treatment which they or their antecedents suffered from 1967 to 1973, when being expelled from, or barred from return to, their homes on the islands and the hardships which immediately flowed from that. These claims were raised in the domestic courts and settled, definitively. The applicants' attempts to pursue matters further in more recent years must be regarded, as held by the House of Lords, to be part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention.[168]

---

[164] *Ibid.*, paras. 464-595, 746.

[165] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2004] EWCA Civ 997, at paras. 10-19 (**Judgments Volume, Tab 4**).

[166] *Chagos Islanders v United Kingdom* (2012) 56 EHRR, at paras. 32-36 (**Judgments Volume, Tab 6**).

[167] *Ibid.*, at paras. 77-87. See at para. 79 with respect to the argument that the claims had not knowingly been renounced: "The Court notes that the applicants have argued that not all of them had signed the waiver forms in the settlement or that those that did had not understood or properly consented to what was involved. However, these issues were argued in the domestic proceedings in the *Chagos Islanders* case and the arguments that the applicants had been subject to oppression or did not realise the settlement was final were rejected by the High Court judge in a detailed judgment after hearing extensive evidence. Of particular relevance is the fact that the Chagos Islanders were represented by lawyers in the litigation which settled."

[168] *Ibid.*, at para. 83. See also the finding at para. 81 with respect to those applicants who had not been party to the UK proceedings but who could at the relevant time have brought their claims before the domestic courts. The ECtHR found that such applicants had failed to exhaust domestic remedies as required by Article 35(1) ECHR.

4.18 Thus the ECtHR recognised the impact of the 1982 Agreement which, following the payment of significant sums by the United Kingdom, led to the renunciation of all claims by the very great majority of the Chagossians in Mauritius.

4.19 The ECtHR's approach was also consistent with how Mauritius itself viewed matters. In 1984, when further proceedings against the United Kingdom were being considered by certain Chagossians, the Mauritian Prime Minister stated that the matter was now closed and that anyone raising it again would be doing so in "bad faith"[169].

4.20 Although the United Kingdom had been successful in its defence of the claims brought before the ECtHR, it did not regard the absence of a legal claim for damages or resettlement as providing a definitive answer to the question whether the Chagossians should be resettled on the Chagos Archipelago. On 20 December 2012 (following the ECtHR decision in *Chagos Islanders v United Kingdom*), the United Kingdom Foreign Secretary announced a review of the Government's policy on resettlement[170], leading to a new study on the feasibility of resettlement, to a public consultation and to the decision taken in November 2016. The United Kingdom returns to these matters in **Section C** below.

(ii) The claims for judicial review

4.21 A series of claims for judicial review have been brought by Louis Olivier Bancoult (a former resident of Peros Banhos).

4.22 In *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs and another*, a challenge was made by Mr Bancoult to the legality of the 1971 Immigration Ordinance which had provided for the compulsory removal of the existing civilian population of the Chagos Archipelago and also prohibited their return. Whilst the challenge was under way, the UK Government commissioned an independent

[169] *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222, at para.701 (**Judgments Volume, Tab 3**).
[170] United Kingdom Foreign Secretary statement, 20 December 2012 (**Annex 53**).

feasibility study to examine whether it would be possible to resettle some of the Chagossians on the outer islands of Peros Banhos and the Salomon Islands.

4.23 The challenge was successful and, in a judgment of 3 November 2000, the court ordered that the relevant provision of the 1971 Immigration Ordinance be quashed[171]. The United Kingdom Government did not appeal. In a statement that day, the then Foreign Secretary Robin Cook explained:

> I have decided to accept the court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said 30 years ago. As Laws LJ recognised, we made no attempt to conceal the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the court and praised the openness of today's Foreign Office.[172]

4.24 A new Immigration Ordinance 2000 was brought into force, providing in relevant part that the restrictions on entry or residence "should not (with the exception of Diego Garcia) apply to British Dependent Territories citizens by virtue of their connection with BIOT"[173]. Some Chagossians made visits to the outer islands to tend family graves or simply to see and try to recognise their former homes. (Such visits had been made by permit prior to 2000, and were invariably funded by the BIOT Administration.) Over the next four years, no one went back to live there, even though there was no legal impediment to them doing so[174].

---

[171] R (*Bancoult) v Secretary of State for Foreign & Commonwealth Affairs and another* [2001] 1 QB 1067, at paras. 56-59 (**Judgments Volume, Tab 2**).

[172] See *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, para. 17 (**Judgments Volume, Tab 5**).

[173] The first generation of resettled Chagossians were citizens of the United Kingdom and Colonies ('CUKC') by birth. They became British Dependent Territory citizens in 1983 under the British Nationality Act 1981, and acquired British citizenship under the British Overseas Territories Act 2002.

[174] See *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, para. 17 (**Judgments Volume, Tab 5**).

4.25 A Feasibility Report for the Resettlement of the Chagos Archipelago was completed in June 2002. It was considered that restoration of the former coconut plantations was not commercially viable. The general conclusion of the report was as follows:

> To conclude, whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining a long-term inhabitation are likely to be prohibitive. Even in the short-term, natural events such as periodic storms from flooding and seismic activity are likely to make life difficult for a settled population.[175]

4.26 There followed discussion of the report between the Government and Mr Bancoult, his advisers and other representatives of the Chagossians. Various landings on the islands were also being threatened with a view, it appears, to attracting publicity, but also as part of a campaign to close the base on Diego Garcia. The Government ultimately took the position that, in the light of the feasibility report, it would be impossible for it to promote or permit resettlement, and it decided to legislate to prevent this through the introduction of new legislation in June 2004 – the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004[176].

4.27 A second judicial review claim (*Bancoult No. 2)* was then brought by Mr Bancoult, challenging the 2004 Orders. He was successful at first instance and before the Court of Appeal, but the claim was rejected by the House of Lords[177]. Lord Hoffmann, who gave the leading speech for the majority in the House of Lords, was fully aware that the removal and resettlement of the Chagossians had been accomplished with a callous disregard of their interests, as indeed the Government had accepted[178]. He nonetheless considered it "quite impossible to say, taking fully into account the practical interests of the Chagossians, that the decision to re-impose immigration control on the islands

[175] Feasibility Study for the Resettlement of the Chagos Archipelago: Phase 2B. Volume 1: Executive Summary, June 2002, p. 24 (**Annex 54**).
[176] For an overview of the factual background, see also *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, at paras. 25-27 (**Judgments Volume, Tab 5)**; See also *Chagos Arbitration* Award, paras. 96-97 (**UN Dossier No. 409**).
[177] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, at paras. 52-63 (**Judgments Volume, Tab 5**).
[178] *Ibid.*, at para. 10.

was unreasonable or an abuse of power"[179]. His basic reasoning in this respect was as follows:

> If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British Government is unwilling to provide and which does not appear to be forthcoming from any other source. During the four years that the Immigration Ordinance 2000 was in force, nothing happened. No one went to live on the islands. Thus their right of abode is, as I said earlier, purely symbolic. If it is exercised by setting up some camp on the islands, that will be a symbol, a gesture, aimed at putting pressure on the Government. The whole of this litigation is, as I said in *R v Jones (Margaret)* [2007] 1 AC 136, 177 'the continuation of protest by other means'.[180]

4.28 The issue was seen as turning on the very significant funding that was needed for resettlement, and on whether the United Kingdom Government was entitled to prohibit unauthorised settlement on the islands, such unauthorised settlement being in reality a means of exerting pressure to make the Government fund a full resettlement. The conclusion was that the Government was so entitled[181]. As to visiting the islands, Lord Hoffmann noted:

> It is true that the Chagossians will now require immigration consent even to visit the islands. But the Government have made it clear that such visits, to tend graves and so forth, will be allowed, and since in practice they are funded by the BIOT administration, immigration consent will be no more than an additional formality.[182]

4.29 The third judicial review claim brought by Mr Bancoult concerns the legality of the Marine Protected Area ('MPA') declared on 1 April 2010 (*Bancoult No. 3*). At first instance, the claim was rejected, because (among other matters) the MPA was

[179] *Ibid.*, at para. 58.
[180] *Ibid.*, at para. 53, emphasis added.
[181] *Ibid.*, at paras. 52-56. See also Lord Rogers at paras. 111-114.
[182] *Ibid.*, at para. 56.

established for a proper purpose, the consultation process was lawful and the MPA was compatible with EU law[183]. The Court of Appeal likewise rejected the challenge,[184] as did the Supreme Court[185].

4.30 In *Bancoult No. 4*, it was claimed that the majority decision in *Bancoult No. 2* should be set aside because the Secretary of State had failed to disclose documents relating to the June 2002 Feasibility Report that had formed part of the 2004 non-resettlement decision[186], and that a new feasibility study had anyway been commissioned which had, in a report of March 2015, recognised the possibility of resettlement (see further under **Section C** below). The Supreme Court rejected the claim in a judgment dated 29 June 2016. In brief, it was considered that disclosure of documents relating to the draft feasibility report would not have made a difference to the outcome. Further, the circumstances considered by the new feasibility report would provide a fresh opportunity for the Government to consider the question of resettlement and for any Chagossian to challenge the 2004 Orders in the light of the up to date information on resettlement[187].

C. Further consideration of resettlement

4.31 On 20 December 2012, the UK Foreign Secretary announced a review of the Government's policy on resettlement[188]. The review initially considered whether or not a new feasibility study should be undertaken, in the light of ongoing criticisms made by Chagossian representatives in relation to the previous study. An initial informal consultation followed in mid-2013 (through a series of meetings and a request for

[183] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2014] Env LR 2 (**Judgments Volume, Tab 7**).
[184] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2014] 1 WLR 2921 (**Judgments Volume, Tab 8**).
[185] *R (on the application of Bancoult No 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2018] UKSC 3 (**Judgments Volume, Tab 11)**. The legality of the declaration of the MPA as a matter of the UN Convention on the Law of the Sea has been separately challenged by Mauritius, and is dealt with in Chapter VI below.
[186] The case was that these documents showed that alterations made by government officials to the draft report undermined the objectivity and independence of the final report and that, had these documents been disclosed in the earlier proceedings, the reliability of the feasibility report could have been successfully challenged.
[187] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 4)* [2017] AC 300, at paras. 61 – 65. Lord Mance, who had dissented in *Bancoult No. 2*, gave the leading speech. (**Judgments Volume, Tab 9**).
[188] United Kingdom Foreign Secretary statement, 20 December 2012 (**Annex 53**).

written input between June and early August 2013, speaking with Chagossian communities in Mauritius, the UK and by video conference in the Seychelles). KPMG was commissioned in March 2014 to conduct an independent feasibility study into the practical costs and risks of different resettlement options to inform the Government's policy review. Chagossian groups and other key stakeholders were consulted throughout the feasibility study. Three different options for resettlement were considered (large, medium and pilot, small scale)[189]:

a. Option 1: Large-scale resettlement (population 1,500) with economic activities such as public sector employment, employment on the United States Naval Support Facility, tourism and fisheries. This sort of development would require infrastructure on Diego Garcia and the outer islands.

b. Option 2: Medium-scale resettlement (population 500) with livelihood options that could be supported in a number of ways such as public sector employment, engagement on the US Naval Support Facility, artisanal fishing and monitoring the MPA.

c. Option 3: Pilot, small-scale resettlement (population 150, serving as a middle ground between permanent resettlement and the status quo) with incremental growth over time, and limited infrastructure on Diego Garcia.

4.32 A draft of the study was shared for consultation with Chagossians and other interested parties on 27 November 2014. The results of the finalised study were published on 10 February 2015[190]. The KPMG Report did not make any recommendations as to resettlement (although it discounted a settlement based only on the Outer Islands without settlement on Diego Garcia on practical and environmental grounds). It did consider that resettlement was possible, although there would be significant challenges,

[189] KPMG Feasibility Study for the Resettlement of the British Indian Ocean Territory, Volume I, 31 January 2015, para 3.3 (**Annex 55**).
[190] Policy Review of Resettlement of the British Indian Ocean Territory: Written statement – HCWS272 (Mr Hugo Swire, Minister of State at the Foreign and Commonwealth Office), 10 February 2015 (**Annex 56**).

including high and very uncertain costs, and long-term liabilities for the United Kingdom taxpayer[191]. Indicative costs for the three options were as follows:

a. Option 1: £190 million to £423 million over 6 years, with ongoing annual costs of £9 million to £21.5 million.

b. Option 2: £111 million over 4 years, with ongoing annual costs of £6.5 million.

c. Option 3: £32 million to £65 million over 2-3 years, with ongoing annual costs of £5 million[192].

4.33 The KPMG Report also concluded with a section on "Next Steps", noting that:

> The issues and challenges facing the potential resettlement of selected islands in the Chagos Archipelago are very significant. They include: human, physical (infrastructure), political, environmental, financial and economic. If a decision is taken to proceed, then careful planning and consultation will be required at every stage.

4.34 It listed a number of further studies and investigations that would have to be carried out, in particular:

– **Human Resources Study** of Chagossians proposing to resettle, covering: (i) family size; (ii) age profile; (iii) education and employment background; (iv) skills and experience; (v) aptitude and training potential; (vi) financial resources; etc.

– **Training Programme** based on the results of the Human Resources Study and commitments by Chagossians wishing to resettle.

– **Site investigations, engineering studies, final designs and costs** – based on selected island(s). These investigations should also focus on cost minimisation and value for money.

– **Implementation and Action Plan** – including procedures for appropriate

[191] Progress in reviewing policy on resettlement of the British Indian Ocean Territory: Written Statement – HCWS461 (James Duddridge, Parliamentary Under Secretary of State at the Foreign and Commonwealth Office), 24 March 2015 (**Annex 57**).
[192] KPMG Feasibility Study for the Resettlement of the British Indian Ocean Territory, Volume I, 31 January 2015, p. 8 (**Annex 55**).

consultation with Chagossians and other stakeholders.

– **Risk Management Study and Plan** to address all relevant risks and uncertainties; and propose mitigation measures to reduce their impact e.g.: (i) implementation delays; (ii) cost over-runs; (iii) climate change issues; (iv) environmental impacts; (v) welfare for ageing population; (vi) Chagossians who decide not to stay; (vii) limited and insufficient capital resources; (viii) Disaster Management and Evacuation Plan to prepare for unforeseen natural and man-made emergencies.

– **Funding Study** to identify sources of funding to support potential resettlement e.g.: (i) capital works and (ii) environmental investigations and monitoring.[193]

4.35 In March 2015, and following the KPMG Report, the UK Government decided to conduct further investigations into resettlement before making any decision. As part of this, the Government conducted a consultation exercise between 4 August and 27 October 2015, amongst other things to understand further the demand for resettlement from Chagossians[194]. The three different KPMG options for resettlement were thus put forward, with an explanation as to the likely level of health, social and education facilities that those resettling would be provided with[195]. The results were published on 21 January 2016.

a. These showed that, while a total of 98% of the 832 self-declared Chagossians who responded were in favour of resettlement in principle, there were more nuanced views about the scenarios that were presented in the consultation document as the most realistic description of how resettlement might work. As to this, 25% were in favour of resettlement once presented with the level of health, education and facilities that could realistically be provided, 6% were not content with such facilities, and the position of 67% was not clear[196].

[193] *Ibid.*, section 8.3.2, footnotes omitted.
[194] BIOT Resettlement Policy Review: Summary of Responses to Public Consultation, 21 January 2016, p. 1 (**Annex 58)**. Certain aspects of the consultation were unsuccessfully challenged: see *R (Horeau and Others) v Secretary of State for Foreign & Commonwealth Affairs* [2016] EWHC 2102 (Admin) (**Judgments Volume, Tab 10)**.
[195] British Indian Ocean Territory (BIOT) Policy Review of Resettlement Consultation with Interested Parties, 4 August 2015, para. 13, and table 1.0 (**Annex 59**).
[196] BIOT Resettlement Policy Review: Summary of Responses to Public Consultation, 21 January 2016, p. 3 (**Annex 58)**.

b. Responses from Chagossians indicated a degree of uncertainty about alternatives to resettlement, although 29% were clear they would not wish to participate in such options[197].

4.36 Following the conclusion of the consultation, further work was done on (among other matters) the costs of resettlement. This work indicated that the costs of resettlement were substantially higher than estimates in the KPMG Report, in part because the use of Diego Garcia's airfield by commercial aircraft had been ruled out.

4.37 While the United Kingdom wished to consult with Mauritius prior to making any decision on resettlement, Mauritius declined to engage. Mauritius' position was that it rejected the consultation exercise on the basis that Mauritius was sovereign over the Chagos Archipelago, and was thus the only State that could discuss and determine issues relating to the Chagos Archipelago, including resettlement[198].

4.38 In November 2016, the United Kingdom Government announced its decision against resettlement of the Chagos Archipelago on the "grounds of feasibility, defence and security interests and costs to the United Kingdom tax payer"[199]. As part of this decision, the Government is providing an approximately £40 million support package to support improvements in the livelihoods of Chagossians in the communities where they now live. In the statement announcing this decision, it was explained:

> In coming to this decision the Government has considered carefully the practicalities of setting up a small remote community on low-lying islands and the challenges that any community would face. These are significant, and include the challenge of effectively establishing modern public services, the limited healthcare and education that it would be possible to provide, and the lack of economic opportunities, particularly job prospects. The Government has

[197] *Ibid.*, p. 4. The aim of such options was to provide support to enable Chagossians to flourish in their current communities, and build their lives there, while allowing a degree of access to the Archipelago that recognised their historical connection to it, but without returning on a long-term basis. See British Indian Ocean Territory (BIOT) Policy Review of Resettlement Consultation with Interested Parties, 4 August 2015, para. 13, p. 10 and table 1.0 (**Annex 59**).

[198] BIOT Resettlement Policy Review: Summary of Responses to Public Consultation, 21 January 2016, p. 5 (**Annex 58)**.

[199] Update on British Indian Ocean Territory: Written Statement – HLWS257 (Baroness Anelay of St Johns, Minister of State at the Foreign and Commonwealth Office), 16 November 2016 (**Annex 60**).

> also considered the interaction of any potential community with the US Naval Support Facility – a vital part of our defence relationship.
>
> The Government will instead seek to support improvements to the livelihoods of Chagossians in the communities where they now live. I can today announce that we have agreed to fund a package of approximately £40 million over the next ten years to achieve this goal. This money addresses the most pressing needs of the community by improving access to health and social care and to improved education and employment opportunities. Moreover, this fund will support a significantly expanded programme of visits to BIOT for native Chagossians. The Government will work closely with Chagossian communities in the UK and overseas to develop cost-effective programmes which will make the biggest improvement in the life chances of those Chagossians who need it most.[200]

4.39 The November 2016 decision is now under challenge in two further sets of judicial review proceedings – one brought by Mr Bancoult and one by the Chagossian Committee Seychelles. The UK Government is defending the proceedings, which are still at an early stage[201]. It believes that the decision on resettlement was rational, and that it is entitled to take account of the very high costs and practical difficulties of resettlement. The decision has been taken only after detailed and independent study, and extensive consultation.

D. Conclusions

4.40 The practicalities, challenges and costs today of resettling Chagossians in the Chagos Archipelago could not be ignored by the United Kingdom. As noted in the November 2016 decision, the challenges included establishing, for a small remote community, modern public services, bearing in mind the limited healthcare and education that it would be possible to provide, and the lack of economic opportunities, particularly job prospects. Although the United Kingdom has considered in the utmost good faith the issue of resettlement, it has ultimately decided in favour of seeking to support the lives of Chagossians by other means (still involving significant public funds). That decision

[200] *Ibid*.

[201] There was also a challenge to certain aspects of the consultation exercise leading to the decision of November 2016: see *R (Horeau and Others) v Secretary of State for Foreign & Commonwealth Affairs* [2016] EWHC 2102 (Admin) (**Judgments Volume, Tab 10)**. Permission to bring a judicial review was refused, and that decision was not appealed.

is expected to be rigorously tested by the English courts in the proceedings now under way.

4.41 On the basis of the matters outlined in this Chapter, it is noted in particular that:

a. Any legal consideration at international law of the treatment of the Chagossians would have to take full account of the 1982 Agreement between the United Kingdom and Mauritius and the settlement of multiple claims that followed, accompanied by freely made and broad renunciations of all future claims by the very great majority of Chagossians in Mauritius. The importance of those renunciations at the international level appears plainly from the 2012 Decision of the ECtHR in *Chagos Islanders v United Kingdom.*

b. The issue of resettlement of the Chagossians could not be approached as if it were a blank sheet of paper at the level of the underlying facts. The United Kingdom has in recent years looked at this issue with very considerable care, and only rejected resettlement in light of the practical challenges and costs that would inevitably be faced. The United Kingdom sincerely regrets that the clock cannot be turned back to the late 1960s[202], but there is a reality to this incontrovertible fact[203]

[202] *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, at para. 53. (**Judgments Volume, Tab 5).**

[203] Cf., in the context of the Court's contentious jurisdiction, *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963*, *I.C.J. Reports 1963* p. 15, at p. 33.

CHAPTER V

THE BILATERAL DISPUTE OVER THE CHAGOS ARCHIPELAGO, AND MAURITIUS' REPEATED EFFORTS TO HAVE THAT DISPUTE DECIDED BY AN INTERNATIONAL COURT OR TRIBUNAL

5.1 This Chapter describes the longstanding dispute that exists between the United Kingdom and Mauritius over the Chagos Archipelago, as well as the various attempts by Mauritius to bring that dispute before an international court or tribunal for decision. As this Chapter makes clear, that dispute is bilateral in nature and concerns principally the question of sovereignty. The implications regarding the Court's exercise of its discretion whether to give an advisory opinion are set out in **Chapter VII** below.

5.2 The Chapter is divided into the following sections: the existence of the dispute since the 1980s (**Section A**); Mauritius' repeated efforts to pursue its sovereignty claim since the 1980s, bilaterally and internationally (**Section B**); and Mauritius' efforts to submit the dispute for binding decision by an international court or tribunal, including this Court (**Section C**).

A. There is a longstanding dispute between Mauritius and the United Kingdom over the Chagos Archipelago

5.3 It is well-known that there is a longstanding dispute between the United Kingdom and Mauritius over the Chagos Archipelago including in particular with respect to sovereignty. That dispute falls squarely within the accepted definition of a 'dispute' long applied in the Court's case-law and that of its predecessor: "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[204]. That there exists a disagreement on points of law and fact between the United Kingdom and Mauritius is not in question.

[204] *PCIJ, The Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2*, at 11. See, also, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 84, para. 30; *Interpretation of Peace Treaties, Advisory Opinion, First Phase, I.C.J. Reports 1950*, p. 65, at p. 74; *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), *Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319, at p. 328.

5.4 The dispute was first raised by Mauritius in 1980, some 12 years after independence on 12 March 1968[205]. Since then, it has been regularly pursued by Mauritius in bilateral meetings and exchanges of correspondence, including at Prime Ministerial level, and in a variety of international fora[206]. The dispute principally concerns sovereignty over the Chagos Archipelago. But it necessarily includes related issues (which have been clarified by the 2015 Award of the UNCLOS Arbitral Tribunal)[207], in particular the meaning and effect of the 1965 Agreement concerning the detachment of the Chagos Archipelago, which agreement embodied the commitments of the United Kingdom, including the undertaking to return the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes.

5.5 Initially, Mauritius cast the dispute as one over the binding nature of the United Kingdom's commitment to return the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes, and the implementation of that commitment, particularly as regards the timing, thus apparently accepting that sovereignty lies currently with the United Kingdom[208]. But most recently, Mauritius has put its claim as a claim to current sovereignty over the Archipelago. In any event, the dispute is plainly a bilateral one with sovereignty at its heart.

B. Mauritius' repeated efforts to promote its sovereignty claim since the 1980s, bilaterally and internationally

5.6 Between independence in 1968 and 1980, Mauritius did not challenge the United Kingdom's sovereignty over the Chagos Archipelago[209]. Since 1980, the issue has been pursued by Mauritius in bilateral exchanges and a variety of international fora[210]. The following are some examples; no attempt is made to be exhaustive.

[205] *Chagos Arbitration*, Award, para. 209 (**UN Dossier No. 409**); see also Chapter VI section A.
[206] *Ibid.*, para. 209; Chapter VI section A to C.
[207] *Ibid***.**
[208] As it clearly does, since the Chagos Archipelago did not form part of the territory of Mauritius that was granted independence on 12 March 1968.
[209] *Chagos Arbitration* Award, para. 100 (**UN Dossier No. 409**).
[210] *Ibid.*, para. 209; Chapter V section A to C.

5.7 On 9 October 1980, the Mauritian Prime Minster, Sir Seewoosagur Ramgoolam, first claimed sovereignty over the Chagos Archipelago before the UN (though in terms that were not entirely clear as to whether this was a claim to present or future sovereignty over Diego Garcia):

> Here it is necessary for me to emphasise that Mauritius, being in the middle of the Indian Ocean has already [in July 1980] reaffirmed its claim to Diego Garcia, and the Prime Minister of Great Britain in a parliamentary statement has made it known that the island will revert to Mauritius when it is no longer required for the global defence of the West. Our sovereignty thus having been accepted, we should go further than that and disband the British Indian Ocean Territory and allow Mauritius to come into its natural heritage as before its independence.[211]

5.8 On 10 October 1980, the United Kingdom Permanent Representative replied, denying that Mauritius had sovereignty over Diego Garcia:

> I wish to make clear that the United Kingdom has sovereignty over Diego Garcia and has not accepted that the island is under the sovereignty of Mauritius. When the Council of Ministers of Mauritius agreed in 1965 to the detachment of the Chagos Islands to form part of the British Indian Ocean Territory it was announced that those islands would be available for the construction of defence facilities and that in the event of the island no longer being required for defence purposes they should revert to Mauritius. What that means is that if the islands were no longer so required the British Government would be willing to consider ceding sovereignty over them to Mauritius.[212]

5.9 Similar exchanges have occurred in the general debate at the UN General Assembly thereafter, with slight changes in Mauritius' language. For instance, on 30 September 1999, the Mauritius Foreign Minister stated:

> The Chagos Archipelago, which was detached from Mauritius by the former Colonial power prior to our independence in 1968 …. This was done in total disregard of the UN declaration embodied in resolution 1514 (XV) of 14 December 1960 and resolution 2066 (XX) of 16 December 1965, which prohibit the dismemberment of colonial territories prior to independence.

---

[211] General Assembly, verbatim record, 35th Session, 30th Plenary Meeting, Thursday, 9 October 1980, 11:00am (A/35/PV.30, para. 40) (**UN Dossier No. 269**).

[212] General Assembly, verbatim record, 35th Session, 30th Plenary Meeting, Thursday, 9 October 1980, 11:00am (A/35/PV.33, paras. 360-361) (**UN Dossier No. 270**).

> Mauritius has repeatedly asked for the return of the Chagos Archipelago, including Diego Garcia, on which a US military base has been built, and thereby the restoration of its territorial integrity.
>
> So far the issue has been discussed within the framework of our friendly relations with the United Kingdom, with a view to arriving at an acceptable solution. Unfortunately, there has not been significant progress. The United Kingdom has been maintaining that the Chagos Archipelago will be returned to Mauritius only when it is no longer required for defence purposes by the West. While we continue the dialogue for an early resolution of the issue on a bilateral basis.[213]

5.10 The United Kingdom Representative has, wherever appropriate, replied firmly to such claims, rejecting them and restating its own sovereignty. For instance, on 30 September 1999, the United Kingdom Representative replied to Mauritius' statement in the following terms:

> The British Government maintains that the British Indian Ocean Territory is British and has been since 1814. It does not recognize the sovereignty claim of the Mauritian Government. However, the British Government has recognized Mauritius as the only State which has the right to assert a claim to sovereignty when the United Kingdom relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes.
>
> The British Government remains open to discussions regarding arrangements governing the British Indian Ocean Territory or the future of the Territory. The British Government has stated that when the time comes for the Territory to be ceded it will liaise closely with the Government of Mauritius.[214]

5.11 On 28 November 2000, in a meeting between the United Kingdom Foreign Secretary, Mr Cook, and the Mauritian Foreign Minister, Mr Gayan, Mauritius stated that the time had come for direct negotiations between it and the United Kingdom as to the sovereignty over the Chagos Archipelago[215]. Confident in its position that it had sovereignty over the Chagos Archipelago, and that it would cede the islands to

---

[213] General Assembly, verbatim record, 54th Session, 18th Plenary Meeting, Thursday, 30 September 1999, 10:00 am (A/54/PV.18, p. 12) (**UN Dossier No. 291**).

[214] General Assembly, verbatim record, 54th Session, 19th Plenary Meeting, Thursday, 30 September 1999, 3:00pm (A/54/PV.19) (**UN Dossier No. 292**).

[215] United Kingdom Telegram No. 149 recording meeting between United Kingdom and Mauritian Deputy Prime Minister, 28 November 2000, para. 4 (**Annex 61)**.

Mauritius when they were no longer needed for defence purposes, the United Kingdom did not agree.

5.12 On 25 January 2001, at a further meeting between the United Kingdom Foreign Secretary, Mr Cook, and Mauritian Foreign Minister, Mr Gayan, Foreign Minister Gayan asked whether "the two Governments could agree to take the issue [the sovereignty dispute] to the ICJ"[216]. The United Kingdom listened to the proposal, but did not agree.

5.13 On 5 March 2009, referring to a media report of a Chagos Environmental Network initiative, the Mauritian Ministry of Foreign Affairs, Regional Integration and International Trade addressed a Note Verbale to the Foreign and Commonwealth Office, in which the Ministry asserted "that, both under Mauritian law and under international law, the Chagos Archipelago is under the sovereignty of Mauritius and the denial of the enjoyment of sovereignty to Mauritius is a clear breach of United Nations General Assembly Resolutions and international law"[217].

5.14 In its response dated 13 March 2009, the Foreign and Commonwealth Office reiterated "that the United Kingdom has no doubt about its sovereignty over the British Indian Ocean Territory…. "[218].

5.15 In addition to numerous bilateral exchanges, Mauritius has raised its sovereignty claim in many international fora. Such claims have increased since the 2015 Arbitral Award failed to give Mauritius what it sought, i.e. a declaration as to its sovereignty (see further **Chapter VI** below). Mauritius has raised the bilateral dispute in bodies of which the United Kingdom is a member and can and does reply (e.g., the Commonwealth Heads of State and Government meeting, the Indian Ocean Tuna Commission ('IOTC'), the International Mobile Satellite Organization) as well as in bodies of which the United Kingdom is not a member and so cannot respond (e.g., the African Union, the Non-Aligned Movement).

[216] United Kingdom Telegram No. 5 recording meeting between United Kingdom Foreign Secretary and Mauritian Foreign Minister, 25 January 2001, p. 2 (**Annex 62)**.

[217] Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 2009(1197/28) (**Annex 63**).

[218] Note Verbale dated 13 March 2009 from the UK Foreign and Commonwealth Office to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. OTD 04/03/09 (**Annex 64**).

5.16 Although Mauritius has sought to frame the current Request as concerning decolonization, it appears clear that the Request concerns the longstanding dispute including in particular over sovereignty. In this regard, at the level of recent bilateral exchanges:

a. On 22 September 2016, in a conversation between Mauritian Prime Minister Jugnauth and the United Kingdom Foreign Secretary Johnson (once the item concerning an advisory opinion had been added to the UN General Assembly agenda), Prime Minister Jugnauth stated that he would be frank: "the question was sovereignty"[219].

b. In a meeting between the United Kingdom's Director for Overseas Territories, Mr Peter Hayes, and the Mauritian Prime Minister Jugnauth on 9 November 2016, Prime Minister Jugnauth stated that while he was "happy to explore options for a deal – provided the UK was 'generous' – but that any offer must be accompanied by a clear date by which the UK would cede sovereignty to Mauritius"[220].

c. Moreover, in negotiations as to the framework for the talks, Mauritius refused to hold talks under a sovereignty umbrella, precisely because they wished to discuss sovereignty. To this end, by a letter dated 11 November 2016, Mauritius made the following points:

> … we note that the purpose of holding discussions under a sovereignty umbrella in the case of Malvinas [which the United Kingdom refers to as the Falkland Islands] was to prevent such discussions from being regarded as a step towards sovereignty negotiations… This reinforces the position of Mauritius that the talks in which we are engaged… cannot be held under a sovereignty umbrella.[221]

[219] United Kingdom record of Foreign Secretary meeting with Mauritius Prime Minister Sir A Jugnauth, New York, 26 September 2016, para. 4 (**Annex 65**).
[220] United Kingdom Telegram No.1605281, 9 November 2016 (**Annex 66**).
[221] Mauritius letter to the United Kingdom, 11 November 2016, p. 2 (**Annex 67**).

5.17 Outside the bilateral context, Mauritian statements in the lead up to and following the Request also make clear that, even though the Request has been framed in terms of decolonization, sovereignty is the real issue in dispute.

5.18 In the build-up to the debate on the Request, Mauritius circulated a lobbying Aide Mémoire dated May 2017 in New York and in Port Louis[222]. The Aide Mémoire largely focuses on the question of sovereignty over the Chagos Archipelago, and claims that have arisen bilaterally and following the *Chagos Arbitration*.

C. Mauritius has made repeated efforts to submit the longstanding dispute to binding decision by an international court or tribunal

5.19 Mauritius has repeatedly sought to have its claim to sovereignty over the Chagos Archipelago decided by an international court or tribunal. With equal consistency, the United Kingdom has declined to accept such submission. The following are examples:

a. On 25 January 2001, Mr Gayan, the Mauritian Foreign Minister, asked the United Kingdom Foreign Secretary, Mr Cook, whether "the two Governments could agree to take the issue [the sovereignty dispute] to the ICJ". The United Kingdom did not agree[223].

b. In 2004, as it does still, the United Kingdom's optional clause declaration, like that of Mauritius (then and now), excluded disputes with Members of the Commonwealth, thus making it clear that neither side had agreed to submit the present dispute to the Court. Mauritius then indicated that it intended to institute proceedings over sovereignty of the Chagos Archipelago at the International Court of Justice, and that in order to establish the jurisdiction of the Court it was prepared to leave the Commonwealth[224]. In order to prevent this from happening the United Kingdom amended its acceptance of the Optional Clause,

[222] Mauritius Aide Mémoire (**Annex 3**).
[223] See paras. 5.12-5.13 above.
[224] *See e.g.* Mauritius may sue UK for islands, *The Dawn,* 8 July 2004, available at https://www.dawn.com/news/363786; Britain and Mauritius in diplomatic stand-off over Diego Garcia, *The Independent*, 7 July 2004, available at http://www.independent.co.uk/news/world/africa/britain-and-mauritius-in-diplomatic-stand-off-over-diego-garcia-552424.html.

following the example of India and excluding disputes with States that are *or have been* a Member of the Commonwealth[225]. From this time on, Mauritius has clearly regarded advisory proceedings as an alternative route to a contentious case for bringing its sovereignty claim before the Court.

In September 2004, the Mauritian Foreign Minister informed the United Kingdom's High Commission to Mauritius that "Mauritius will not now be tabling a resolution referring to BIOT at the ICJ at this session"[226]. Part of the reason appears to have been that Mauritius regarded the dispute as bilateral. In a speech to the 59th Session of the UN General Assembly on 28 September 2004, the Mauritian Foreign Minister stated that "[a]s the Assembly is aware, Mauritius has always favoured a bilateral approach in our resolve to restore our exercise of sovereignty over the Chagos Archipelago…"[227].

However, that threat of an advisory opinion was reintroduced by Mauritius a few months later, following a disagreement as to the use of a Mauritian vessel for Chagossian heritage visits to the Chagos Archipelago[228]. It is clear from exchanges between the United Kingdom and Mauritius that Mauritius regarded the advisory opinion as a lever in its bilateral relationship with the United Kingdom. To this end, in January 2005, Mauritian Prime Minister Berenger is reported as stating that "we do not want to be forced to raise the matter [sovereignty] in the ICJ but will do so if the deadlock [over the use of the Mauritian flagged vessel] cannot be broken"[229].

---

[225] Declaration under Article 36, paragraph 2, of the Statute, 4 July 2004. The same reservation is included in the United Kingdom's latest Optional Clause Declaration, dated 22 February 2017, which covers "all disputes arising after 1 January 1987, with regard to situations or facts subsequent to the same date, other than: … (ii) any dispute with the government of any other country which is or has been a Member of the Commonwealth; ….".

[226] United Kingdom Telegram No.79 recording meeting between Mauritius Secretary of Foreign Affairs and British High Commissioner, Port Louis, 7 September 2004, para 2 (**Annex 68).**

[227] Statement by Hon. Jaya Kirshna Cuttaree, Minister of Foreign Affairs, International Trade and Regional Cooperation of the Republic of Mauritius at the Fifty-Ninth Session of the UN General Assembly, 28 September 2004 (**UN Dossier No. 300)**; see also UK letter in reply dated September 2004 **(UN Dossier No. 301).**

[228] United Kingdom Telegram No.9, 17 January 2005 (**Annex 69)**.

[229] *Ibid*.

c. On 20 December 2010 Mauritius commenced Annex VII arbitration proceedings against the United Kingdom under UNCLOS[230]. Among other matters, Mauritius sought a finding that "[T]he UK does not have sovereignty over the Chagos Archipelago…"[231]. As set out further in **Chapter VI**, the Tribunal found that it did not have jurisdiction over the sovereignty aspects of Mauritius' claim[232]. As explained in **Chapter VI** below, while ostensibly about the establishment of a Marine Protected Area around the Chagos Archipelago, the Tribunal found that Mauritius' primary claims raised questions of sovereignty over which it had no jurisdiction.

d. On 20 October 2011, Mauritius wrote to the United Kingdom, stating that a dispute existed between it and the United Kingdom as to the application of Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965 ('CERD') to the Chagos Archipelago[233]. The dispute as presented by Mauritius comprised the issues of sovereignty and rights of return and entry. It was stated in this letter:

> The Government of Mauritius considers that:
>
> i. as Mauritius is a party to the CERD, and the Chagos Archipelago is subject to the sovereignty of Mauritius, the CERD applies to the Chagos Archipelago;
>
> ii. as the United Kingdom is a party to CERD, and as the United Kingdom exercises de facto (but unlawful) control over the territory of the Chagos Archipelago, the United Kingdom has an obligation to ensure that the CERD is applicable to that territory and to give effect to the applicable CERD obligation;
>
> iii. the United Kingdom has acted, and continues to act, in violation of Articles 2 and 5 of the CERD, *inter alia*, by preventing the exercise of the right of return of the former inhabitants of the Chagos Archipelago, as well as the right of entry of other Mauritian nationals.

---

[230] Notification under Article 287 and Annex VII, Article of the United Nations Convention on the Law of the Sea, in the dispute concerning the 'Marine Protected Area' related to the Chagos Archipelago (Mauritius v. United Kingdom), 20 December 2010 (**UN Dossier No. 407**).

[231] *Chagos Arbitration*, Mauritius Memorial, at para. 1.3(i), available at https://www.pcacases.com/web/view/11.

[232] See further Chapter VI, paras. 6.7-6.8.

[233] Mauritius letter from Minister of Foreign Affairs, Regional Integration and International Trade to UK Foreign Secretary, 20 October 2011 (**Annex 70)**.

> It is apparent that there exists a dispute between Mauritius and the United Kingdom as to the interpretation and application of the CERD, including but not limited to the application of Articles 2 and 5 to the Chagos Archipelago.

The United Kingdom responded on 22 November 2011, stating that the relevant immigration legislation in force applied without distinction as to race, colour or national or ethnic origin, and that accordingly there was no dispute between Mauritius and the United Kingdom as to the interpretation and application of the CERD[234]. The United Kingdom also reiterated its position as to its sovereignty. Mauritius nonetheless reiterated and expanded upon this CERD claim by letter and Note Verbale dated 21 March 2012[235].

5.20 On 17 May 2016, Mauritian Prime Minister Jugnauth gave a speech in which he intimated that, unless the United Kingdom provided a date for the transfer of sovereignty, Mauritius would seek a referral of the claim to this Court in autumn 2016. The relevant part of the speech reads as follows:

> … In this regard, I requested that the Chagos Archipelago be returned by the United Kingdom to the effective control of Mauritius by a precise date to be agreed upon and proposed that consideration could be given to the joint management of the Chagos Archipelago pending its return to Mauritius. I asked for a reply to be given to my request by the end of June 2016, otherwise Mauritius would take appropriate action at the international level, including at the United Nations. The need for a precise date to be set for the return of the Chagos Archipelago to the effective control of Mauritius was also stressed during the bilateral talks last week[236].

5.21 On 14 July 2016, Mauritius wrote to the UN Secretary-General asking for the inclusion of the item "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in

[234] United Kingdom Note Verbale No.69/2011, 22 November 2011 (**Annex 71**).
[235] Mauritius Note Verbale No.8/2012 and letter from Minister of Foreign Affairs, Regional Integration and International Trade to United Kingdom Foreign Secretary, 21 March 2012 (**Annex 72**).
[236] Mauritius Prime Minister Sir A Jugnauth Speech, Mauritian Parliamentary Records, 17 May 2016 (**Annex 1**).

1965" be added to the provisional agenda of the seventy-first session of the UN General Assembly[237]. The subsequent procedure has been described in **Chapter I** above.

D. Conclusions

5.22 The above account of exchanges between Mauritius and the United Kingdom, and of Mauritius' efforts to raise the matter in various international fora, show that, beginning in the 1980s, sovereignty over the Chagos Archipelago (in particular) has been a matter of bilateral dispute. The record also shows that Mauritius has repeatedly sought a judicial settlement of the longstanding dispute; the United Kingdom has consistently declined to accept reference of the matter to the International Court of Justice or any other international court or tribunal. The current request for an advisory opinion is in reality another attempt by Mauritius to secure an international judicial decision on the longstanding dispute.

[237] Letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations to the Secretary-General (A/71/142 of 14 July 2016) (**UN Dossier No. 1**).

CHAPTER VI

THE *CHAGOS MARINE PROTECTED AREA ARBITRATION (MAURITIUS v. UNITED KINGDOM)*

A. Introduction: the significance of the *Chagos Arbitration*

6.1 On 20 December 2010, Mauritius commenced arbitral proceedings against the United Kingdom under Part XV and Annex VII of the United Nations Convention on the Law of the Sea ('UNCLOS') with respect to the United Kingdom's establishment in April 2010 of a 200 nautical mile marine protected area ('MPA') around the Chagos Archipelago: the *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (hereafter '*Chagos Arbitration'*)[238]. The proceedings led to an Award dated 18 March 2015[239]. In the Award, the five Members of the Arbitral Tribunal reached unanimous conclusions in certain respects, but were divided on whether they had jurisdiction over issues related to sovereignty. The majority held that they did not. The minority, however, considered that jurisdiction was not lacking and reached conclusions that have since been relied on by Mauritius, including before the General Assembly[240].

6.2 The *Chagos Arbitration* provides an important illustration of how the Request – despite its formulation as a matter concerned with the process of decolonization – concerns issues that have long been in dispute between the United Kingdom and Mauritius at the bilateral level. As explained further in this Chapter:

a. The matters that are now being put before the Court in the Request – the detachment of the Chagos Archipelago, the 1965 Agreement, the meaning and effect of General Assembly resolutions 1514(XV), 2066(XX), 2232(XXI), 2357(XXII) and of any applicable obligations of international law, the removal of the Chagossians – have not only been in dispute in multiple bilateral

[238] Notification under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea, in the dispute concerning the 'Marine Protected Area' related to the Chagos Archipelago (Mauritius v. United Kingdom), 20 December 2010 (**UN Dossier No. 407**).
[239] *Chagos Arbitration* Award, (**UN Dossier No. 409**).
[240] See further under Section C below.

exchanges between Mauritius and the United Kingdom as part of Mauritius' claim to sovereignty, but were also pleaded by Mauritius in considerable detail as the key elements to a claim to sovereignty in the *Chagos Arbitration*.

b. The United Kingdom took a principled objection to any assertion by the UNCLOS Annex VII Tribunal of jurisdiction over the sovereignty issue, and that objection was upheld[241]. Having failed before the Tribunal in 2015, Mauritius elected in 2016 to bring the same issues before the General Assembly with a view to seeking an advisory opinion. The same contentious dispute over sovereignty has now been put before the General Assembly, and will no doubt be portrayed by Mauritius to this Court, as a matter of incomplete decolonization suitable for the Court's advisory as opposed to contentious jurisdiction.

c. The United Kingdom did not consent to the resolution of these issues before the Annex VII Tribunal, and it has made clear that it does not consent to this Court's contentious jurisdiction over the dispute[242]. Yet the actual and intended impact of Mauritius' recent steps is that the longstanding bilateral dispute, in particular as to sovereignty, is nonetheless being brought before the Court.

6.3 As is developed in **Part Two** of this Written Statement, it is of considerable importance to the exercise of the Court's discretion that to give a reply to the current Request would have the effect of circumventing the principle that, under international law, a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. The very fact of the recent *Chagos Arbitration* provides a powerful demonstration as to how that principle is engaged in this case.

6.4 Moreover, the Award in the *Chagos Arbitration* contains certain determinations, in particular with respect to the 1965 Agreement, that are binding on the United Kingdom and Mauritius and that would fall to be applied in any consideration of the current status of the Chagos Archipelago.

[241] Cf. the views of the minority as to jurisdiction in *Chagos Arbitration*: Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, paras. 22 – 47 (**UN Dossier No. 409**).
[242] See para 5.20 above.

B. Mauritius' claims in the *Chagos Arbitration*

6.5 Although presented as a claim under UNCLOS, Mauritius' case before the Annex VII Tribunal had at its heart a claim to sovereignty over the Chagos Archipelago, which the Tribunal was asked to determine in Mauritius' favour. Mauritius' submission was "that the UK is not 'the coastal State' within the meaning of Articles 55, 76 and 2 of the 1982 Convention, and therefore does not have the right to establish maritime zones, including the 'MPA', around the Chagos Archipelago"[243]. The Tribunal was asked to make an express determination to that effect as the primary head of relief sought[244]. In doing so, it was asked to determine (*inter alia*) that –

a. "The purported establishment by the United Kingdom of maritime zones for the Chagos Archipelago is based upon a breach of fundamental principles of international law";

b. "The UK's claim to be 'the coastal State' for the purpose of Part V of the Convention, and thus to be entitled to establish an EEZ and the 'MPA', is founded upon its purported claim to sovereignty over the Chagos Archipelago, following the UK's unlawful detachment of the Archipelago from the territory of Mauritius in 1965. … the excision was carried out in breach of fundamental principles of international law";

c. "The detachment of the Chagos Archipelago was, first and foremost, contrary to the right of Mauritius to self-determination", with specific reliance being placed by Mauritius on General Assembly resolutions 1514(XV), 2066(XX), 2232(XXI) and 2357(XXII)";

d. "The 'agreement' of former representatives of Mauritius to the excision of the Chagos Archipelago does not validate the dismemberment of Mauritius"[245].

[243] Mauritius' Memorial, para. 6.1, available at https://www.pcacases.com/web/sendAttach/1796.
[244] Mauritius' Memorial, p. 155, para (1), available at https://www.pcacases.com/web/sendAttach/1796.
[245] Mauritius' Memorial, paras. 6.8-6.30, available at https://www.pcacases.com/web/sendAttach/1796.

6.6 Mauritius' arguments in this respect were developed at length in its written and oral pleadings[246]. Although the United Kingdom contested the jurisdiction of the Tribunal to make the determinations sought, there was no separate jurisdictional phase. Thus, in its written and oral pleadings the United Kingdom also engaged in full with the disputed issues over the alleged 'unlawful detachment', the issue of self-determination and sovereignty more generally[247].

6.7 In characterising the dispute before it, the Tribunal found that –

> … the record (see paragraphs 101-107 above) clearly indicates that a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago. *Since at least 1980, Mauritius has asserted its sovereignty over the Chagos Archipelago in a variety of fora, including in bilateral communications with the United Kingdom and in statements to the United Nations*. Mauritius has also challenged the circumstances by which the Archipelago was detached; questioned the validity of the Mauritius Council of Ministers' approval of that decision; enshrined a claim to sovereignty over the Archipelago in its Constitution and legislation; and declared its own exclusive economic zone in the surrounding waters. Finally, the pleadings in these proceedings are replete with assertions of Mauritian sovereignty over the Chagos Archipelago. [248]

Against the backdrop outlined above, the Tribunal found that certain of Mauritius' claims related to territorial sovereignty over the Chagos Archipelago, and that it lacked jurisdiction with respect to such sovereignty claims[249].

---

[246] See in particular, Mauritius' Memorial, Chapters 3 and 6, available at https://www.pcacases.com/web/sendAttach/1796; Reply of Mauritius, Chapters 2 and 5, available at https://pcacases.com/web/sendAttach/1799; Transcript, day 1, pp. 16/6 – 22/19, 33/11 – 34/20, and 37/2-10 (Prof. Sands) https://pcacases.com/web/sendAttach/1571; day 2, available at, 107/18 – 141/24 https://pcacases.com/web/sendAttach/1572; day 3, 231/17 – 255/5 (Prof. Crawford), available at https://pcacases.com/web/sendAttach/1573; day 8, 924/4 – 925/7 (Prof. Sands) and 953/13 – 985/7 (Prof. Crawford), available at https://pcacases.com/web/sendAttach/1578.

[247] See in particular, the United Kingdom's Counter-Memorial, Chapters 2 and 7, available at https://pcacases.com/web/sendAttach/1798; Rejoinder, Chapters 2 and 5, available at https://pcacases.com/web/sendAttach/1800; Transcript, days 5-6, pp. 505/14 – 544/11, 637/4 - 655/10, 695/14 – 719, 721/21 – 736/18 (Wood), available at https://pcacases.com/web/sendAttach/1575; and days 10-11, 1199/4 – 1231/2, 1240/7 – 1258/17 (Wood), available at https://pcacases.com/web/sendAttach/1580.

[248] *Chagos Arbitration* Award, para. 209 (emphasis added) (**UN Dossier No. 409)**.

[249] *Ibid*, paras. 212-221.

C. The findings of the Tribunal on the substance of the claims

6.8 The Award in the *Chagos Arbitration* nonetheless contains some consideration of the facts relating to the independence of Mauritius, the detachment of the Chagos Archipelago and the removal of the Chagossian population[250]. Moreover, the Tribunal found that it did have jurisdiction to consider Mauritius' claims that establishment of the MPA was in breach of rights enjoyed by Mauritius under Articles 2(3) and 56(2) of UNCLOS, which in turn called for reference to and interpretation of the 1965 Agreement. The Tribunal held in this respect:

> … It is common ground between the Parties that there was agreement between the United Kingdom and the Mauritius Council of Ministers in 1965 to the detachment of the Archipelago (the "1965 Agreement"). The Parties disagree, however, regarding whether Mauritian consent was freely given, whether any agreement is valid or binding, and even regarding what was agreed. In the course of these proceedings, the validity or otherwise of the 1965 Agreement was a central element of the Parties' submissions on Mauritius' First and Second Submissions, sovereignty, and the identity of the coastal State. The Tribunal has found that it lacks jurisdiction to consider these submissions.
>
> At the same time, the legal effect of the 1965 Agreement is also a central element of the Parties' submissions on Mauritius' Fourth Submission, insofar as it involves the Lancaster House Undertakings. The Tribunal finds that its jurisdiction with respect to Mauritius' Fourth Submission (see paragraph 323 above [of the Award]) permits it to interpret the 1965 Agreement to the extent necessary to establish the nature and scope of the United Kingdom's undertakings.
>
> The Tribunal will approach the Lancaster House Undertakings by considering how the Parties understood the 1965 Agreement at the time it was concluded. The Tribunal will then go on to consider the legal status of the 1965 Agreement and the extent to which the Tribunal is called upon to engage with Mauritius' arguments regarding its validity. …[251]

6.9 As has been explained in **Chapter III** above[252], through the 1965 Agreement, the Mauritius Council of Ministers gave its consent to the detachment of the Chagos Archipelago, while the United Kingdom committed itself to accord certain rights and to pay certain sums of money to Mauritius. Regarding the legal status of the 1965

[250] *Ibid*, paras. 63-99.
[251] *Ibid.*, paras. 418-420.
[252] See paras. 3.29-3.32 above.

Agreement, the Tribunal in the *Chagos Arbitration* found that, as a matter of British constitutional law, an agreement between the British Government and a non-self-governing territory would not be governed by international law. However, the Tribunal also found "that both Parties were committed to honouring the 1965 Agreement in their post-independence relations", although they had not been able to express that commitment as a matter of international law for such time as Mauritius remained a colony[253]. The Tribunal continued:

> Had Mauritius remained part of the British Empire *[sc. remained a British Overseas Territory*], the status of the 1965 Agreement would have remained a matter of British constitutional law. The independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement. In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. *When Mauritius became independent and the United Kingdom retained the* Chagos Archipelago, the Parties fulfilled the conditions necessary to give effect to the 1965 Agreement and, by their conduct, reaffirmed its application between them.[254]

6.10 The Tribunal ultimately concluded on this point:

> Accordingly, the Tribunal concludes that, upon Mauritian independence, the 1965 Agreement became a matter of international law between the Parties.[255]

6.11 The Tribunal then turned to the issue of the subsequent repetition by the United Kingdom of the undertakings made in September 1965 as part of the 1965 Agreement (the "Lancaster House Undertakings"), and detrimental reliance by Mauritius, which it found "suffices to resolve any concern that defects in Mauritian consent in 1965 would have prevented the Lancaster House Undertakings from binding the United Kingdom"[256]. The Tribunal held that –

> … after its independence in 1968, Mauritius was entitled to and did rely upon the Lancaster House Undertakings to (a) return the Chagos Archipelago to Mauritius when no longer needed for defence purposes; (b) preserve the benefit

[253] *Chagos Arbitration*, Award, para. 424 (**UN Dossier No. 409)**.
[254] *Ibid.*, para. 425 (emphasis added).
[255] *Ibid.*, para. 428.
[256] *Ibid*.

> of any minerals or oil discovered in or near the Chagos Archipelago for the Mauritius Government; and (c) ensure that fishing rights in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable. The Tribunal, therefore, holds that the United Kingdom is estopped from denying the binding effect of these commitments, which the Tribunal will treat as binding on the United Kingdom in view of their repeated reaffirmation after 1968. [257]

6.12 The significance of the *Chagos Arbitration* is thus not merely that it shows Mauritius pleading out in a bilateral dispute the very same issues as are now being put before the Court in the current Request. Further, although the Tribunal in the *Chagos Arbitration* did not decide the issue on sovereignty, it did make important findings with respect to the 1965 Agreement, which are binding as between the United Kingdom and Mauritius. In particular, it found that:

a. "When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, the Parties fulfilled the conditions necessary to give effect to the 1965 Agreement and, by their conduct, *reaffirmed its application between them*."[258] Thus, through Mauritius attaining independence, and through affirmation, the 1965 Agreement became a matter of international law between the Parties.

b. The Tribunal also found that "after its independence in 1968, Mauritius was entitled to and did rely upon the Lancaster House Undertakings to (a) return the Chagos Archipelago to Mauritius when no longer needed for defence purposes; …"[259].

6.13 In the *dispositif* of the Award, the Tribunal referred back to its findings on the legally binding nature of undertakings made by the United Kingdom in the 1965 Agreement and made a declaration of breach of certain provisions of UNCLOS, as follows:

> In relation to the merits of the Parties' dispute, the Tribunal, having found, *inter alia*,

[257] *Ibid*, para. 448.
[258] *Ibid.*, para. 425 (emphasis added).
[259] *Ibid.*, para. 448.

(1) that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea;

(2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and

(3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding;

DECLARES, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.

6.14 The breaches of Articles 2(3) and 194(4) concerned Mauritius's fishing rights in the territorial sea[260], while the breach of Article 56(2) concerned the UK obligation in the exclusive economic zone ('EEZ') to have "due regard to" the rights of Mauritius with respect to the undertaking to return[261]. In each case, the breach consisted in substance of the United Kingdom's failure to have due regard to Mauritius' rights flowing from the undertakings contained in the 1965 Agreement. While the Tribunal concluded that the obligation in Article 2(3) is limited to exercising sovereignty subject to the general rules of international law, it considered that general international law required the United Kingdom to act in good faith in its relations with Mauritius, including with respect to the undertakings, and hence there was found to be a breach[262].

6.15 Mauritius has argued for, and taken the benefit of, these findings. It is not open to Mauritius to take any position inconsistent with these or other findings in the Award.

6.16 To date, before the General Assembly, Mauritius has sought to invoke the Award, but has mischaracterised the findings that were made. In its Aide Mémoire submitted to the General Assembly, Mauritius stated that: "In 2015, an Arbitral Tribunal acting under Part XV of the UN Convention on the Law of the Sea (UNCLOS) unanimously found that [the] commitment to return the Chagos Archipelago to Mauritius is binding under international law, acknowledging that Mauritius has inalienable legal rights with

[260] *Ibid.*, paras. 516, 520-521 and 540.
[261] *Ibid.*, para. 540.
[262] *Ibid.*, paras. 516-517.

respect to the Chagos Archipelago and that the process of decolonization remains incomplete."[263] As to this:

a. It is correct that the Tribunal found that there was an international law obligation on the United Kingdom to return the Chagos Archipelago to Mauritius, but only "when no longer needed for defence purposes" (see the *dispositif* at **paragraph 6.14** above);

b. The Tribunal said nothing whatsoever about either any alleged "inalienable legal rights" of Mauritius or "the process of decolonization remain[ing] incomplete". The Tribunal did not consider the decolonization arguments made by Mauritius (it found that it lacked jurisdiction) and made no acknowledgements of any kind as to decolonization.

6.17 Mauritius has placed great weight on the so-called "un-contradicted" views of the minority on the sovereignty issue[264]. Judges Kateka and Wolfrum considered that, in circumstances where (in their view) no valid consent had been given by Mauritius to the detachment of the Chagos Archipelago in 1965, the detachment was unlawful[265]. The United Kingdom notes that:

a. It is meaningless for Mauritius to portray the views of the minority as un-contradicted by the majority. The majority simply did not enter into the sovereignty issues, finding that the Tribunal lacked jurisdiction to do so. To suggest that the proceedings as a whole confirm Mauritius' position that the

[263] Mauritius Aide Mémoire, May 2017, para. 7 (**Annex 3**).

[264] See e.g. Mauritius Aide Mémoire, May 2017, para. 7: "Two members of the Tribunal found, *inter alia*, that the excision of the Chagos Archipelago from Mauritius in 1965 showed 'a complete disregard for the territorial integrity of Mauritius by the United Kingdom' [fn omitted], in violation of the right to self-determination. No contrary view was put forward by any other members of the Tribunal." See also letter of the Permanent Mission of the Republic of Mauritius to the United Nations dated 5 June 2017, referring to the minority's ruling that Mauritius is the coastal State "which has not been contradicted by the other three arbitrators", and see the accompanying description of the Award (**Annex 3).**

[265] *Chagos Arbitration,* Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, at paras. 70-80, (**UN Dossier No. 409**).

Chagos Archipelago is "an integral part of the territory of the Republic of Mauritius" is simply wrong[266].

b. The conclusions expressed by the minority turned on their views on the absence of consent: the question of whether consent to detachment was validly given by Mauritius in the 1965 Agreement was critical to them[267]. Thus the views of the minority separately demonstrate how the array of arguments made by Mauritius – then and now – come down to issues originally agreed/reaffirmed and originally contested at the bilateral level.

D. Negotiations following the Award

6.18 The Award stated by way of "final observations":

> In concluding that the declaration of the MPA was not in accordance with the provisions of the Convention, the Tribunal has taken no view on the substantive quality or nature of the MPA or on the importance of environmental protection. The Tribunal's concern has been with the manner in which the MPA was established, rather than its substance. It is now open to the parties to enter into negotiations that the Tribunal would have expected prior to the proclamation of the MPA, with a view to achieving a mutually satisfactory arrangement for protecting the marine environment, to the extent necessary, under a sovereignty umbrella.[268]

6.19 The two States did subsequently enter into negotiations, including through three rounds of talks (held under a so-called sovereignty umbrella, i.e. without prejudice to the disputed sovereignty issue), held in November 2015, May 2016 and August 2016.

6.20 Following the addition of the Request for an advisory opinion to the General Assembly's Agenda in September 2016, on 4 November 2016, Mauritius wrote to the

[266] Cf. Letter from Permanent Mission of the Republic of Mauritius to the United Nations, 5 June 2017 (**Annex 2**).
[267] *Chagos Arbitration,* Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, at paras. 74-80 (**UN Dossier No. 409**).
[268] *Chagos Arbitration* Award, at para. 544.

United Kingdom asking to put talks as to the implementation of the Award on hold[269]. The United Kingdom replied asking Mauritius to reconsider, stating that delays would otherwise occur[270]. Talks have not since recommenced.

E. Conclusions

6.21 The Award in the *Chagos Arbitration* is of considerable importance in the relations between Mauritius and the United Kingdom, and likewise so far as concerns the current proceedings. In this respect:

a. Mauritius' claims in the *Chagos Arbitration* show how the issues that are now put forward as suitable for an advisory opinion have very recently been formulated by Mauritius as the core issues in a bilateral dispute over who is the coastal State so far as concerns the Chagos Archipelago, i.e. as a bilateral sovereignty dispute.

b. Although the Tribunal did not have jurisdiction to rule on the sovereignty issues, it did rule on the meaning and effect of the 1965 Agreement in the context of Mauritius' other claims. As to this, it found that, from Mauritius' independence, the 1965 Agreement became a matter of international law between the Parties. By reference to the undertakings contained in the 1965 Agreement and since reaffirmed, it ruled that the United Kingdom is obliged as a matter of international law to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes.

c. The minority, which considered that the disputed sovereignty issues were within jurisdiction, were of the view that consent to detachment had not validly been

[269] By a letter dated 4 November 2016, Mauritius stated that "discussion between Mauritius and the UK should focus on issues relating to the completion of the decolonisation of the Republic of Mauritius and the exercise of full sovereignty of the Republic of Mauritius over the Chagos Archipelago"; and that "since the outcome of these discussions [i.e. those on the Request] are likely to influence the discussions and eventual decision on issues relating to the implementation of the Award… it would be more appropriate to have the latter discussion [i.e. relating to the Award] at a later stage". Mauritius letter to the United Kingdom, 4 November 2016, paras. 2-3 (**Annex 73)**.

[270] United Kingdom letter to Mauritius, 4 November 2016, para. 1 (**Annex 74**).

given in the 1965 Agreement and hence that detachment had been unlawful. Their reasoning, with which the Unite Kingdom disagrees, merely highlights the central nature of this bilateral Agreement to the long-disputed issues that are now being portrayed as suitable for an advisory opinion.

PART TWO: DISCRETION

CHAPTER VII

THIS IS A CASE WHERE THE COURT SHOULD EXERCISE ITS DISCRETION SO AS NOT TO GIVE AN ADVISORY OPINION

A. The Court's discretion under Article 65(1)

7.1 The Court's power to give an advisory opinion is established by Article 65(1) of the ICJ Statute, which provides:

> 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.

7.2 Two immediate points stand out with respect to the discretion – the Court "may give" ("*peut donner*") – enjoyed by the Court under Article 65(1).

7.3 First, the subject-matter of the discretion is the giving of an advisory opinion on "any legal question". This is a different and narrower formulation to that used at Article 14 of the Covenant of the League of Nations, pursuant to which the Permanent Court was empowered to "give an advisory opinion upon *any dispute or question* referred to it …" ("*sur tout différend ou tout point*") (emphasis added). As certain commentators have noted, the idea within the framework of the League of Nations was to create an additional and flexible means of peaceful settlement of disputes, less binding than judgments in contentious cases between States, but also relating in the first place to inter-State controversies[271]. The advisory jurisdiction of the current Court is less broad, and that follows from the materially different language used in Article 65(1) of the ICJ

[271] Simma et al, *The Charter of the United Nations: A Commentary* (3rd ed), Vol. II, 1978 (Oellers-Frahm), referring to Daillier in Cot/Pellet (eds.), pp. 1291, 1292; Schlochauer, H.-J., 'Permanent Court of International Justice', *EPIL* III, pp. 988–1004. Note also that the invocation of Article 14 was subject to Article 5, pursuant to which: "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting."

Statute and Article 96(1) of the UN Charter[272], as well as being reflected in the different practice of the two Courts[273].

7.4 Secondly, the existence of the discretion under Article 65(1) is of considerable importance and has been regularly emphasised by the Court[274]. This is not, of course, to suggest that the discretion has been regularly exercised by the Court so as to decline to give an opinion: the Court has thus far not had occasion to exercise its discretion so as to decline to answer – as opposed to reformulate – a given legal question put to it under Article 65[275]. The Court has, however, identified situations where exercise of the discretion to refuse may be appropriate.

7.5 Of particular relevance to the current case is the well-known passage from the *Western Sahara* case concerning judicial propriety – in the context of the basic principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. Referring back to the *Interpretation of Peace Treaties* case, the Court explained:

> Thus the Court [in *Interpretation of Peace Treaties*] recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
>
> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[276]

---

[272] Cf. Article 96(a) of the UN Charter: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

[273] See e.g. Simma et al, *The Charter of the United Nations: A Commentary* (3rd ed), Vol. II, 1979 (Oellers-Frahm). See also Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (2nd ed), 1673 (Cot).

[274] See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at para. 44.

[275] Cf. the decision reached by the PCIJ in *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5.*

[276] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at p. 25, paras. 32-33, referring to *Interpretation of Peace Treaties, Advisory Opinion, First Phase, I.C.J. Reports 1950*, p. 65, at p. 71.

7.6 There are five important points to make on this passage.

7.7 First, the concern of the Court in *Western Sahara* – that the fundamental principle of consent be upheld – is at least as valid today as it was in 1975. This Court and other international tribunals have in recent years become very familiar with attempts by claimant States to re-characterise their claims – including sovereignty claims – so as bring them within the jurisdictional provisions of treaties that are not designed to cover them. Such attempts have not been successful, as is consistent with the recognition of the continuing and central importance of consent to the exercise of jurisdiction at the international plane. The recent advisory opinions of the Court show that the principle restated in the *Western Sahara* case remains very important. The passage was quoted and applied, for example, in the *Wall* case, the Court's conclusion merely being that the principle was not engaged on the facts, i.e. it did "not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement"[277].

7.8 Secondly, while the Court's jurisdiction under Article 65(1) is different in nature and effect to its contentious jurisdiction, this does not provide a sufficient answer to the need to uphold the principle of consent. That is plain from the Court's reasoning in cases such as *Interpretation of Peace Treaties* and *Western Sahara.* Of course, an advisory opinion is not binding on the parties to a given dispute, unlike a judgment of the Court, and it is given to the requesting organ as opposed to States. However, the Court is still being asked to set out its view in the form of statements of law and such statements – although non-binding – have also been directed at third States[278].

7.9 Thirdly, as follows from the above, it is not the purpose of Article 65(1) to establish a form of residual, non-binding dispute settlement mechanism for claimants who are unable to establish contentious jurisdiction in respect of their claims, but are able to find support for a request from a majority in the General Assembly. It is not just that

[277] See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at p. 159, para. 50.

[278] See e.g. the Court's declaration in the *dispositif* in the *Wall* case that "[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall …" (*ibid.,* p. 202). Such a declaration is not formally binding, but that would also be true in a contentious case. See Article 59 of the Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

the plain words of Article 65(1) (cf. Article 14 of the League Covenant) and the interpretation of the Court do not support any such approach. Also, were it otherwise, the Court could readily become the home for multiple longstanding and/or notorious disputes as to which there is no agreed forum.

7.10 Fourthly, the existence of some form of dispute in the background to a request made under Article 65(1) is nonetheless common[279], and it is well-established that the mere fact of a background dispute will not be enough for the Court to decide not to exercise its jurisdiction. What is necessary is that the existence of a given dispute engages considerations of judicial propriety that require the Court to refuse an opinion, and the Court has said that compelling reasons would be needed to lead it to refuse its opinion in response to a request falling within its jurisdiction[280].

7.11 Finally, factors other than, or overlapping with, a lack of consent may give rise to considerations of judicial propriety. So far as concerns the current case, the Court could not properly be asked to depart from findings in previous contentious proceedings that are binding on two State parties to a dispute that is put before it in the context of its advisory jurisdiction. Further, there may be disputed issues of fact that the Court is unable properly to determine outside the confines of contentious proceedings[281].

B. Judicial propriety in the current case

7.12 Against that backdrop, it is useful to identify the salient features of the dispute between the United Kingdom and Mauritius that underlies the current Request, before turning to the past opinions of the Court to assess whether this dispute is such as to engage considerations of judicial propriety in a compelling way.

---

[279] See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at p. 158, para. 48, referring to *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, at p. 24, para. 34.

[280] See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 416, para. 31. Although cf. Dissenting Opinion of Judge Bennouna, para. 5, and Separate Opinion of Judge Keith, para. 5.

[281] See e.g. Judge Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice', in *Enhancing the Rule of Law Through the International Court of Justice*, ed. Gaja and Stoutenburg (2014) 63 at pp. 68-69.

7.13 As follows from **Chapters V and VI** above, there is a longstanding dispute between the United Kingdom and Mauritius with respect to sovereignty over the Chagos Archipelago and related matters, in which Mauritius has sought determinations on the legality of the detachment of the Chagos Archipelago and in particular on the lack of validity of the 1965 Agreement, on applicable obligations of international law, and on the meaning and effect of General Assembly resolutions 1514 (XV), 2066 (XX), 2232 (XXI) and 2357 (XXII). As to this bilateral dispute:

a. For many years following the independence of Mauritius, there was no dispute at all between Mauritius and the United Kingdom as to the United Kingdom's sovereignty over the Chagos Archipelago[282]. Moreover, both States reaffirmed the 1965 Agreement[283].

b. Mauritius' assertion of sovereignty over the Chagos Archipelago dates back to the early 1980s[284]. It has since been pursued by Mauritius in bilateral exchanges with the United Kingdom, in statements made to the General Assembly, and in various threatened and actual inter-State proceedings against the United Kingdom, including before the Annex VII tribunal in the *Chagos Arbitration*[285].

c. The close connection between the *Chagos Arbitration* and the current case is reflected in the unique fact that two Members of the Court (as constituted at the time of the Request), Judges Crawford and Greenwood, elected to recuse themselves because of their past involvement in those Annex VII proceedings. Further, while the Tribunal in the *Chagos Arbitration* considered that it lacked jurisdiction to determine the sovereignty issue as requested by Mauritius, it did consider and uphold alternative submissions made by Mauritius as to the 1965 Agreement and as to the return of the Chagos Archipelago when no longer needed for defence purposes[286].

[282] See paras. 3.38-3.50 above.
[283] *Chagos Arbitration* Award, para. 425 (**UN Dossier No. 409).** See also paras. 3.38-3.50 above.
[284] See further Chapter V, Section A above.
[285] See further Chapter VI above.
[286] *Chagos Arbitration* Award, para. 448 (**UN Dossier No. 409)**.

d. In January 2001, Mauritius expressly sought the United Kingdom's consent to resolution of the dispute over sovereignty before this Court, but that consent was not given[287]. Again, in 2004 Mauritius publicly stated that it was intent on bringing a case against the United Kingdom before the Court[288]. In 2011-2012, Mauritius reiterated its claim to sovereignty over the Chagos Archipelago and indicated to the United Kingdom that it was considering the commencement of proceedings before this Court under the International Convention on the Elimination of All Forms of Racial Discrimination[289].

e. The underlying reality is that it is only having sought, on multiple occasions, to have the longstanding bilateral dispute resolved in contentious proceedings that, in 2016, Mauritius turned to the General Assembly, with the matter portrayed as one concerning decolonization, although it concerns the same issues that have for decades been at the centre of a bilateral dispute.

f. As is plain from the express language of the Aide Mémoire submitted by Mauritius to UN Member States, the Request currently before the Court is aimed at "enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago"[290]. The Aide Mémoire also contains a long list of alleged "serious violations of international law, including human rights and international

---

[287] See paras 5.12-5.13 above.

[288] See para 5.20(a) above.

[289] See para 5.20(d) above.

[290] Mauritius, Aide Mémoire, May 2017, para. 2 (**Annex 3)**. See also Mauritius press release, 31 October 2017 (**Annex 75)**; and the resolutions of the African Union and the Heads of State or Government of Non-Aligned Countries to which reference is made at the sixth preambular paragraph to General Assembly resolution 71/292: By its Resolution on Chagos Archipelago Ex. CL/994(XXX), adopted 30-31 January 2017, the African Union (emphasis added) "RESOLVE[D] to fully support the action initiated by the Government of the Republic of Mauritius at the level of the United Nations General Assembly with a view to ensuring the completion of the decolonization of the Republic of Mauritius *and enabling the Republic of Mauritius to effectively exercise its sovereignty over the Chagos Archipelago, including Diego Garcia*." African Union Resolution on Chagos Archipelago Ex. CL/994(XXX), 30-31 January 2017, preambular paragraph 6 (**Annex 76**).
At the summit of 17-18 September 2016, the Heads of State or Government of the NAM resolved as follows: "*Cognizant that the Government of the Republic of Mauritius is committed to taking all appropriate measures to affirm the territorial integrity of the Republic of Mauritius and its sovereignty over the Chagos Archipelago under international law*, the Heads of State or Government resolved to fully support such measures including any action that may be taken in this regard at the United Nations General Assembly." Record of 17th Summit of Heads of State and Government of the Non-Aligned Movement, NAM 2016/CoB/DOC.1. Corr.1, para. 339 (**Annex 77**).

environmental law", many of which do not concern decolonization but rather the use of Diego Garcia, the creation of an MPA and alleged pollution[291]. Like the sovereignty issue, these are matters that are, or have been, in dispute at the bilateral level. The bilateral nature of the issues raised by the Request is further emphasised by the summary in Mauritius' Aide Mémoire of the recent bilateral negotiations between the United Kingdom and Mauritius (which, as noted in **Chapter I** above, postponed the General Assembly's consideration of the Request)[292].

g. The draft Request was formulated by Mauritius so as to avoid any express reference to a dispute over sovereignty. However, as appears from its wording, from the Mauritian Aide Mémoire, from the statements made at the General Assembly meeting of 22 June 2017, and from subsequent statements of Mauritius[293], the Request has as its object a declaration from this Court to the effect that the United Kingdom acts unlawfully in the "continued administration", i.e. in continuing to assert its sovereignty over, the Chagos Archipelago[294].

h. In its Aide Mémoire, Mauritius also makes much of the finding by the UNCLOS Annex VII Tribunal that, as a result of the 1965 Agreement, the United Kingdom had become bound under international law to return the Chagos Archipelago to Mauritius once it was no longer required for defence purposes[295]. The United Kingdom accepts this[296]. Mauritius, however, glides over the fact that, by the 1965 Agreement, in November 1965 the Mauritius Council of Ministers also gave its consent to the detachment of the Chagos

[291] Mauritius, Aide Mémoire, May 2017, para. 8 (**Annex 3**).
[292] *Ibid.*, paras. 10-11.
[293] See Mauritius press release, 31 October 2017 referring to a meeting between Mauritius' Prime Minister and Mr Bancoult and reporting that (emphasis added): "The meeting focused on *joint efforts being undertaken at the International Court of Justice for Mauritius to effectively exercise its sovereignty over the Chagos Archipelago* and for the right of Mauritian citizens, including those of Chagossian origin, to return to and resettle in the Chagos Archipelago" (**Annex 75).**
[294] See para 5.22 above.
[295] Mauritius, Aide Mémoire, May 2017, paras. 6-7 (**Annex 3**).
[296] See para 6.13 above.

Archipelago[297], and likewise the fact that the Annex VII Tribunal found that the 1965 Agreement was reaffirmed by the conduct of the two States and became an international law agreement upon independence. The status, interpretation and application of the bilateral 1965 Agreement could be of central importance to the resolution of the disputed issue over sovereignty, and these matters are likewise central to the answer to the current Request that Mauritius is understood to be seeking[298].

7.14 It follows from all the above that there is a longstanding bilateral dispute in particular over sovereignty that is central to, underlies, and motivates the current Request. Far from being concerned primarily with the process of decolonization[299], the Request appears to seek from the Court determinations as to the legal status and effect of a longstanding bilateral agreement, i.e. the 1965 Agreement, and seemingly also determinations as to the 1982 Agreement and the multiple renunciations that followed.

7.15 The United Kingdom has no wish to contest the suitability of the Court addressing matters of decolonization in general. If the current Request could be answered without *de facto* determining the longstanding bilateral dispute over sovereignty and related matters, the United Kingdom could and would have no objection. However, this does not appear to be possible (or intended). For example, as to the 1965 Agreement:

a. This is an international Agreement that has been reaffirmed by Mauritius on and since independence[300].

b. It is a bilateral agreement. Its binding effect and interpretation are not, and could not be, subject to challenge by any third party or body, and can only be contested by either Mauritius or the United Kingdom.

[297] See paras. 3.29-3.32 above.
[298] General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88) , p.6. (**UN Dossier No. 6**).
[299] Cf. the assertions of Mauritius in Mauritius Note Verbale No.210/2017(MMG/CD/5/SEC) to Member States of the United Nations Human Rights Council, 21 June 2017, para. (e) (**Annex 78)**.
[300] *Chagos Arbitration* Award, para. 425. (**UN Dossier No. 409)**; and paras. 3.33-3.50 above.

c. Despite its past reaffirmations of the 1965 Agreement, Mauritius has elected in the *Chagos Arbitration*, and apparently now again, to contend that this Agreement is invalid. The United Kingdom contests this, as it has always done since the matter was first put in issue by Mauritius (albeit decades after independence).

d. The status of the Agreement is a solely bilateral matter, which this Court is nonetheless now being asked to engage with. It is not a matter that will somehow arise in the Court's consideration of the Request *sua sponte*. It is only through Mauritius reiterating its past challenge to the validity of the 1965 Agreement *in these proceedings* that this issue will come before the Court, and will thereby become a critical issue for the Court to decide before it could give an answer to the Request. Thus, although the Request comes from the General Assembly, it could only be through the two States joining issue before the Court on their longstanding bilateral dispute as to this 1965 bilateral Agreement that the Court could be in a position to begin to answer the Questions put. Thus the issue that is being put before the Court is truly bilateral in nature and cannot be seen as originating separately in the General Assembly.

e. For the Court then to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. The United Kingdom has made plain on various occasions that it does not consent to Mauritius' challenge to the validity of the 1965 Agreement being submitted to adjudication. Moreover, Mauritius' submissions may be asking the Court to make determinations inconsistent with those that already bind it and the United Kingdom as a result of the *Chagos Arbitration*.

7.16 The United Kingdom recognises that Question (a) of the Request is purely historical in nature and could, indeed, would have to be answered by reference to the position as of the grant of independence in 1968, when it was in no sense suggested by Mauritius that the 1965 Agreement was invalid. It nonetheless requires the Court to engage in other

matters that have long been in issue as part of a bilateral dispute. Moreover, Question (b) asks the Court to address the legal consequences arising from "the continued administration by the United Kingdom … of the Chagos Archipelago".

a. Question (b) thus appears inevitably to require consideration of the current position so far as concerns sovereignty, i.e. the validity of the 1965 Agreement, taking into account the whole history of the bilateral relations/exchanges of the United Kingdom and Mauritius from the latter's independence, and bearing in mind that the legal status and reaffirmation of the 1965 Agreement are matters on which the Annex VII Tribunal in the *Chagos Arbitration* has already made relevant and binding determinations.

b. Question (b) likewise refers to "the inability of *Mauritius* to implement a programme for the resettlement on the Chagos Archipelago of *its* nationals, in particular of Chagossian origin" (emphasis added). This appears to be a reference to Mauritius' potential rights as a sovereign, and not to any rights to be exercised by or on behalf of the Chagossians.

7.17 The above is not a situation that is replicated in the past requests before the Court. The key cases where the existence of a dispute has been considered by the present Court with respect to its discretion under Article 56(1) are as follows:

a. *Interpretation of Peace Treaties*: as the Court explained in its Advisory Opinion, the request was solely concerned with the applicability to certain disputes of the *procedure* for settlement instituted by the Peace Treaties with Bulgaria, Romania and Hungary. The Court was not being asked to engage in the *merits* of those disputes. Distinguishing the request at issue in *Eastern Carelia*[301], the Court stated in terms that the request "in no way touches the merits of those disputes", and that "the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it"[302].

[301] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5.*
[302] *Interpretation of Peace Treaties, Advisory Opinion, First Phase, I.C.J. Reports 1950*, p. 65, at p. 72.

b. The *Namibia* case: the background to the request was Security Council resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon States to act accordingly[303]. The Security Council had already determined that the action of South Africa was unlawful.

c. *Western Sahara:* as to the key question of whether Western Sahara had been *terra nullius* at the time of colonisation, the Court considered that although there was a "legal controversy", this was one that arose during the proceedings of the General Assembly and "did not arise independently in bilateral relations"[304]. It found that:

> The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory. [305]

Moreover, as the Court explained, the issue between Morocco and Spain regarding Western Sahara was not one as to the legal status of the territory as of the date of the request, but one as to the rights of Morocco over it at the time of colonization. Thus the Court concluded: "The settlement of this issue *will not affect the rights of Spain today* as the administering Power … It follows that the legal position of the State which has refused its consent to the present proceedings is *not 'in any way compromised* by the answers that the Court may give to the questions put to it' *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950,* p. 72)."[306] The

[303] *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.
[304] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at p. 25, para. 34.
[305] *Ibid.*, pp. 26-27, para. 39.
[306] *Ibid.,* p. 27, para. 42 (emphasis added).

contrast with Question (b) of the current Request, which is expressly focused on the "continued administration by the United Kingdom", is striking.

d. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*: the Court upheld the rule that it should not give a reply to a request where this would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent, finding however that to give a reply to the question put would have no such effect. It drew a distinction between the difference as to the *applicability* of the Convention on Privileges and Immunities, with which it could concern itself, and the dispute between the United Nations and Romania with respect to the *application* of that Convention, which it evidently considered it could not state its position on[307].

e. The *Wall* case: the Court acknowledged that Israel and Palestine had expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court had been asked to pronounce. However, and unlike the current case, the subject-matter of the advisory opinion then sought (construction of the wall) was by no means the central aspect of the longstanding dispute between Israel and Palestine. Further, while the Court considered that the opinion had been requested on a question of particularly acute concern to the United Nations, it was one located in a much broader frame of reference than a bilateral dispute. The responsibility of the United Nations had its origin in the League of Nations Mandate and the Partition Resolution concerning Palestine, and was considered by the General Assembly as permanent in nature. In those very particular circumstances, and moreover in circumstances where there were no directly relevant bilateral agreements comparable to the 1965 and/or 1982 Agreements in this case, the Court did not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement[308].

[307] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989,* p. 177, at p. 191, para. 38.
[308] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at pp. 158-159 paras. 49-50.

7.18 It follows from the above that the current case engages the principle stated in *Western Sahara* in a way that is unique.

a. In the above cases: the underlying substantive issue in the given dispute had already been decided (*Namibia*); or was carefully not placed before the Court (*Interpretation of Peace Treaties*, also the *Convention on the Privileges and Immunities of the United Nations* case); or was circumscribed so as to avoid the current rights of the parties (*Western Sahara*); or was peripheral to the core subject matter of the underlying bilateral dispute and instead reflected one facet of a topic which the Court regarded as of much broader concern to the United Nations (the *Wall* case).

b. By contrast, and regardless of its formulation so as to avoid any express reference to sovereignty, the current Request in its effect seeks a decision in Mauritius' favour on the defining dispute in UK-Mauritius relations – the longstanding bilateral dispute over sovereignty, and in the absence of any prior determinations by the Security Council (cf. *Namibia* and the *Wall*[309]). Further, the Request has not been made in circumstances where the General Assembly had been actively considering the Chagos Archipelago in the context of decolonization (or any other context)[310].

c. The Request has also been framed in such a way as to seek to impact upon "the legal status of the territory today" and to "affect the rights of [the United

[309] As to the *Wall* case, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, p. 166, paras. 74-75 referring to Security Council resolutions 242 (1967), 298 (1971) and 478 (1980); at para. 99 on Security Council resolutions 237 (1967), 446 (1979), 681 (1990) and 799 (1992) concerning application of the Fourth Geneva Convention 1949; and at paras. 120 and 135 on Security Council resolutions 446 (1979), 452 (1979) and 465 (1980) with respect to Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) being in breach of international law.

[310] It has been suggested by Judge Higgins that, in the Advisory Opinion in the *Wall* case, the Court revised rather than applied *Western Sahara* so far as concerns this criterion. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* Sep. Op. Judge Higgins, paras. 12-13, and cf. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at pp. 26-27, para. 39. It is noted, however, that the issue of Palestine had been a constant source of concern and activity for the General Assembly, including in the repeatedly reconvened Tenth Emergency Special Session: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at pp. 145-146 and 159, paras. 18-19 and 49.

Kingdom] today" (cf. *Western Sahara*[311]), in circumstances where there are bilateral agreements between two disputing parties on the very subject matter of the request (cf. the *Wall* case, where there was no agreement concerning whether the wall could be constructed or on compensation for those Palestinians impacted by its construction, and still less multiple renunciations by Palestinians of rights to bring any claim with respect to the wall).

d. Thus, the intention appears to be that the Court, in responding to the Request, should consider and determine the issues relating to the 1965 Agreement, i.e. an agreement that is unquestionably bilateral in nature, that was centrally in dispute as between the United Kingdom and Mauritius in the *Chagos Arbitration*, and as to which certain binding determinations have already been made by the Annex VII Tribunal. It may also be the case that the 1982 Agreement and the multiple renunciations are being called into question.

e. Yet the two parties' competing submissions as to *inter alia* the 1965 Agreement would be decided without even the benefit of the protections inherent in a contentious procedure. The absence of such protections was a source of much concern in the *Wall* case[312], and those concerns merely change form, and do not disappear, when a respondent State is willing to assist the Court by setting out its position on the merits. Thus, for example, the State would have considerably less time to put forward its arguments in oral argument, and would not benefit from a second round i.e. an opportunity to reply to the arguments that the disputing party has made.

f. Further, it appears that the Court will be being asked to engage with a set of complex facts, including as to the bilateral dealings between (i) the UK Government and the Mauritian Council of Ministers in the period mid-1965 to

[311] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at p. 25, para. 42: "The issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will not affect the rights of Spain today as the administering Power, …".

[312] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, Separate Opinion of Judge Owada; Declaration of Judge Buergenthal.

March 1968, and (ii) the United Kingdom and Mauritius in the period thereafter[313]. It is plain that it must be for Mauritius, in the context of any judicial proceedings, to make good its case on duress and/or that the 1965 Agreement does not contain a valid consent and was not reaffirmed by it in the post-independence period. It bears the burden of proof in this respect. Yet, in advisory opinions, there are no parties as such before the Court and the concept of burden of proof would in the usual course be playing no role[314]. This offers an apt demonstration of why the current issues are not suitable for determination in an advisory opinion and do raise questions of judicial propriety. This is all the more so to the extent that Mauritius may ask the Court to re-open matters that have been determined in the *Chagos Arbitration*.

7.19 In short, the Request concerns a dispute that has arisen "independently in bilateral relations"[315]. Of course, the issue of the Chagos Archipelago was a matter of concern for the United Nations in the years prior to the independence of Mauritius, but in the following years there was no challenge to the United Kingdom's sovereignty over the Chagos Archipelago, while Mauritius *qua* sovereign State reaffirmed the 1965 Agreement[316]. As to the position that Mauritius has wished and now wishes to take on the 1965 Agreement, that was and is a matter solely for Mauritius in exercise of its rights as a sovereign State. It was only from the early 1980s that the dispute arose, and independently so, in the bilateral relations of the United Kingdom and Mauritius. Various attempts have since been made by Mauritius to secure contentious jurisdiction over this dispute, and it now seeks to have the same dispute addressed by the Court through the means of an advisory opinion.

---

[313] Note the view expressed in the *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 39 *AM. J. INT'L L.* Supp. 1, 22, para. 69, that the opinion should be made on the basis of an agreed and stated set of facts. See also at paras. 71 and 73.

[314] See e.g. Judge Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice', in *Enhancing the Rule of Law Through the International Court of Justice*, ed. Gaja and Stoutenburg (2014) 63 at pp. 68-69.

[315] Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at pp. 157-158, para. 47, referring to *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12 at p. 25, para. 34.

[316] *Chagos Arbitration*, Award, para. 425 (**UN Dossier No. 409**); and see paras. 3.38-3.50 above.

C. Conclusions

7.20 While the United Kingdom notes that the Request makes no express reference to sovereignty and does not expressly seek an opinion as to which State is entitled to or should retain or acquire sovereignty, the United Kingdom finds it very difficult to read the Request in any way other than as requiring an opinion from the Court on these long-disputed issues, including as to the current legal consequences (cf. *Western Sahara*). Likewise, the United Kingdom finds it difficult to see how the case that Mauritius is making can be consistent with the binding determinations already made in the *Chagos Arbitration*.

7.21 In these circumstances, the giving of an advisory opinion would not be consistent with judicial propriety, including because it would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If the principle of non-circumvention is not to be upheld in this case, and the Court is to express its position on the bilateral Agreements and post-1968 reaffirmations and bilateral relations between the United Kingdom and Mauritius, then it appears that the principle may be taken as abandoned altogether. It is submitted that this would be inconsistent with both the language of Article 65(1), the Court's jurisprudence, and its position as a Court of Law.

PART THREE

THE LEGAL ISSUES ARISING FROM THE QUESTIONS

CHAPTER VIII

THE PROCESS OF DECOLONIZATION WAS LAWFULLY COMPLETED IN 1968

8.1 As explained in **Chapter VII** above, the United Kingdom is firmly of the view that the Court should exercise its discretion and not respond to the questions put to it in the Request. It is only in the alternative, should the Court decide to answer the Question (a), that in this Chapter the United Kingdom offers some considerations that should inform any such response.

8.2 **Section A** considers the terms of the Question, including the assumptions made and the particular choice of words used. **Section B** explains that Mauritius consented to the detachment of the Chagos Archipelago in 1965 and that Mauritius' recent allegations as to invalidity of consent have no basis in either British constitutional law or international law. The process of decolonization was thus lawfully completed in 1968. This provides the short answer to Question (a).

8.3 **Section C** explains that even if self-determination had constituted a right under international law in 1965, it would not have prohibited detachment of the Chagos Archipelago. It was no part of any (supposed) right that the boundaries of a non-self-governing territory had to remain entirely unchanged. Paragraph 6 of General Assembly resolution 1514 (XV) was adopted in haste, without any clear understanding as to its meaning, and did not reflect any rule of customary international law in existence in 1960, 1965 or 1968 or subsequently. **Section D** explains how, in any event, the right to self-determination had not crystallized by 1968.

A. Interpretation of Question (a)

8.4 Question (a) reads:

> 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?

8.5 Four points may be made about the Question.

8.6 First, as to temporal issues, two dates are important for Question (a): the detachment of the Chagos Archipelago from Mauritius in 1965, and the independence of Mauritius in 1968[317]. If the detachment of the Chagos Archipelago was lawful on 8 November 1965, then it follows that it was also lawful at the time of Mauritius' independence on 12 March 1968. According to the inter-temporal rule, the applicable law, whether municipal or international, is the law of the relevant time[318]. The Court should look at a legal concept as it stood at the relevant time, and not in the light of how the law subsequently developed[319].

8.7 Second, questions put to the Court for an advisory opinion "should be asked in neutral terms rather than assuming conclusions of law that are in dispute"[320]. Question (a) departs from that standard by assuming that the four listed General Assembly resolutions reflect relevant "obligations" under international law. These resolutions are not legally binding, as is the case with most General Assembly resolutions, and as is evident from a close examination of their terms and the circumstances of their negotiation and adoption[321]. Nor do they reflect obligations binding on the United Kingdom in respect of the Chagos Archipelago or Mauritius.

a. General Assembly resolutions 2232 (XXI) and 2357 (XXII) may be dealt with briefly. These were omnibus resolutions on 25 Territories expressing

[317] Although Question (a) refers to 1968, the General Assembly agenda item, as proposed by Mauritius and as included in the agenda on 16 September 2016, only refers to 1965 ("Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965"), as does the title given to the case by the International Court.
[318] *See Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 39, para. 79; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, p. 23, para. 16 (citing *Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, p. 176, at p. 189).
[319] *Island of Palmas* (1928) 2 RIAA 829, 845. See also *Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, p. 176, at p. 189 and *Kasilkili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, p. 1062, para 25.
[320] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 36, para. 62.
[321] Section C below.

"deep concern", but not creating any binding legal obligations for Member States.

b. **Section C** of this Chapter will focus on the status and meaning of resolution 1514 (XV), the words of its paragraph 6 being repeated in resolutions 2232 and 2357. **Section C** will also consider resolution 2066 (XX), which is the only resolution of the four that focuses on the "Question of Mauritius". Resolution 2066 (XX) did not however create any legal obligations for the United Kingdom, and did not purport to do so (see further **paragraphs 8.49-8.54** below).

8.8 Third, Question (a) makes no express reference to "sovereignty" when this is in fact the real issue that Mauritius seeks to have addressed by the Court in these proceedings[322].

8.9 Fourth, Question (a) refers to the process of decolonization being "lawfully completed". "Decolonization" is sometimes used interchangeably with self-determination, but it is distinct from it. Decolonization is a political process, not a legal principle or right under international law. The process of decolonization seeks to eliminate colonial domination over parts of the world. Through the pursuit of the *political* process of decolonization for many decades, including under the League of Nations, a *legal* right of self-determination emerged after the 1960s.

8.10 It is undisputed that Mauritius became a sovereign independent State on 12 March 1968. In the United Kingdom's submission, this date marked the lawful completion of the process of decolonization for Mauritius.

8.11 Following its independence, Mauritius was removed from the list of territories monitored by the United Nations Special Committee on Decolonization

[322] See Chapter VII above.

(Committee of 24 or 'C-24')[323]. It was admitted to the United Nations on 24 April 1968. It is noteworthy that when the UN Security Council discussed Mauritius' application to join the UN and made a recommendation to the General Assembly[324], no Member made any reference to the Chagos Archipelago[325]. Nor did Mauritius. When the General Assembly admitted Mauritius to membership in the UN[326], no Member State referred to the Chagos Archipelago or expressed any reservations as to the process of decolonization in its case[327]. Again, nor did Mauritius.

B. The elected representatives of Mauritius validly consented to the detachment of the Chagos Archipelago

8.12 There was no suggestion by Mauritius as of 12 March 1968 that the consent to the detachment of the Chagos Archipelago was invalid. The claim that the consent of its elected representatives was obtained under conditions of duress, was raised with the United Kingdom belatedly in August 2012 in the Memorial of Mauritius in the *Chagos Arbitration*[328]. The argument did not appear in the Notice of Arbitration, which had been filed in 2010[329]. Nor did Mauritius raise duress as vitiating consent in its multiple statements in the General Assembly's general debate beginning in 1980[330].

8.13 In the *Chagos Arbitration* proceedings, Mauritius advanced two main arguments to challenge the validity of the consent it gave to the detachment in 1965. First, it argued that the consent was invalid because of the United Kingdom Prime Minister Wilson's

---

[323] 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, Twenty-Third Session, 1968 (A/7200/Rev.1)**,** para 176 (**UN Dossier No. 257**).

[324] Security Council Resolution 249, "Admission of new members to the United Nations," (S/RES/249 of 18 April 1968) (**UN Dossier No. 260)**.

[325] Security Council, Official Records, 23rd year, 141th meeting, 18 April 1968 (S/PV.1414) (**UN Dossier No. 261)**.

[326] General Assembly Resolution 2371(XXII) "Admission of Mauritius to membership in the United Nations" (A/RES/2371(XXII) of 24 April 1968) (**UN Dossier No. 263**).

[327] General Assembly, verbatim record, 22nd Session, 1643rd Plenary Meeting, Wednesday, 24 April 1968, 3:00 p.m. (A/PV.1643) (**UN Dossier No. 264**).

[328] Mauritius' Memorial, *Chagos Arbitration*, paras 1.23, 6.25, 6.29-6.30, available at https://www.pcacases.com/web/sendAttach/1796 .

[329] *Chagos Arbitration*, Notification and Statement of Claim, 20 December 2010 (**UN Dossier No. 407)**.

[330] See **UN Dossier Nos. 269, 271, 272, 273, 281-291, 293-294, 296, 298, 300, 302, 304, 306, 308, 310, 312-313.**

"veiled threat" at the September 1965 meeting that independence would not be granted unless the Mauritian Ministers agreed to the detachment[331]. Second, Mauritius contended that the consent was contrary to the rules on self-determination because the Council of Ministers did not represent the people and/or lacked legal capacity to consent, and a referendum was required[332].

8.14 These arguments are wrong on the facts and the law.

8.15 The facts of the consent by Mauritius to the detachment of the Chagos Archipelago have been set out in **Chapter III**. In brief:

a. On 23 September 1965, the Premier of Mauritius and other senior Mauritian politicians agreed in principle to the detachment of the Chagos Archipelago, a condition of which was the undertaking by the United Kingdom to return the Archipelago to Mauritius when it was no longer needed for defence purposes.

b. During October 1965, the Mauritian representatives requested and obtained further undertakings in exchange for agreement to the detachment.

c. On 6 October 1965, the British Government asked the elected Council of Ministers whether they agreed to detachment, and in response on 5 November 1965, six weeks after the in-principle agreement, Mauritius' Council of Ministers expressly consented to the detachment.

d. In August 1967, the detachment of the Chagos Archipelago was a matter of public record. That month the General Election was won by those in favour of independence and who had agreed to the detachment of the Chagos Archipelago. The newly-elected Legislative Assembly voted for independence without the Chagos Archipelago.

[331] Mauritius' Reply, *Chagos Arbitration*, para 2.53, available at https://www.pcacases.com/web/sendAttach/1799.
[332] Mauritius' Memorial, *Chagos Arbitration*, para. 6.29; Mauritius' Reply, *Chagos Arbitration,* paras. 2.69, 5.24. See also Transcripts 248:24 to 251:21; 972: 16-24, available at https://www.pcacases.com/web/sendAttach/1573 and https://www.pcacases.com/web/sendAttach/1578.

e. From 1968, Mauritius did not question the legal validity of consent to the detachment, even in its multiple interventions in the General Assembly from 1980 onwards. Indeed, after 1968 Mauritius reaffirmed its consent to the detachment, including the conditions for its return, on multiple occasions.

8.16 In assessing these facts and interpreting the 1965 Agreement, the Court is to apply the law of the relevant time[333]. From 1965 until the independence of Mauritius on 12 March 1968, the governing law was British constitutional law, as has already been found in the *Chagos Arbitration*[334]. It was also found that "both Parties were committed to honouring the 1965 Agreement in their post-independence relations"[335]. However, in this pre-independence period, probably the most that the 1965 Agreement could have been was a contract binding upon the parties under domestic law[336]. If it were to be regarded as a contract in 1965, there would be no basis for concluding that the United Kingdom's conduct came anywhere close to meeting the standard for duress under the law at the time[337], and Mauritius has not suggested that it did.

8.17 As for the post-independence period, the *Chagos Arbitration* Tribunal explained: "The independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement" [338]. After 12 March 1968, the governing law was thus international law. The drafters of the Vienna Convention on the Law of Treaties (which was adopted the following year) rejected a freestanding doctrine of duress and instead provided for two specific circumstances where coercion would vitiate consent.

a. Article 51 provides that the expression of a State's consent to be bound by a treaty which has been "procured by the coercion of its representative through

[333] See para. 8.6 above.
[334] *Chagos Arbitration* Award, para. 425 (**UN Dossier No. 409)**.
[335] *Ibid.*, para. 424 (**UN Dossier No. 409)**.
[336] I. Hendry and S. Dickson, *British Overseas Territories Law*, p. 261, cited in the *Chagos Arbitration* Award, para. 424 (**UN Dossier No. 409)**.
[337] Treitel, *The Law of Contract,* 2nd Ed., 1966, p.286 (**Annex 79**); Chitty, *Chitty on Contracts*, 23rd Ed. (1968), 312, 351 (**Annex 80**).
[338] *Chagos Arbitration* Award, para. 425 (**UN Dossier No. 409)**.

acts or threats directed against him" shall be without legal effect. The acts or threats must directed against the representative as an individual, in his or her private capacity, and not against the State[339]. The record of the meeting between Prime Minister Wilson and Premier Sir Ramgoolam relied on by Mauritius does not suggest any communication that even approaches this test[340]. Nor indeed did the Premier express Mauritius' consent to be bound on that occasion. That was given by the Council of Ministers on 5 November 1965.

b. Article 52 provides that a treaty is void if its conclusion was "procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations"[341]. Mauritius has not shown (and of course could not show) any evidence of any threat or use of force by the United Kingdom.

8.18 It follows that under British constitutional law or under international law, the representatives of Mauritius who agreed to the detachment were not under duress and their consent was valid.

8.19 Mauritius' secondary argument is that consent to the detachment could only be expressed through a referendum as evidence of the free and genuine consent of the population concerned[342]. This argument assumes that some form of consent was required, which is an assumption that the United Kingdom rejects. In any event, there is no rule of international law requiring that a population express its free will, including its consent to the detachment of a part of its territory (in this case, a remote Lesser Dependency), through a referendum. Mauritius has sought to present the supposed rule as part of the right to self-determination[343]. As set out in **Section D** below, no right to

[339]O. Dörr, K. Schmalenbach, *Vienna Convention on the Law of Treaties. A Commentary* (2012), pp. 857-869.
[340] See paras. 3.17-3.24 above.
[341] During the negotiation of this Article, proposals for a broader doctrine that encompassed economic and political forms of duress were rejected: C Murphy, "Economic Duress and Unequal Treaties" (1970-71) 11 *Virginia Journal of International Law* 51.
[342] Mauritius' Memorial, *Chagos Arbitration*, paras 6.28-6.29, available at https://pcacases.com/web/sendAttach/1796.
[343] *Ibid.*, paras 6.28-6.29.

self-determination existed under international law until after the 1960s, but even if it had, the right did not require consultation by referendum.

8.20 A referendum was not required for the question of the independence of a colonial territory, let alone the detachment of a Lesser Dependency. Hendry and Dickson (addressing British practice) explain:

> The consistent practice in the post-Second World War decolonisation process was to ensure that independence had the support of the people of a territory either by referendum or by means of a general election at which independence formed part of the winning party's mandate. In this way the principle of self-determination was regarded as satisfied[344].

8.21 In the case of Mauritius, a General Election was the method chosen for determining the support of the people[345]. General Elections also preceded independence in cases such as Kenya, Zambia, The Gambia, and Guyana. In other cases, such as Jamaica, Malta, and Tuvalu, a referendum on independence was held. The choice of method was a political matter.

8.22 Even under today's understanding of self-determination, there is no restriction that would prevent the detachment of the Chagos Archipelago by consent of the elected representatives. The Friendly Relations Declaration lists four possible outcomes for the exercise by a people of their right of self-determination: establishment of a sovereign and independent state; free association with another independent state; incorporation within an independent state; or "any other political status freely determined by a people". In fact, none of these outcomes concern the excision of a part of the territory, but even if they did, the principle at stake is 'free determination', not mandatory referendums. Over the last seven decades, the UN has supervised or endorsed referendums, consultations, decisions of representative bodies and negotiations between an outgoing administering Power and the local popular representatives. What matters is the process should be based on "informed, free and voluntary choice by the

[344] I. Hendry, S. Dickson, *British Overseas Territory Law* (2011) p. 280 (**Annex 81**).

[345] It was also the method supported by the majority of the Mauritian representatives to the Constitutional Conference in 1965. See Mauritius Constitutional Conference 1965, presented to Parliament by the Secretary of State for the Colonies by Command of Her Majesty, Command Paper 2797 (October 1965) (**Annex 22**).

peoples concerned"[346]. Such an informed, free and voluntary choice was made by Mauritius in 1965, 1967 and 1968, and the argument that consent was vitiated by duress was not raised for nearly five decades[347].

8.23 The consent of Mauritius to the detachment of the Chagos Archipelago in 1965, which continued through to independence (and beyond), inevitably means that as of independence in 1968 the process of decolonization was "lawfully completed".

C. There was no rule of international law prohibiting the detachment of the Chagos Archipelago in 1965

8.24 It is the United Kingdom's position that a right to self-determination did not crystallize until after the 1960s (see **Section D** below). But even if such a right had existed and had become binding on the United Kingdom as of 1965, it would not have prohibited the detachment of the Chagos Archipelago.

8.25 In pursuing its dispute with the United Kingdom before various fora, Mauritius has argued that the right to self-determination *contains* 'a right of territorial integrity prior to independence' or that this is a customary rule *associated* with self-determination. It relies on paragraph 6 of General Assembly resolution 1514 (XV). This argument appears, for example, in its pleadings in the *Chagos Arbitration,*[348] in its explanatory memorandum of 14 July 2016 annexed to its request for a new item to be added to the General Assembly's agenda[349], its Aide Mémoire of May 2017[350], and the statement of

[346] UN Legal Counsel, Opinion of 11 February 1997, *UN Juridical Yearbook*, p 449, available at http://legal.un.org/docs/?path=../unjuridicalyearbook/pdfs/english/volumes/1997.pdf&lang=E**.**

[347] The acceptance of Mauritius of the detachment of the Chagos Archipelago is referred to by Crawford in *The Creation of States in International Law* (2nd ed, 2006), Appendix 3, p. 754, n 11. The BIOT is described as "4 groups of islands detached from Mauritius Seychelles in 1965; 3 returned to Seychelles after independence. 1 group (including Diego Garcia) remains dependent but is not reported on" to the UN under Article 73(e). Crawford observes that: "[o]nly the Chagos Archipelago now remains of the [British Indian Ocean] Territory: *in view of Mauritius' apparent acceptance of the position*, its status as a Chapter XI territory must be considered doubtful" (emphasis added).

[348] Mauritius' Memorial, *Chagos Arbitration*, paras. 6.11-6.13 available at https://pcacases.com/web/sendAttach/1796; Mauritius' Reply, para. 2.70, available at https://pcacases.com/web/sendAttach/1799.

[349] Letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations to the Secretary-General (A/71/142 of 14 July 2016), annex, paras 4 and 5 (**UN Dossier No. 1**).

[350] Mauritius Aide Mémoire, May 2017, paras 4-5 (**Annex 3)**.

Minister Mentor Jugnauth on the day of the vote in the General Assembly on 22 June 2017[351]. Indeed, the preamble to the resolution requesting an Advisory Opinion recalls:

> the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in its resolution 1514 (XV) of 14 December 1960, and in particular paragraph 6 thereof, which states that 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.[352]

8.26 Mauritius' argument assumes that a right to territorial integrity as expressed in paragraph 6 of General Assembly resolution 1514 (XV) (1960) was:

a. part of a legal right to self-determination that existed in 1965/68; and/or

b. otherwise customary international law in 1965/1968 and therefore binding on the United Kingdom; and

c. applied to the situation in Mauritius/Chagos Archipelago in 1965/1968.

Each of these assumptions is incorrect.

(i) Paragraph 6 of General Assembly resolution 1514 (XV) was not part of a legal right to self-determination in 1965/1968

8.27 By virtue of the principle of self-determination, "all peoples shall freely determine their political status and freely pursue their economic, social and cultural development". This language appears in resolution 1514 (XV)[353], in the two International Covenants (1966)[354], and (in different terms) in the Friendly Relations Declaration (1970)[355]. The

[351] General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88), p 6 (Jugnauth) (**UN Dossier No. 6**).
[352] General Assembly Resolution 71/292 "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965" (A/RES/71/292 of 22 June 2017), second preambular para (**UN Dossier No. 7**).
[353] Operative para. 2.
[354] Common Article 1.
[355] Under the principle of equal rights and self-determination of peoples.

language does not prescribe the type of political status nor how the people should pursue their development.

8.28 Formulations of the principle of self-determination in the various instruments are silent as to the territory on which a people is living. They say nothing about "the partial or total disruption of the national unity and the territorial integrity of a country", which is mentioned only in paragraph 6 of resolution 1514 (XV).

8.29 Mauritius, for its part, has argued that the principle of *uti possidetis* applies to the "totality of the previous non-self-governing territory", that is, the whole territory as it was in the period prior to independence[356]. This is not the case, and is not suggested in the Court's jurisprudence. On the contrary, in *Burkina Faso/Mali*, the Court explained that the principle secures respect for territorial boundaries *at the moment when independence is achieved*[357]. For Mauritius, this moment was 12 March 1968, at which time the Chagos Archipelago did not form part of the territory of Mauritius, having been detached three years earlier, in 1965.

8.30 At the time, colonial boundaries were often fixed – and adjusted – for administrative convenience. If Mauritius' interpretation of *uti possidetis* were adopted by the Court, the stability of many frontiers around the world inherited at independence could be subject to endless challenges.

[356] Mauritius' Memorial, *Chagos Arbitration*, paras 6.23-6.24, available at https://pcacases.com/web/sendAttach/1796.

[357] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 554, at p. 570, para. 33 and pp. 616-617, para. 116. The Court observed that "[b]y becoming independent, the new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law—and consequentially the principle of *uti possidetis*—applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onward." It explained that international law "applies to the State *as it is*, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands" (para. 30, emphasis in original).

(ii) Paragraph 6 of General Assembly resolution 1514 (XV) (1960) did not reflect a rule of customary international law binding on the United Kingdom in 1965/68

8.31 The so-called right to territorial integrity for non-self-governing territories in the period leading up to independence is not supported by widespread and virtually uniform State practice. A close reading of resolution 1514 (XV) and the circumstances of its drafting and adoption reveal that it did not reflect rules of customary international law. Moreover, resolution 2066 (XX) (1965) did not contain binding obligations. In any event, even if it had been a customary rule, the United Kingdom would have been a persistent objector to any such rule.

General Assembly Resolution 1514 (XV) (1960)

8.32 The starting point is that General Assembly resolutions are not binding under international law. Under Article 10 of the UN Charter, the General Assembly "may discuss any questions or any matters within the scope of the present Charter, and … may make *recommendations* to the Members of the United Nations or to the Security Council".[358] In very limited circumstances, Assembly resolutions have binding effect: where they relate to the adoption of the scale of assessments, the budget, and the internal administration and management of the Organisation under Article 17 of the Charter[359]. The Court has explained that General Assembly resolutions may provide "evidence important for establishing the existence of a rule or the emergence of an *opinio juris*"[360]. It is necessary to examine the content and conditions of a resolution's adoption and whether an *opinio juris* exists. Alternatively, a series of General Assembly resolutions "may show the gradual evolution of the *opinio juris* required" to establish a new rule of customary international law[361].

[358] (Emphasis added).
[359] UN Secretariat Legal Opinion of 9 May 1986, *UN Juridical Yearbook 1986*, available at http://legal.un.org/docs/?path=../unjuridicalyearbook/pdfs/english/by_volume/1986/chpVI.pdf&lang=E#page=13.
[360] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254-255, para. 70.
[361] *Ibid.*

8.33 The text of resolution 1514 (XV) indicates that it is an aspirational instrument. The Assembly is "[c]onscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principle of equal rights and self-determination of all peoples" and "recognize[s] the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence". It speaks of the role of the UN in "*assisting* the movement for independence in Trust and Non-Self-Governing Territories" and recognizes the "ardent[] *desire*" of peoples to end colonialism[362]. Its drafters intended the resolution to speak of desired principles, not to prescribe precise obligations or methods of implementation[363].

8.34 The fact that resolution 1514 (XV) is called a "Declaration" does not mean that it is legally binding. In the case of resolution 1514 (XV), its content and conditions of adoption confirm its non-binding status. It is also worthwhile noting that "Declaration" has been a standard term for non-binding instruments in UN practice:

> International human rights declarations are not legally binding; the term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations[364].

8.35 The provision in resolution 1514 (XV) that Mauritius relies on to pursue its sovereignty claim is paragraph 6. After "[s]olemnly proclaim[ing] the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations", the General Assembly "to this end declare[d] that":

---

[362] (Emphasis added).

[363] General Assembly, verbatim record, 15th Session, 946th Plenary Meeting, Wednesday, 14 December 1960, 12:00 p.m. (A/PV.946) (**UN Dossier No. 73**) Iran: "We have tried, in the text now before you, to state as clearly as possible the principles that we wanted to defend. . . . [F]or reasons which will . . . derive from the special circumstances of each State, we did not want to be specific how these principles should be applied." General Assembly, verbatim record, 15th Session, 933rd Plenary Meeting, Friday, 2 December 1960, 3:00 p.m. (A/PV.933) (**UN Dossier No. 64**): Australia: "This declaration is different from the Charter. The Charter, as I say, is a treaty obligation and precisely worked out. This declaration is different even from the Universal Declaration of Human Rights, which was carefully worked over in a commission and a committee and even then had no binding or enforceable status".

[364] Definition of key terms, UNICEF Introduction to the Convention on the Rights of the Child, available at https://www.unicef.org/french/crc/files/Definitions.pdf.

> 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.[365]

8.36 Paragraph 6 is not drafted in terms appropriate for a rule of customary international law. It does not use legal terminology ("any attempt", "disruption", "national unity", "country"). The language indicates the highly political nature of the paragraph, which is at most a statement of policy, not law. Also, the negotiating history of paragraph 6 shows that it was not considered customary international law in 1960. The paragraph was introduced at a late stage in the process, less than three weeks before the adoption of the resolution and it was not emphasised by delegates during the plenary meetings. A last-minute dispute over an amendment proposed by Guatemala indicated that the scope and meaning of paragraph 6 was unclear.

8.37 The agenda item entitled "Question of a declaration on the granting of independence to colonial countries and peoples" was proposed for inclusion in the agenda of the General Assembly by Mr. Khrushchev, Chairman of the Council of Ministers of the Union of Soviet Socialist Republics, during his address to the Assembly on 23 September 1960[366]. This proposal was formalized in a letter to the President of the General Assembly on the same day[367], which was submitted together with a draft Declaration on the granting of independence to colonial countries and peoples[368].

8.38 The item was considered intermittently between September and December 1960. Paragraph 6 was a late addition to the text at the end of November 1960[369]. Most delegates' interventions in the plenary focused on colonialism in general, and, where applicable, their own colonial experiences. Most of the 27 Member States that did refer

---

[365] The French text reads: « *Toute tentative visant à détruire partiellement ou totalement l'unité nationale et l'intégrité territoriale d'un pays est incompatible avec les buts et les principes de la Charte des Nations Unies*. »
[366] United Nations General Assembly, Fifteenth Session Official Record, 869th Plenary Meeting, UN Doc. A/PV.869, 23 September 1960, para. 94ff (**Annex 82**).
[367] United Nations General Assembly, Fifteenth Session, Chairman of the Council of Ministers of the Union of Soviet Socialist Republics Letter to President of the General Assembly, UN Doc. A/4501, 23 September 1960 (1960) (**Annex 83**).
[368] General Assembly, "Declaration on the Grant of Independence to Colonial Countries and Peoples, submitted by Mr. N.S. Khrushchev, Chairman of the Council of Ministers of the USSR, Chairman of the USSR Delegation, on 23 September 1960 for consideration by the United Nations General Assembly at its fifteenth session" (A/4502 of 23 September 1960; A/4502/Corr.1 of 27 September 1960) (**UN Dossier No. 75**).
[369] Earlier working papers discussed by the Afro-Asian Group did not contain paragraph 6.

to specific paragraphs of the draft resolution during the wider debates focused on paragraph 5, and, to a lesser extent, paragraphs 2 and 3.

8.39 Indonesia addressed paragraph 6 immediately before the vote on the resolution. The Indonesian delegate, at the 947th plenary meeting on 14 December 1960, said:

> When drafting this document, my delegation was one of the sponsors of paragraph 6, and in bringing it into the draft resolution we had in mind that the continuation of Dutch colonialism in West Irian is a partial disruption of the national unity and the territorial integrity of our country.[370]

8.40 The retention of West New Guinea/West Irian by The Netherlands was done at the moment of independence, which is why Indonesia was concerned "that the integrity of the national territories of peoples *which have attained independence* shall be respected"[371]. Indonesia's intervention shows that it did not intend paragraph 6 to include situations of the adjusting of boundaries by the administering Power prior to independence.

8.41 Other States also did not interpret paragraph 6 as prohibiting the adjustment of boundaries in the period preceding independence, but they gave different reasons. Iran, Pakistan, Tunisia and Cyprus saw paragraph 6 as affirming the prohibition on the use of force in Article 2(4) of the Charter (hence the references to "territorial integrity" and "the purposes and principles of the Charter of the United Nations"), in particular as applied to new States that had just emerged from colonialism[372].

8.42 In the last moments of the negotiation, Guatemala with its claim to British Honduras (Belize) in mind, proposed a new operative paragraph:

---

[370] General Assembly, verbatim record, 15th Session, 947th Plenary Meeting, Wednesday, 14 December 1960, 3:00 p.m. (A/PV.947), para 9 (**UN Dossier No. 74)**.

[371] General Assembly, verbatim record, 15th Session, 936th Plenary Meeting, Monday, 5 December 1960, 8:30 p.m. (A/PV.936), para 55 (**UN Dossier No. 67)** (emphasis added).

[372] General Assembly, verbatim record, 15th Session, 936th Plenary Meeting, Monday, 5 December 1960, 8:30 p.m. (A/PV.936), Iran, p. 995 para. 71 (**UN Dossier No. 67)**; General Assembly, verbatim record, 15th Session, 930th Plenary Meeting, Thursday, 1 December 1960, 10:30 a.m. (A/PV.930), Pakistan, p. 1059, para 73 (**UN Dossier No. 61)**; General Assembly, verbatim record, 15th Session, 929th Plenary Meeting, Wednesday, 30 November 1960, 3:00 p.m. (A/PV.929), Tunisia, p. 1044, para 126, (**UN Dossier No. 60)**; General Assembly, verbatim record, 15th Session, 945th Plenary Meeting, Tuesday, 13 December 1960, 3:00 p.m. (A/PV.945), Cyprus, p. 1255, para. 93 (**UN Dossier No. 72)**.

> 7. The principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to recovery of territory.[373]

8.43 The 'Guatemala amendment' triggered a debate over whether paragraph 6 was wide enough to sanction the "recovery" of neighbouring territory by a State, against the wishes of that territory's population[374]. This was not conclusively resolved. On the day of the adoption of the resolution, Indonesia, with its claims to West Irian/West New Guinea in mind, asserted that the Guatemalan amendment was already "fully expressed" in paragraph 6, and that such "territories and peoples" had already been "taken into consideration" in the paragraph[375]. Ostensibly reassured, Guatemala withdrew its amendment[376].

8.44 The Netherlands, in explanation of its vote for resolution 1514 (XV), challenged Indonesia's characterisation of paragraph 6 as being wide enough to encompass the Guatemalan amendment. The Dutch delegate said that paragraph was a reaffirmation of Article 2(4) of the United Nations Charter on the prohibition on the use of force[377].

8.45 When Cambodia introduced the draft resolution on behalf of 43 States in the Assembly on 28 November 1960, it gave no explanation of its terms[378]. The draft resolution was adopted without change on 14 December 1960 by a vote 89-0-9, with the United Kingdom abstaining. The United Kingdom's interventions during the debate noted that it was difficult to improve on Chapter XI of the Charter, particularly as the problems of the development of political independence varied according to an individual territory's circumstances[379].

---

[373] United Nations General Assembly, Fifteenth Session, Official Records, Annexes 1960-61, Part 2, Agenda Item 87, Guatemala Amendment to Document A/L.323, UN Doc. A/L.325, 7 December 1960, p. 7 (**Annex 84**).
[374] General Assembly, verbatim record, 15th Session, 945th Plenary Meeting, Tuesday, 13 December 1960, 3:00 p.m. (A/PV.945), Cyprus, p. 1255, para. 93 (**UN Dossier No. 72)**; and General Assembly, verbatim record, 15th Session, 946th Plenary Meeting, Wednesday, 14 December 1960, 12:00 p.m. (A/PV.946), pp. 1267-70 (**UN Dossier No. 73)**.
[375] General Assembly, verbatim record, 15th Session, 947th Plenary Meeting, Wednesday, 14 December 1960, 3:00 p.m. (A/PV.947), p. 1271, paras. 9-10 (**UN Dossier No. 74)**.
[376] *Ibid.*, p 1271, paras. 15-16, p 1276, paras. 63-4.
[377] *Ibid.*, p 1276, para. 62.
[378] General Assembly, verbatim record, 15th Session, 936th Plenary Meeting, Monday, 5 December 1960, 8:30 p.m. (A/PV.936) (**UN Dossier No. 67)**.
[379] General Assembly, verbatim record, 15th Session, 925th Plenary Meeting, Monday, 28 November 1960, 10:30 a m. (A/PV.925), paras. 16-19 (**UN Dossier No. 56)**; General Assembly, verbatim record, 15th Session,

8.46 In sum, paragraph 6 of resolution 1514 (XV) cannot be read as reflecting a customary international law rule prohibiting any change to the boundaries of colonial territories prior to independence. The negotiations reveal a lack of consensus on its meaning; they certainly do not show a sense of a legal obligation that would prohibit the adjustment of colonial boundaries by an administering Power.

8.47 In 1970, the Friendly Relations Declaration – an instrument that was carefully negotiated over more than six years – made no reference to resolution 1514 (XV). This omission was deliberate[380]. The Special Committee's May 1970 report to the Sixth Committee contains several references to resolution 1514 (XV), mainly in proposed paragraphs for the draft Declaration[381]. These were not adopted.

8.48 The Friendly Relations Declaration also departed from the language of paragraph 6 of resolution 1514 (XV). Paragraph 6 uses the term "*country*", which could be taken to mean a sovereign state or a non-state entity such as a province or a pre-independence territory. The Friendly Relations Declaration, in contrast, refers to "the territorial integrity or political unity of *sovereign and independent States*", thus excluding application of the provision to pre-independence territories[382]. The material differences between resolution 1514 (XV) and the Friendly Relations Declaration strongly suggest that the former did not reflect customary international law; States had no hesitation in arguing for - and making - changes to aspects of resolution 1514 when drafting the Friendly Relations Declaration.

General Assembly Resolution 2066 (XX) (1965)

8.49 Five years after resolution 1514 (XV), the Assembly adopted resolution 2066 (XX) on "The Question of Mauritius". Mauritius relies on this resolution to claim that there was

947th Plenary Meeting, Wednesday, 14 December 1960, 3:00 p m. (A/PV.947), paras. 45-58 (**UN Dossier No. 74)**.

[380] R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: A Survey", 65 AJIL 713 (1971), at 730-733.

[381] United Nations General Assembly, 25th Session, Special Committee Report to Sixth Committee, UN Doc. A/8018, May 1970 (**Annex 85)**. For proposed paragraphs see p. 27, para. 50; p. 40, para. 6; p. 43, headings VI and VII.

[382] (Emphasis added).

a binding rule prohibiting detachment of the Archipelago in 1965[383], but the text and circumstances of its adoption do not support this claim.

8.50 Resolution 2066 (XX) was not drafted in mandatory terms (nor could it be legally binding on States, being a resolution of the General Assembly unrelated to budgetary matters). In its preambular paragraph, the Assembly noted with deep "concern":

> that any step taken by the Administering Power to detach certain islands from the territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples], in particular of paragraph 6 thereof.

There is no condemnation of the United Kingdom, nor any statement that it has acted in breach of international law.

8.51 The Assembly then "*invite[d]*" the United Kingdom to take measures to implement resolution 1514 (XV) and "*request[ed]*" that the provisions of the resolution be observed in relation to Mauritius[384]. The use of non-binding language when referring back to resolution 1514 (XV) also reaffirms the General Assembly's own understanding, at the time, that resolution 1514 (XV) itself was not legally binding[385]. In paragraph 4 of resolution 2066 (XX), the Assembly proceeded to *invite* "the Administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity"[386].

8.52 The non-mandatory nature of resolution 2066 (XX) is confirmed by the fact that it was adopted some five weeks after the establishment of the BIOT on 8 November 1965 and a month after the Fourth Committee had been informed by the United Kingdom on 16

[383] Letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations to the Secretary-General (A/71/142 of 14 July 2016), para. 4 (**UN Dossier No. 1)**; General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a m. (A/71/PV.88), p. 6 (Jugnauth) (**UN Dossier No. 6)**; Mauritius Aide Mémoire, May 2017, para. 5 (**Annex 3**).

[384] (Emphasis added).

[385] The reference to resolution 1514 (XV) was also not a consensus decision. Fourth Committee, summary record, 1570th Meeting, Friday, 26 November 1965, 3:20 p m. (A/C.4/SR.1570), para. 6 (**UN Dossier No. 154)**, Denmark stated that it was "not convinced that steps envisaged by the administering Power, in full agreement with the Government of Mauritius, with respect to certain small islands in the Indian Ocean was in conflict with General Assembly resolution 1514".

[386] (Emphasis added).

November 1965 of the BIOT's creation[387]. In resolution 2066 (XX), the General Assembly merely invited the United Kingdom not to take future action to "dismember the Territory of Mauritius", knowing that the detachment had already occurred.

8.53 The draft resolution was adopted by the Fourth Committee by 77-0 with 17 abstentions, including the United Kingdom. The United Kingdom delegate explained that the United Kingdom could not support the paragraph of the resolution in which the detachment of certain islands from the Territory of Mauritius was described as a contravention of the 1960 Declaration. The United Kingdom was still less able to regard such action as constituting a dismembering of the Territory or a violation of its territorial integrity. The question of the territorial integrity of Mauritius did not arise in that context[388] because the detachment of the Chagos Archipelago was an "administrative re-adjustment freely worked out" with the elected representatives[389].

8.54 On 16 December 1965, the General Assembly adopted resolution 2066 (XX) by 89-0 with 18 abstentions, including the United Kingdom.

State practice regarding the process of decolonization, in particular the practice of partition/detachment

8.55 Mauritius has not established a customary "right" of a people of a territory to the integrity of its boundaries prior to independence. This would require Mauritius to demonstrate a "settled practice", meaning "extensive and virtually uniform", accompanied by the requisite *opinio juris*[390].

8.56 State practice has been far from settled. The process of decolonization around the world has featured detachment, partition, merger and other arrangements. Such practice has been widely employed not only by the United Kingdom, but by many other

[387] United Nations General Assembly, Twentieth Session, Official Records, Fourth Committee 1558th Meeting, UN Doc. A/C.4/SR.1558 (extract), 16 November 1965, para 80 (**Annex 14** and **UN Dossier No. 152**).
[388] Fourth Committee, summary record, 1570th Meeting, Friday, 26 November 1965, 3:20 p.m. (A/C.4/SR.1570), p. 319, para. 18 (**UN Dossier No. 154).**
[389] United Nations General Assembly, Twentieth Session, Official Records, Fourth Committee 1558th Meeting, UN Doc. A/C.4/SR.1558 (extract), 16 November 1965, para 80 (**Annex 14** and **UN Dossier No. 152**).
[390] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969*, p. 13, at p. 44, para. 77.

administering Powers, including France, Belgium, The Netherlands, the United States, Australia, and New Zealand. The United Nations itself was often involved or at least acquiesced in these arrangements.

8.57 There was widespread State practice in the 1950s and 1960s on detachment prior to the independence of a colony and constitution as a separate territory of the administering Power (Turks and Caicos Islands and the Cayman Islands were separated from Jamaica and became British Overseas Territories); detachment prior to independence of a colony and attachment to another colony/former colony (The Esparses Islands were attached to Madagascar by France and then later administered by the Prefect of Réunion); detachment prior to independence of a colony/protectorate and establishment as an independent sovereign State (Spanish and French zones of influence in Morocco were discontinued when it became independent); merging of colonial territories and/or newly independent States to form a federation or independent State (British Somaliland and Italian Somaliland merged to form the Somali Republic); and splitting into two or more independent States at the time of independence (the Belgian Trust Territory of Ruanda-Urundi became the independent States of Rwanda and Burundi).

8.58 The arrangements that have resulted from these changes to the boundaries of colonial and other dependent territories have been accepted by the international community. The finding of a "right" to the pre-independence territorial integrity of a colonial territory would throw many existing boundaries into doubt.

The United Kingdom was a persistent objector to any rule prohibiting the detachment of Chagos Archipelago

8.59 Even if there had been a customary "right" for the people of a non-self-governing territory to territorial integrity in the 1960s, it would not be binding on the United Kingdom because it was a persistent objector.

8.60 The United Kingdom had consistently objected to the notion in paragraph 6 of resolution 1514 (XV) (1960) that Mauritius says precluded the detachment of the Chagos Archipelago.

8.61 The United Kingdom has consistently voted against or abstained on the General Assembly's annual resolution on the implementation of resolution 1514 (XV). It has never voted in favour. It has given a standard explanation of its vote in the Fourth Committee that it found some elements of the draft unacceptable (including the language of paragraph 6 of resolution 1514 (XV)) and remains committed to modernising its relationship with its remaining Overseas Territories, taking fully into account the view of the people of those Territories.

(iii) Paragraph 6 of General Assembly resolution 1514 (XV) did not and could not apply to the situation in Mauritius/Chagos Archipelago

8.62 Even if the meaning of paragraph 6 of resolution 1514 (XV) were clear and as Mauritius urges, it did not and could not apply because the Chagos Archipelago was not an integral part of the Colony of Mauritius for the purpose of the application of the concept of "territorial integrity" in paragraph 6.

8.63 As stated in **Chapter II**, the Chagos Archipelago is 2,150 kilometres from Mauritius. At the relevant time, they were also remote in terms of social, cultural, political and legal connections with Mauritius[391]. It was a 'Lesser Dependency' with no economic relevance to Mauritius other than as a supplier of coconut oil.

D. There was no right to self-determination under international law in 1968

8.64 A pertinent legal question before this Court is whether there was a rule binding on the United Kingdom requiring decolonization to be of the "whole territory" of Mauritius including the Chagos Archipelago. However, in its bilateral dispute with the United Kingdom over sovereignty over the Chagos Archipelago, Mauritius has consistently raised the broader question of when a right to self-determination came into effect[392].

[391] See Chapter II above.

[392] See the bilateral exchanges in Chapter V above; General Assembly, verbatim record, 71st Session, 88th Plenary Meeting, Thursday, 22 June 2017, 10 a.m. (A/71/PV.88), p 7 (Jugnauth) (**UN Dossier No. 6**).

8.65 Mauritius has argued that "the right to self-determination was clearly established" in 1965[393]. The United Kingdom challenged this argument in detail in the *Chagos Arbitration* proceedings[394]. The Arbitral Tribunal declined to decide the question because it was not necessary for the determination of those of Mauritius' claims over which it had jurisdiction[395]. It is also not determinative of the answer to Question (a) because, as explained in **Section C** above, even if a right to self-determination existed in 1965/1968, it did not follow that the content of the right prohibited the detachment of the Chagos Archipelago. Nonetheless, to assist the Court and to rebut the argument of Mauritius, the United Kingdom sets out briefly its argument that the right did not become customary international law until after the 1960s.

8.66 The UN Charter's purposes and principles includes "the principle of equal rights and self-determination of peoples" as the basis on which "nations" develop friendly relations. The Charter does not further define the content of the principle. The principle was elaborated upon, though not transformed into a "right", in various resolutions and other instruments.

8.67 Mauritius has in the past placed reliance on General Assembly resolutions of the 1950s and 1960s. But General Assembly resolutions are, subject to narrow exceptions, recommendatory in nature[396].

8.68 General Assembly resolution 421 D (V) (1950) refers to the "right of peoples and nations to self-determination". It was adopted by an unrecorded vote of 30 in favour and 9 against, with 13 abstentions. Moreover, the Assembly was merely calling upon the ECOSOC to request the Commission on Human Rights "to study ways and means which would ensure the right of peoples and nations to self-determination"[397]. Similarly, resolution 545(VI) (1952) was adopted by a non-

[393] *Chagos Arbitration* Award, para. 172 (**UN Dossier No. 409**).
[394] United Kingdom Counter-Memorial, *Chagos Arbitration*, Chapter VII, section B; United Kingdom Reply, Chapter V, section C, available at https://www.pcacases.com/web/sendAttach/1798 and https://www.pcacases.com/web/sendAttach/1800.
[395] *Chagos Arbitration* Award, paras. 203, 212, 219-22 (**UN Dossier No. 409**).
[396] See para. 8.32 above.
[397] United Kingdom's Rejoinder, *Chagos Arbitration*, para 5.15 and Appendix to Chapter V with the voting records for the various resolutions, showing that virtually all of them were adopted by a divided vote, available at https://pcacases.com/web/sendAttach/1800.

recorded vote of 42 in favour and 7 against, with 5 abstentions. That resolution only decided to include a reference to a right to self-determination in the draft of what became the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), which were still 14 years away from being adopted (16 December 1966) and 24 years from entering into force between the United Kingdom and Mauritius (20 August 1976).

8.69 General Assembly resolutions on decolonization during the 1960s were non-binding and did not reflect extant obligations under international law, regardless of whether some of their provisions would one day be similar to international law obligations that developed later.

8.70 By the time the two Covenants were adopted in December 1966, there was no consensus as to the existence, meaning and scope of self-determination. Common Article 1 stated that all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development", but it was silent as to what type of political status could be determined and how development could be pursued. It was also silent as to territorial integrity. Further, the adoption of the Covenants in 1966 did not mean that Common Article 1 was a binding legal obligation under customary international law. The Covenants did not enter into force until 3 January 1976 and 23 March 1976, respectively. Mauritius acceded to the Covenants in 1973, and the United Kingdom ratified them on 20 May 1976. They have therefore been in force between Mauritius and the United Kingdom since 20 August 1976.

8.71 The United Kingdom had consistently, throughout the 1950s and 1960s, objected to references to a 'right' of self-determination in UN instruments. And when it came to the adoption of the two Covenants, the United Kingdom emphasised that its obligations under the Charter cannot be expanded or modified by the content of Common Article 1, including its reference to a 'right'. When the United Kingdom signed the two Covenants on 12 September 1968, it made in each case the following declaration, which has not been withdrawn:

> by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail.

8.72 In particular, the Charter refers to friendly relations based on respect "for the principle of equal rights and self-determination of peoples" (Article 1(2)), the principle of non-intervention in matters within the domestic jurisdiction of any state (Article 2(7)), and the responsibilities for the inhabitants of non-self-governing territories including to "assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement" (Article 73(b)).

8.73 In 1974, the need to maintain these declarations upon ratification was considered by a Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights. The Report of the Working Group included the following:

> The United Kingdom strongly opposed the inclusion of [article 1], holding that self determination was a principle not a right. The essential objection from the United Kingdom point of view was that because of the vagueness of the article, it could be interpreted as imposing on a colonial power greater obligations in respect of dependent territories than the Charter itself. Most of our remaining dependent territories are still not ready to choose their eventual status. On signature of the Covenant in 1968, therefore, we sought to establish that acceptance of the Covenant would not commit us to more in the colonial field than do our present obligations under the Charter (especially Articles 1, 2 and 73)[398].

8.74 In the course of negotiating what would become the 1970 General Assembly resolution 2625 (XXV) (Friendly Relations Declaration), the United Kingdom's position on the legal status of the 'principle' of self-determination was set out at length, in comments dated 18 September 1964[399]. The United Kingdom stated, *inter alia*, that

> although the principle of self-determination is a formative principle of great potency, it is not capable of sufficiently exact definition in relation to particular

[398] Report of Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights, 1 August 1974, Annex D, para. 5 (**Annex 86**).
[399] United Nations General Assembly, Nineteenth Session, United Kingdom comments on the Friendly Relations Declaration, UN Doc. A/5725/Add. 4, 22 September 1964 (**Annex 87)**.

circumstances to amount to a legal right, and it is not recognized as such either by the Charter of the United Nations or by customary international law[400].

8.75 The Friendly Relations Declaration was adopted in October 1970. It was the first consensus resolution on the right of self-determination, with the United Kingdom joining the consensus. It had been carefully negotiated over more than six years[401], in contrast to the Assembly resolutions of the 1960s cited in Question (a) that were negotiated in a short period of time and each had to be voted upon. The first codification of the right to self-determination in a binding instrument occurred on 3 January 1976, with the entry into force of the International Covenant on Economic, Social and Cultural Rights.

8.76 In 1971, the Court referred to the "principle of self-determination" as giving the peoples of non-self-governing territories the right to choose their political status[402]. In 1975, the Court referred to the "right" of a people of a territory to "determine their future political status by their own freely expressed will" as the "right of that population to self-determination"[403]. Two decades later in 1995, the Court stated that self-determination was "one of the essential principles of contemporary international law" and had an "*erga omnes* character" that was "irreproachable" [404]. The Court reaffirmed its approach in 2004 and 2010[405].

8.77 In order to answer Question (a), it is not necessary for the Court to address the precise moment in time that a right to self-determination in international law emerged. Even if such a right existed in 1965/1968, it did not establish a rule prohibiting the detachment of the Chagos Archipelago. However, an examination of

[400] *Ibid*., p. 6

[401] R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: A Survey", 65 AJIL 713 (1971), at 730-733.

[402] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Reports 16, para. 52.

[403] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 12, at p. 36, para. 70.

[404] *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 90, at p.102, para. 29.

[405] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004,* p. 136, at paras. 87-88, 118, 122, 149, 155-6; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports* 2010, p. 403, at p. 436, para. 79.

the General Assembly resolutions of the 1950s and 60s relied on by Mauritius shows that a legal right to self-determination did not emerge until after the 1960s.

E. Conclusions

8.78 The short answer to Question (a) is that the process of decolonization of Mauritius was lawfully complete when Mauritius gained its independence on 12 March 1968. The elected representatives of Mauritius had freely agreed to the detachment of the Chagos Archipelago in the 1965 Agreement. As held by the Tribunal in the *Chagos Arbitration*, the 1965 Agreement was reaffirmed on independence, and there was moreover no suggestion by Mauritius as of 12 March 1968 that the consent was invalid. The relevant territory of Mauritius was thus as it existed at that moment of independence in 1968, namely without its former Lesser Dependency of the Chagos Archipelago.

8.79 In its ongoing bilateral dispute with the United Kingdom, Mauritius has argued that the people of a non-self-governing territory had a "right" to territorial integrity prior to independence. It relies on paragraph 6 of resolution 1514 (XV) (1960) to establish this "right". This is incorrect.

8.80 General Assembly resolution 1514 (XV) was an aspirational instrument. There was no consensus on the substantive meaning of paragraph 6. There was also no settled practice or *opinio juris* to support Mauritius' argument that paragraph 6 reflected customary international law. On the contrary, there was State practice showing an acceptance that the boundaries of non-self-governing territories may lawfully change through detachment, merger and other arrangements.

8.81 Finally, an international law right to self-determination did not come into existence or bind the United Kingdom until after the end of the 1960s and therefore had no impact on the lawful completion of Mauritius' decolonization in 1968.

CHAPTER IX

THE CONSEQUENCES UNDER INTERNATIONAL LAW OF THE UNITED KINGDOM'S ADMINISTRATION OF THE CHAGOS ARCHIPELAGO

9.1 As with **Chapter VIII**, the present Chapter is in the alternative to the United Kingdom's primary conclusion that the Court should exercise its discretion not to respond to the questions. The present Chapter addresses the second of the two questions put to the Court by the General Assembly (Question (b)). **Section A** seeks to understand the intent behind Question (b), and explores its scope. **Section B** considers the relevance for Question (b) of the 2015 *Chagos Arbitration* Award. The Chapter concludes in **Section C** by stating the United Kingdom's position on how the Court should reply if it were to decide to respond to Question (b).

A. Interpretation of Question (b)

9.2 Question (b) reads:

> What are the consequences under international law, including obligations reflected in the above-mentioned resolutions *[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]*, 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?[406]

9.3 Question (b) assumes that the response to Question (a) will be that the political process of decolonization of Mauritius was not lawfully completed in 1968. As has been explained in **Chapter VIII** above, this assumption is incorrect. The process of decolonization of Mauritius was indeed completed on 12 March 1968.

[406] The French text of question (b) reads: *«Quelles sont les conséquences en droit international, y compris au regard des obligations évoquées dans les résolutions susmentionnées, du maintien de l'archipel des Chagos sous l'administration du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, notamment en ce qui concerne l'impossibilité dans laquelle se trouve Maurice d'y mener un programme de réinstallation pour ses nationaux, en particulier ceux d'origine chagossienne ?».*

That being so, the United Kingdom considers that Question (b) does not fall to be answered.

9.4 If, nevertheless, the Court were to address Question (b), it will first be noted that the question is both vague and expressed in very broad terms. It asks about the 'consequences under international law' of the United Kingdom's 'continued administration' of the Chagos Archipelago. It may first be recalled in this connection that in practical terms the administration of the British Indian Ocean Territory is unusually confined in nature.

a. It has however resulted in an important environmental protection regime for the maritime zones of the Chagos Archipelago. The Marine Protected Area ('MPA') that was established in 2010 was much debated in the *Chagos Arbitration*. Contrary to the impression that Mauritius seeks to convey, the Arbitral Tribunal did not find that an MPA as such was unlawful, but rather that the establishment of the MPA was in certain particular respects not done in conformity with UNCLOS[407].

b. It is also to be noted that, consistent with the 1965 Agreement, the continued administration of the United Kingdom does not include any exploitation of the living or non-living resources of the Archipelago and its 200-nautical mile zone and its continental shelf. In fact, the United Kingdom has offered to work together with Mauritius to establish the outer limit of the continental shelf beyond 200 nautical miles from the baselines, as Mauritius has itself informed the Commission on the Limits of the Continental Shelf[408].

9.5 In order to answer Question (b), as worded by the General Assembly, it appears that the Court would need to express its opinion, *inter alia*, on whether the United Kingdom or Mauritius currently enjoys sovereignty over the Chagos Archipelago. In order to determine that question, it would be necessary for the Court to assess

[407] *Chagos Arbitration* Award (**UN Dossier No. 409**), para. 547 B *(Dispositif)*, read with paras. 522-541.
[408] Letter from the Permanent Representative of Mauritius to the United Nations to the Secretary of the Commission on the Limits of the Continental Shelf, 24 December 2015 (**Annex 88**).

the whole range of bilateral dealings between the United Kingdom and Mauritius, both before and after the independence of Mauritius on 12 March 1968. However, as explained in **Chapter VII** above, questions of sovereignty cannot be the subject of these advisory proceedings, since that would be the clearest possible circumvention of the requirement of consent to international litigation. Among other things, it appears that the Court may be being asked to reopen and reconsider matters already decided by the binding Award given in the *Chagos Arbitration* (see **Section B** below). In particular, insofar as was necessary to go into the issue in the Arbitration[409], the UNCLOS Arbitral Tribunal found that in 1968, the 1965 Agreement became an international law agreement[410].

9.6 To the apparently very general question that is asked, two specifications are added. These were presumably intended to give some focus to Question (b), and shed light on the intent behind it:

a. The consequences under international law are said to include those arising from (*y compris au regard des*) obligations reflected in (*évoquées dans*) four General Assembly resolutions from the 1960s: 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; and

b. In particular (*notamment*), the consequences under international law are said to be consequences "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."

9.7 The first specification (**paragraph 9.6(a)** above) seems chiefly to be aimed at pointing the Court to what those who drafted the question (Mauritius) see as part of the applicable law. In doing so, it incorrectly and inappropriately assumes that the content of obligations, if any, "reflected" in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI)

[409] See paras. 6.7-6.8 above.
[410] *Chagos Arbitration*, Award, paras. 425-428 (**UN Dossier No. 409**).

of 20 December 1966 and 2357 (XXII) of 19 December 1967 are legally binding on the United Kingdom. As has already been explained in **Chapter VIII** above, this is not the case because of their status as Assembly resolutions, their text, their context, and the circumstances of their adoption.

9.8 The second specification (**paragraph 9.6(b)** above) gives the only specific indication of the subject-matter of Question (b). As explained in **Section C** below, it too begs a large number of questions, whilst assuming that Mauritius has or intends to have some unspecified 'programme for the resettlement … of its nationals'. Mauritius has however been notably vague on its own plans for the Archipelago. The only clear statement Mauritius has made in this regard is providing assurances that it intends to maintain the US military base on Diego Garcia and that the "Security arrangements will remain in place"[411]. Indeed:

a. Despite the reference to a resettlement programme in Question (b), it does not appear that one exists. In a speech delivered in The Hague in connection with these proceedings on 27 November 2017, Mauritius' Prime Minister could only speak of a commitment to "elaborate, once our decolonization is complete, a plan of resettlement"[412].

b. Even more strikingly, Question (b) introduces the prospect of settlement by Mauritian nationals generally as opposed to resettlement solely by Chagossians. It refers to a Mauritian "programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin".

c. In the same 27 November 2017 speech, Mauritius' Prime Minister reiterated this message, speaking of putative plans of "resettlement for the former inhabitants as well as any other Mauritian citizen who wishes to live in the

[411] Mauritius Prime Minister P Jugnauth Introductory Address at the Meeting of Legal Advisers on the Request for an ICJ Advisory Opinion Pursuant to the UN General Assembly Resolution 71/292 of 22 June 2017, The Hague, 27 November 2017 (**Annex 89**).
[412] *Ibid*.

Chagos Archipelago"[413]. Mauritius' intentions about the settlement of Mauritian citizens generally (those who are not Chagossians) on islands of the Chagos Archipelago have not been spelt out.

9.9 In order to be able to consider the Question, the Court would presumably need to have information on the existence, feasibility of, and intentions behind any resettlement programme that Mauritius might have for resettling its nationals, "including but not limited to those of Chagossian origin", on the Chagos Archipelago. As to feasibility with respect to the resettlement of Chagossians, the Court would need to consider the issues as they appear from United Kingdom's commissioning of a detailed and independent feasibility report, its conduct of a public consultation exercise (August-October 2015), and the November 2016 decision against resettlement[414].

9.10 Furthermore, in identifying 'the consequences under international law', the Court may be being asked to take a view on the effect to be given to the express and comprehensive renunciation of all legal claims following on from the 1982 Agreement and the renunciations then made by the very great majority (all but 12) of the Chagossians in Mauritius. As noted in **Chapter IV** above, the United Kingdom's position (supported by the conclusions of the ECtHR) is that such renunciations operated as a valid waiver of all claims, including with respect to resettlement.

9.11 What is certain is that, in light of the vague and broad formulation of Question (b), it is difficult to identify with any certainty what the Court is being requested to deal with in its answer. It is indeed so general and obscure that it may be doubted whether it is a 'legal question' within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court.

[413] *Ibid*.
[414] See paras. 4.31-4.39 above.

B. The relevance for Question (b) of the *Chagos Arbitration*

9.12 The arbitral proceedings instituted by Mauritius against the United Kingdom under Annex VII of UNCLOS have been described in **Chapter VI** above. For the purposes of Question (b), the following findings of the Arbitral Tribunal (which are accepted by the United Kingdom) are particularly relevant:

a. The Tribunal found to be legally-binding the United Kingdom's undertaking "to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes"[415]. It found that "after its independence in 1968, Mauritius was entitled to and did rely upon the Lancaster House Undertakings to (a) return the Chagos Archipelago to Mauritius when no longer needed for defence purposes; …"[416].

b. The Tribunal found that upon Mauritius' independence the Agreement reached in 1965 became an international agreement between the Republic of Mauritius and the United Kingdom. The Tribunal looked into the matter in depth, and concluded as follows:

> The independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement.[417]

c. The Tribunal also found that the Agreement was further reaffirmed by the Parties:

> In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, *the Parties fulfilled the conditions necessary to give effect to the 1965 Agreement and, by their conduct, reaffirmed its application between them*.[418]

[415] *Chagos Arbitration* Award, para. 547 B (2) (*Dispositif*) (**UN Dossier No. 409**).
[416] *Ibid*., para. 448.
[417] *Ibid*., para. 425.
[418] *Ibid.* (emphasis added).

d. The Tribunal found that the undertaking to return contained in the 1965 Agreement gave Mauritius an interest in significant decisions that bear upon the possible future uses of the Archipelago: "Mauritius' interest is not simply in the eventual return of the Chagos Archipelago, but also in the condition in which the Archipelago will be returned."[419] This is also a bilateral matter.

9.13 These findings are binding on Mauritius and the United Kingdom and the two Parties are bound to accept and implement them under international law. As will be seen in **Section C** below, these findings provide definitive answers to Question (b), insomuch as there are legal consequences for the United Kingdom as to its continued administration of the BIOT.

9.14 The Court should not seek to reopen findings of the Arbitral Tribunal. It is not just that such findings bind the United Kingdom and Mauritius. The Parties would remain bound by the Award even if the Court were to reach a conflicting or differing interpretation as to their rights and obligations vis-à-vis each other.

C. The appropriate response to Question (b)

9.15 For the reasons given in **Chapter VII** above, it is respectfully submitted that the Court should exercise its discretion and decline to respond to Question (b).

9.16 If, nevertheless, the Court should decide to respond to the Question, for the reasons given in **Chapter VIII** above, the United Kingdom submits that the correct answer to Question (a) is that the decolonization of Mauritius was lawfully completed in 1968. In this case, the Court need not proceed to answer Question (b).

[419] *Ibid*., para. 298.

9.17 In the alternative and in order to assist the Court were it to reach a different conclusion on Question (a), the United Kingdom now turns to the possible conclusions the Court may draw in answer to Question (b).

9.18 The first and fundamental point to make is that, whatever the answer to Question (a), it cannot affect the United Kingdom's continued sovereignty over the Chagos Archipelago until the islands are ceded to Mauritius in accordance with the undertaking in the 1965 Agreement. That is the incontrovertible effect of the Mauritius Independence Act 1968 together with the detachment of the Archipelago in 1965. The islands of the Chagos Archipelago were not included in the territory of Mauritius to which independence was granted on 12 March 1968. Nothing that happened before or since that date, however it is qualified, affects that basic legal position. Any other finding would be contrary to the *uti possidetis* principle and cast doubt upon the boundaries of many territories emerging from decolonization.

9.19 As explained in **Chapter VIII** above, the decolonization of Mauritius was indeed lawfully completed in 1968. Therefore, contrary to the assumption underlying Question (b), there are no international legal consequences arising from the United Kingdom's continued administration (as the British Indian Ocean Territory) of the Chagos Archipelago, from 8 November 1965 to the present day, other than:

a. the rights and obligations that flow from any State's sovereignty over territory; and

b. any additional rights and obligations related to the United Kingdom's administration of the Chagos Archipelago, which flow from international agreements to which the United Kingdom is a party. In the context of Question (b), between Mauritius and the United Kingdom such additional obligations may be found in the 1965 Agreement, as was held by the UNCLOS Arbitral Tribunal in its Award of 18 March 2015, an Award

binding on both Mauritius and the United Kingdom[420], the implementation of which is a bilateral matter as between the two States.

9.20 Therefore, if a response were to be given to Question (b), it would have to be based on the 1965 Agreement, as interpreted by the Arbitral Tribunal in its binding Award of 18 March 2015, and could emphasise the following points:

a. As the Arbitral Tribunal held, the United Kingdom is under an international legal obligation to cede the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes[421]. The 1965 Agreement became a binding international agreement between Mauritius and the United Kingdom upon the independence of Mauritius on 12 March 1968[422].

b. While it continues to administer the Archipelago, the United Kingdom is under an obligation to recognize Mauritius' interest in the condition in which the Archipelago will be returned[423].

c. The United Kingdom is under no international legal obligation to resettle the Chagossians in Mauritius. As the European Court of Human Rights recognised, the 1982 Agreement led to the renunciation of all claims by the very great majority of the Chagossians in Mauritius, which were thus fully discharged. This, however, does not mean that the United Kingdom should in any sense desist from its decision to implement a significant (approximately £40 million) support package to support improvements in the livelihoods of Chagossians in the communities where they now live.

[420] UNCLOS Annex VII.
[421] *Chagos Arbitration* Award, para. 547 B (2) (*Dispositif*) (**UN Dossier No. 409**).
[422] *Ibid*., para. 425; see also paras. 429 and 434.
[423] *Ibid*., para. 298.

D. Conclusions

9.21 It has been shown in this Chapter that Question (b) is obscure and very general, and moreover inappropriately assumes that the Court has answered Question (a) in a certain way. The legal consequences of the United Kingdom's continued administration of the Chagos Archipelago have been largely determined, with binding force as between the Parties, in the 2015 *Chagos Arbitration* Award. The legal consequences remain those set out in the Award.

CONCLUSION

For the reasons given above, the United Kingdom respectfully requests the International Court of Justice to reaffirm the principles upon which it should exercise its discretion under Article 65, paragraph 1, of the Statute, and decline to give answers to the questions posed by the General Assembly in this case.

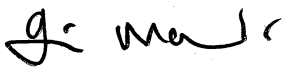
Sir Iain Macleod, K.C.M.G

Representative of the United Kingdom of Great Britain and Northern Ireland

15 February 2018

CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein.



Sir Iain Macleod, K.C.M.G

Representative of the United Kingdom of Great Britain and Northern Ireland

15 February 2018

LIST OF JUDGMENTS

The judgments to accompany the United Kingdom's Written Statement are set out below in chronological order.

VOLUME 1

Tab 1 *Permal v The Ilois Trust Fund* Mauritius Law Reports [1984]

Tab 2 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and another* [2001] 1 QB 1067

Tab 3 *Chagos Islanders v Attorney General and the BIOT Commissioner* [2003] EWHC 2222

Tab 4 *Chagos Islanders v Attorney General and the BIOT Commissioner* [2004] EWCA Civ 997

VOLUME 2

Tab 5 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] 1 AC 453

Tab 6 *Chagos Islanders v United Kingdom* (2012) 56 EHRR

Tab 7 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] Env LR 2

Tab 8 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2921

Tab 9 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No.4) [2017] AC 300

Tab 10 *R (Horeau and Others) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2012 (Admin)

Tab 11 *R (on the application of Bancoult No 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2018] UKSC 3

LIST OF ANNEXES

The Annexes to the United Kingdom's Written Statement are set out below and numbered in the order in which they are referred to in the text.

VOLUME 1

VOLUME 2

VOLUME 3

Annex 76 African Union Resolution on Chagos Archipelago Ex. CL/994(XXX), 30-31 January 2017

Annex 77 Record of 17th Summit of Heads of State and Government of the Non-Aligned Movement, NAM 2016/CoB/DOC.1. Corr.1 (extracts), 17-18 September 2016, pp.104-105

Annex 78 Mauritius Note Verbale No.210/2017(MMG/CD/5/SEC) to Member States of the United Nations Human Rights Council, 21 June 2017

Annex 79 Treitel, *The Law of Contract,* 2nd Ed., 1966 (extracts) p.286

Annex 80 Chitty, *Chitty on Contracts*, 23rd Ed. (1968) (extracts), 312, 351

Annex 81 I. Hendry, S. Dickson, *British Overseas Territory Law* (2011) p. 280

Annex 82 United Nations General Assembly, Fifteenth Session Official Record, 869th Plenary Meeting, UN Doc. A/PV.869, 23 September 1960

Annex 83 United Nations General Assembly, Fifteenth Session, Chairman of the Council of Ministers of the Union of Soviet Socialist Republics Letter to President of the General Assembly, UN Doc. A/4501, 23 September 1960

Annex 84 United Nations General Assembly, Fifteenth Session, Official Records, Annexes 1960-61, Part 2, Agenda Item 87, Guatemala Amendment to Document A/L.323, UN Doc. A/L.325, 7 December 1960

Annex 85 United Nations General Assembly, Twenty-fifth Session, Special Committee Report to Sixth Committee, UN Doc. A/8018, May 1970

Annex 86 Report of Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights, 1 August 1974

Annex 87 United Nations General Assembly, Nineteenth Session, United Kingdom comments on the Friendly Relations Declaration, UN Doc. A/5725/Add. 4, 22 September 1964

Annex 88 Mauritius Letter from the Permanent Representative to the United Nations to the Secretary of the Commission on the Limits of the Continental Shelf, 24 December 2015

Annex 89 Mauritius Prime Minister P Jugnauth Introductory Address at the Meeting of Legal Advisers on the Request for an ICJ Advisory Opinion Pursuant to the UN General Assembly Resolution 71/292 of 22 June 2017, The Hague, 27 November 2017