INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR ADVISORY OPINION)

Written Comments of the Republic of Mauritius

VOLUME I

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CHAPTER 1

INTRODUCTION

1.1 Mauritius submits these Written Comments on the Written Statements filed by other States and the African Union pursuant to the Court's Order of 17 January 2018. In commenting on other Written Statements, Mauritius does not repeat what is set out in its own Written Statement of 1 March 2018. For the avoidance of doubt, it fully adopts and relies upon the evidence and arguments in that Statement.

1.2 These Written Comments do not seek to address each and every point raised in the other Written Statements. Mauritius has focused on the most important points relevant to two areas: (i) the Court's jurisdiction to render the Advisory Opinion, and the propriety of it doing so; and (ii) the legal and factual issues pertaining to the two questions referred by the General Assembly. The absence of comment on other matters raised in other Written Statements should not be construed as agreement by Mauritius.

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1.3 Written Statements were submitted by 31 U.N. Member States. They span all five U.N. Regional Groups and encompass States with a population of more than four billion people. This includes eight States in the African Group;[1] six Asia-

[1] Written Submission of the Republic of Djibouti (1 Mar. 2018) (hereinafter "Written Submission of Djibouti"); Written Statement of the Kingdom of Lesotho (1 Mar. 2018) (hereinafter "Written Statement of Lesotho"); Written Submission of Madagascar (28 Feb. 2018) (hereinafter "Written Submission of Madagascar"); Written Statement of the Republic of Mauritius (1 Mar. 2018) (hereinafter "Written Statement of Mauritius"); Written Statement of the Republic of Namibia (1 Mar. 2018) (hereinafter "Written Statement of Namibia"); Written Statement of the Republic of Niger (28 Feb. 2018) (hereinafter "Written Statement of Niger"); Submission of the Republic of Seychelles; Written Statement Submitted by the Government of the Republic of South Africa (hereinafter "Written Statement of South Africa").

Pacific Group States;[2] eight in the Western Europe and Others Group;[3] two in the Eastern European Group;[4] and seven in the Latin American and Caribbean Group.[5] The African Union also filed a Written Statement on behalf of its membership of 55 African States, including Mauritius.[6] The number and range of participating States, and their broad diversity, underscore that the matters referred to the Court by the General Assembly are recognised as being of fundamental importance to the international community as a whole.

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[2] Written Statement of the People's Republic of China (1 Mar. 2018) (hereinafter "Written Statement of China"); Written Statement Submitted by the Republic of Cyprus (12 Feb. 2018) (hereinafter ¨Written Statement of Cyprus"); Written Statement of the Government of the Republic of Korea (28 Feb. 2018) (hereinafter "Written Statement of the Republic of Korea"); Written Statement of the Republic of India (28 Feb. 2018) (hereinafter "Written Statement of India"); Written Comments addressed to the International Court of Justice by the Republic of the Marshall Islands (1 Mar. 2018) (hereinafter "Written Comments of the Marshall Islands"); Written Statement of the Government of the Socialist Republic of Viet Nam (hereinafter "Written Statement of Viet Nam").

[3] Written Statement of the Government of Australia (27 Feb. 2018) (hereinafter "Written Statement of Australia"); Exposé écrit de la République Française; Written Statement of Germany (Jan. 2018) (hereinafter "Written Statement of Germany"); State of Israel's Written Statement (27 Feb. 2018) (hereinafter "State of Israel's Statement"); Written Statement addressed to the International Court of Justice by the Principality of Liechtenstein (20 Feb. 2018) (hereinafter ¨Written Statement of Liechtenstein"); Written Statement of the Kingdom of the Netherlands (27 Feb. 2018) (hereinafter "Written Statement of the Netherlands"); Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 Feb. 2018) (hereinafter "Written Statement of the United Kingdom"); Written Statement of the United States of America (1 Mar. 2018) (hereinafter "Written Statement of the United States of America").

[4] Written Statement by the Republic of Serbia (27 Feb. 2018) (hereinafter "Written Statement by Serbia"); Written Statement by the Russian Federation (27 Feb. 2018) (hereinafter "Written Statement of the Russian Federation").

[5] Written Statement of the Argentine Republic (1 Mar. 2018) (hereinafter "Written Statement of the Argentine Republic"); Statement of Belize (30 Jan. 2018) (hereinafter "Statement of Belize"); Written Statement of the Federative Republic of Brazil (1 Mar. 2018) (hereinafter "Written Statement of Brazil"); Written Statement by the Republic of Chile (28 Feb. 2018) (hereinafter "Written Statement of Chile"); Written Statement of the Republic of Cuba (hereinafter "Written Statement of Cuba"); Written Statement of the Republic of Guatemala to the International Court of Justice (Mar. 2018) (hereinafter "Written Statement of Guatemala"); Written Statement of the Republic of Nicaragua (1 Mar. 2018) (hereinafter "Written Statement of Nicaragua").

[6] Written Statement of the African Union (1 Mar. 2018) (hereinafter ¨Written Statement of the African Union").

1.4 With regard to the Written Statements submitted by other States and the African Union, Mauritius wishes to make three preliminary observations.

1.5 **First**, Australia is alone in contesting the jurisdiction of the Court to give the requested Advisory Opinion. Every other State (including the administering power) and the African Union are in agreement that there is no bar to the Court's jurisdiction in respect of the matters raised by the request.

1.6 With regard to propriety, just six out of 32 Written Statements expressly object to the admissibility of the Advisory Opinion.[7] The overwhelming majority of States and the African Union recognise not only that the Court can answer both questions posed by the General Assembly, but that it should do so.

1.7 **Second**, of the Written Statements that address the first question, only two States (the U.K. and the U.S.) argue that there was no right of self-determination in customary international law when the Chagos Archipelago was detached from Mauritius in 1965, or when Mauritius became independent in 1968. Every other Written Statement that addresses the matter concludes that there was a right to self-determination by the time the Chagos Archipelago was detached from Mauritius. And every Written Statement that proceeds to apply the legal framework to the facts concludes that the right to self-determination has been violated, and that as a result the decolonisation of Mauritius was not – and has not been – lawfully completed.

[7] Written Statement of Australia; Written Statement of Chile; Exposé écrit de la République Française; State of Israel's Statement; Written Statement of the United Kingdom; Written Statement of the United States of America.

1.8 **Third**, none of the Written Statements challenge the well-established principle of international law that where decolonisation has not been lawfully completed, it must be completed immediately. Further, no Written Statement disputes the principle that every State must refrain from aiding or abetting the continuance of the colonial administration, or from hindering the decolonisation process in any way, if the Court finds that decolonisation has not been lawfully completed. Finally, no Written Statement disputes that during the brief time it would take for decolonisation to be completed, the Chagos Archipelago must be administered in a manner that serves the best interests of Mauritius and the Mauritian people.

I. The facts

1.9 Mauritius submits that the Court has before it all of the factual and legal material required to answer the two questions. Factual submissions were filed by a number of States and the African Union, including certified copies of annex documents relevant to the decolonisation of Mauritius and the detachment of the Chagos Archipelago.[8] The Court has also received a comprehensive Dossier from the U.N. Secretariat. In the view of Mauritius, in light of the Written Statements and the U.N. Dossier, the facts are straightforward and not contentious, and give rise to no real difficulties for the Court.

1.10 Much of Mauritius' factual submissions are based on the publicly available documentary records of the administering power. It follows that, as between the

[8] *See, in particular*, Written Statement of Mauritius; Written Statement of the United Kingdom; Written Statement of the African Union; Written Statement of Australia; Written Submission of Djibouti; Written Statement of India; Written Statement of South Africa; Written Statement of the United States of America.

States that put forward factual submissions, there is no disagreement on many of the key issues. These include that:

a) Mauritius was under British colonial rule from 3 December 1810 until 12 March 1968;[9]

b) The Chagos Archipelago was administered as a dependency of Mauritius throughout the entire period of British colonial rule, giving effect and continuity to the prior practice of France;[10]

c) Before granting independence to Mauritius, the administering power sought to obtain the "agreement" of Mauritian Ministers to the detachment of the Chagos Archipelago;[11]

d) When enquiries were made by the administering power, Mauritian Ministers expressed opposition to detachment;[12]

e) On 23 September 1965, at the Constitutional Conference in London at which the ultimate status of Mauritius was to be determined, and fewer than five hours after a meeting between the Premier of Mauritius (Sir Seewoosagur Ramgoolam) and the British Prime Minister (Harold Wilson), three Mauritian Ministers expressed for the

[9] Written Statement of India, para. 10; Written Statement of Mauritius, paras. 2.1, 2.13-2.14; Written Statement of the United Kingdom, paras. 2.10-2.13.

[10] Written Statement of the African Union, para. 190; Written Statement of Australia, para. 7; Written Submission of Djibouti, para. 35; Written Statement of India, paras. 11, 57-59; Written Statement of Mauritius, paras. 2.15-2.47; Written Statement of South Africa, para. 12; Written Statement of the United Kingdom, para. 2.17; Written Statement of the United States of America, para. 2.6.

[11] Written Submission of Djibouti, para. 38; Written Statement of Mauritius, paras. 3.33-3.38, 3.53-3.58; Written Statement of the United Kingdom, paras. 3.10-3.11.

[12] Written Statement of the United Kingdom, paras. 3.10-3.11; Written Statement of India, para. 17; Written Statement of Mauritius, paras. 3.30, 3.36-3.38, 3.51-3.52.

first time their "agreement" in principle to the detachment of the Chagos Archipelago, but did so only in the face of clear indications that independence would not be granted if they did not offer their "consent";[13]

f) On 5 November 1965, the Mauritius Council of Ministers, presided over by the British Governor, Sir John Rennie, reiterated the "agreement" to the detachment of the Chagos Archipelago;[14]

g) The administering power detached the Chagos Archipelago from Mauritius three days later, on 8 November 1965, by an Order in Council, to form part of the "British Indian Ocean Territory";[15]

h) This new colony was created in haste, and presented to the U.N. as a *fait accompli*, to avoid criticism and to mitigate against the "considerable pressure" the Mauritian colonial government would inevitably be under to withdraw "agreement" to detachment;[16]

i) Thereafter, the administering power did not put before the U.N. "a complete picture" as to the number and status of people living in the

[13] Written Submission of Djibouti, paras. 37-40; Written Statement of India, paras. 18-19, 50; Written Statement of Mauritius, paras. 3.68-3.84; Written Statement of South Africa, para. 13; Written Statement of the United Kingdom, Annexes 31-33.

[14] Written Statement of Australia, para. 8; Written Statement of India, para. 20; Written Statement of Mauritius, para. 3.90; Written Statement of the United Kingdom, para. 3.31.

[15] Written Statement of the African Union, para. 3; Written Statement of Australia, para. 8; Written Statement of India, paras. 16, 21, 23; Written Statement of Mauritius, paras. 3.95-3.96; Written Statement of South Africa, para. 15; Written Statement of the United Kingdom, para. 2.30; Written Statement of the United States of America, para. 2.6.

[16] Written Statement of Mauritius, paras. 1.12, 3.91; U.K. Foreign Office, *Minute from Secretary of State for the Colonies to the Prime Minister*, FO 371/184529 (5 Nov. 1965), paras. 6-7 (**Annex 70**). References to Annexes 1-200 in these Written Comments refer to those submitted with Mauritius' Written Statement of 1 March 2018. Mauritius annexes to these Written Comments an additional 35 Annex documents, which, for ease of reference, have been assigned Annex numbers 201-235.

Chagos Archipelago even after the relevant facts were known to it, and it falsely informed the U.N.'s Fourth Committee that "[g]reat care would be taken" to look after their welfare;[17]

j) The administering power went on to remove forcibly the entire population of the Chagos Archipelago between 1967 and 1973, and "treated the Chagossians very badly" by acting in "callous disregard of their interests";[18]

k) Mauritius attained independence on 12 March 1968, without the Chagos Archipelago;[19]

l) The most recent resettlement study commissioned by the administering power concluded that resettlement of the Chagos Archipelago is possible, and 98% of Chagossian respondents to a public consultation have expressed a desire to return to the islands.[20]

1.11 Bearing in mind that Mauritius and the administering power have both advanced a detailed historical account, there are four principal areas of disagreement as to the facts. Contrary to the position adopted by Mauritius and the great majority of States, and the African Union, the U.K. asserts that:

[17] Written Statement of the United Kingdom, para. 1.5; Written Statement of the United Kingdom, Annex 14, p. 240, para. 80; Written Statement of Mauritius, paras. 1.8, 3.102.

[18] Written Statement of the United Kingdom, paras. 1.5, 4.3. *See also* Written Statement of the African Union, paras. 3, 244; Written Statement of Australia, para. 10; Written Statement of Brazil, para. 26; Written Statement of India, paras. 53-55; Written Statement of Mauritius, paras. 3.100-3.107; Written Statement of South Africa, para. 17.

[19] Written Statement of India, para. 26; Written Statement of Mauritius, para. 4.3; Written Statement of South Africa, para. 16; Written Statement of the United Kingdom, para. 3.40; Written Statement of the United States of America, para. 2.8.

[20] Written Statement of Mauritius, para. 4.58; Written Statement of the United Kingdom, paras. 4.32, 4.35.

a) 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" of Resolution 1514 (XV);[21]

b) Mauritius' independence and the detachment of the Chagos Archipelago were separate issues, and the administering power's decision to grant independence was unconnected to the Mauritian Ministers' "agreement" to detachment;[22]

c) the representatives of Mauritius freely consented to the detachment of the Chagos Archipelago, and/or the 1967 general elections in Mauritius met the requirements of self-determination;[23]

d) resettlement of the Chagossians is not feasible, and is subject to the 1982 settlement agreement, which entailed the renunciation by many Chagossians of their rights to future claims arising out of their removal from the Chagos Archipelago.[24]

1.12 The first and third points (whether the Chagos Archipelago was an integral part of Mauritius and the question of "consent") give rise to mixed questions of fact and law, and relate to the first question referred by the General Assembly to the Court. They are addressed in Chapter 3.[25] The fourth point (concerning the

[21] Written Statement of the United Kingdom, para. 8.62.

[22] *Ibid.*, para. 3.8.

[23] *Ibid.*, paras. 1.4, 1.23, 3.7-3.8, 3.35-3.37, 3.52.

[24] *Ibid.*, para. 4.41.

[25] *See* paras. 3.69-3.106 below.

resettlement of the Chagossians) pertains to the second of the General Assembly's questions, and is addressed in Chapter 4.[26]

1.13 As to the second point, it is a matter of surprise that the U.K. feels able to assert, given the material before the Court, that there is "no basis whatsoever" for saying that Mauritius' independence was made conditional upon Ministers' "agreement" to detachment.[27] The Court has before it a large volume of clear and incontrovertible documentary evidence to the contrary, most of which emanates from records and documents held by, and readily accessible to, the administering power itself. In relation to the vast majority of this material, the U.K.'s Written Statement is totally silent. Mauritius looks forward to reading the U.K.'s Written Comments, and in particular its response to the factual material put forward in the Dossier from the U.N. Secretariat and in Mauritius' Written Statement.

A. INDEPENDENCE WAS CONDITIONAL ON "AGREEMENT" TO DETACHMENT

1.14 Of the Written Statements that address the nature of Mauritian Ministers' "agreement" to detachment, all – except for that of the U.K. – come to the same conclusion as Mauritius.[28] For instance, **Djibouti** states that "the pressure placed on the Mauritian representatives constituted duress sufficient to undermine the validity of the agreement purportedly reached" and that "[t]he United Kingdom's attempts to obtain the 'consent' of the Mauritian leadership were disingenuous

[26] *See* paras. 4.112-4.132 below.

[27] Written Statement of the United Kingdom, para. 3.8.

[28] Whereas the Written Statement of the United States does not address *inter alia* "the role of consent", it is stated that "[n]evertheless, the United States believes the Court could not resolve these issues in a manner that would support a finding that Mauritius's decolonization was not lawfully completed in 1968." *See* Written Statement of the United States of America, para. 4.6 and fn. 68 on p. 17.

from the beginning."[29] Likewise, **India** concludes that "British Cabinet papers, at the time of detachment of the Chagos Archipelago, reveal that Mr. Harold Wilson, the Prime Minister, informed the Mauritian Premier in September 1965 that part of the price for independence was Mauritius' assent to the detachment of the Chagos."[30]

1.15 The material before the Court makes clear that independence and "agreement" to detachment formed part of an inseparable "package deal" offered to Mauritian Ministers at the 1965 Constitutional Conference.[31] Before the start of the Conference, a plan was concocted by which talks on detachment would take place "in parallel (and in a smaller group) with the constitutional talks, the object being to link both up in a possible package deal at the end."[32] During the Conference, Edward Peck, a Foreign Office Assistant Under-Secretary of State, wrote that: "It seems likely that the detachment of the islands may have to be arranged in a package deal at the conclusion of the Constitutional Talks."[33] Likewise, Anthony Fairclough, the Head of the Pacific and Indian Ocean Department in the Colonial Office, acknowledged the interdependence of the issues: "The British side had tried to keep the independence issue which the conference was really meant to deal with, separate from the defence project, but the outcome of the latter was found to depend partly on the former problem."[34]

[29] Written Submission of Djibouti, paras. 37-38.

[30] Written Statement of India, para. 50.

[31] Written Statement of Mauritius, paras. 3.68-3.81.

[32] U.K. Foreign Office, *Minute from E. H. Peck to Mr. Graham: Indian Ocean Islands*, FO 371/184527 (3 Sept. 1965), p. 2, para. 2 (emphasis added) (**Annex 52**).

[33] *Secretary of State's Private Discussion with the Secretary of State for Defence* (15 Sept. 1965), para. 1 (emphasis added) (**Annex 55**).

[34] *Defence Facilities in the Indian Ocean* (23-24 Sept. 1965), Record of a Meeting with an American Delegation headed by Mr. Kitchen, on 23 September, 1965, Mr. Peck in the chair, p. 1 (emphasis

1.16 Mauritius is accused of placing "such great weight on a bilateral meeting between the British Prime Minister and the Mauritian Premier on the morning of 23 September 1965" so as to "distract attention".[35] The U.K. refers briefly to a note prepared for Prime Minister Wilson in which it is stated that:

> Sir Seewoosagur Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope; hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago.[36]

1.17 Of this note, and the meeting to which it relates, it is contended by a single State – the U.K. – that Mauritius "distorts the nature of the briefing note and what actually transpired at the meeting."[37] That State argues that "a range of matters were discussed" and that the overriding purpose of the meeting was "not 'to compel Sir Seewoosagur Ramgoolam to agreement to the detachment' and 'frighten him with hope'."[38] This is a solitary – and surprising – interpretation of the documentary material that has been put before the Court. It is also one which is not justified by any reasonable appreciation of events.

1.18 **First**, the briefing note itself leaves no room for ambiguity. It was written by the Prime Minister's Private Secretary on Foreign Affairs, Sir Oliver Wright, a distinguished British diplomat with nearly 20 years of experience, who later went on to serve *inter alia* as Deputy Under-Secretary of State in the Foreign Office and

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added) (**Annex 62**). The Colonial Office was merged with the Commonwealth Relations Office on 1 August 1966 to become the Commonwealth Office, which was then itself merged with the Foreign Office in October 1968, resulting in the Foreign and Commonwealth Office.

[35] Written Statement of the United Kingdom, para. 3.18.

[36] U.K. Colonial Office, *Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius*, PREM 13/3320 (22 Sept. 1965) (emphasis added) (**Annex 59**).

[37] Written Statement of the United Kingdom, para. 3.18.

[38] *Ibid.*, paras. 3.20, 3.24.

British Ambassador to Denmark, West Germany and the United States. Sir Oliver was the only other person to attend the bilateral meeting between Prime Minister Wilson and Premier Ramgoolam, and was responsible for the record of that meeting. It is striking that the State in question would seek to directly contradict the words written by its own former employee and representative.[39]

1.19 **Second**, with regard to the record of the meeting, it is incorrect to suggest that "a range of matters were discussed".[40] The only matters of substance discussed were the detachment of the Chagos Archipelago and the ultimate status of Mauritius.[41] As recognised by Judges Kateka and Wolfrum in the *Chagos Marine Protected Area Arbitration*, Prime Minister Wilson's "threat that Ramgoolam could return home without independence" plainly amounted to duress.[42]

1.20 **Third**, and contrary to what is asserted by one State, the timing of events demonstrates the significance of the meeting between Prime Minister Wilson and Premier Ramgoolam.[43] From the earliest approaches in April and July 1965, Mauritian Ministers were steadfast and resolute in their opposition to the detachment of the Chagos Archipelago.[44] This opposition continued throughout the

[39] In a separate note, Sir Oliver explained that the purpose of the Prime Minister's meeting with Sir Seewoosagur was to enable the Colonial Secretary "to bring the talks to the boil on Friday, September 24". *See Note* from J. O. Wright to J. W. Stacpoole of the Colonial Office (21 Sept. 1965) (**Annex 208**).

[40] Written Statement of the United Kingdom, para. 3.20.

[41] U.K. Foreign Office, *Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 A.M. on Thursday, September 23, 1965*, FO 371/184528 (23 Sept. 1965) (**Annex 60**).

[42] *The Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, UNCLOS Annex VII Tribunal (18 Mar. 2015) (hereinafter "*The Chagos Marine Protected Area Arbitration*, Dissenting and Concurring Opinion (18 Mar. 2015)"), para. 77 (**Dossier No. 409**).

[43] Written Statement of the United Kingdom, para. 3.19.

[44] Written Statement of Mauritius, paras. 3.30, 3.36-3.38, 3.51-3.52.

Constitutional Conference, up to and including the second meeting on "defence matters" on 20 September 1965.[45] When Premier Ramgoolam met with Prime Minister Wilson three days later, at 10:00 a.m. on 23 September 1965, he was told by the Prime Minister in no uncertain terms that:

> [I]n 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, although he could not of course commit the Colonial Secretary at this point.[46]

1.21 It was only four and a half hours after this meeting that Premier Ramgoolam and two of his colleagues reluctantly "agreed" to the detachment of the Chagos Archipelago.[47]

1.22 As is made clear in Mauritius' Written Statement at paragraphs 3.74 to 3.80, in the years that followed the meeting between Premier Ramgoolam and Prime Minister Wilson, British civil servants, diplomats and politicians at the highest levels acknowledged that Mauritius had been granted independence on condition of "agreement" to detachment. This was also recognised by Mauritian Ministers who had attended the Conference, and the Mauritian Parliamentary Select Committee on the detachment of the Chagos Archipelago.[48]

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[45] *Ibid.*, paras. 3.63-3.66.

[46] U.K. Foreign Office, *Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 A.M. on Thursday, September 23, 1965*, FO 371/184528 (23 Sept. 1965), p. 3 (**Annex 60**).

[47] United Kingdom, *Record of a Meeting Held in Lancaster House at 2.30 p.m. on Thursday 23rd September: Mauritius Defence Matters*, CO 1036/1253 (23 Sept. 1965), para. 23 (**Annex 61**).

[48] Written Statement of Mauritius paras. 3.75, 4.4-4.14.

1.23 In its Written Statement, Mauritius referred to eight documents, all publicly available from the archives of the British Government, which expressly recognise that independence was granted to Mauritius on condition that Mauritian Ministers "agreed" to detachment.[49] Significantly, the U.K. Written Statement makes no reference to any of these documents. It is equally notable that it has not put forward a single document to directly contradict the contention that Prime Minister Wilson threatened Premier Ramgoolam with non-independence if the detachment of the Chagos Archipelago was not "agreed".

1.24 In light of the assertion in the U.K. Written Statement that the decision to grant independence was unconnected to the "agreement" to detach the Chagos Archipelago, Mauritius has revisited the Colonial and Foreign Office archival records. The further research serves only to reconfirm what has been set out in Mauritius' Written Statement. By way of example, no fewer than eight additional documents clearly confirm that detachment and independence were linked, and that the administering power threatened to withhold independence from Mauritius, unless the Ministers "agreed" to detachment:

[49] U.K. Foreign Office, *Minute from E. H. Peck to Mr. Graham: Indian Ocean Islands*, FO 371/184527 (3 Sept. 1965), p. 2, paras. 1-2 (**Annex 52**); *Secretary of State's Private Discussion with the Secretary of State for Defence* (15 Sept. 1965), para. 1 (**Annex 55**); *Defence Facilities in the Indian Ocean* (23-24 Sept. 1965), Record of a Meeting with an American Delegation headed by Mr. Kitchen, on 23 September, 1965, Mr. Peck in the chair (**Annex 62**); United Kingdom, *Minute from M. Z. Terry to Mr. Fairclough - Mauritius: Independence Commitment*, FCO 32/268 (14 Feb. 1967), para. 4 (**Annex 86**); U.K. Colonial Office, *Minute from A. J. Fairclough of the Colonial Office to a Minister of State, with a Draft Minute appended for signature by the Secretary of State for Commonwealth Affairs addressed to the Foreign Secretary*, FCO 16/226 (22 May 1967), para. 7 (**Annex 89**); U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1., on Thursday, 25th May 1967 at 9:45 a.m.*, OPD(67) (25 May 1967), p. 2 (**Annex 90**); *Letter* from J. N. Allan of the British High Commission in Port Louis to P. Hunt of the East African Department, FCO 31/3834 (4 Mar. 1983), para. 2(a) (**Annex 126**); *Letter* from M. Walawalkar of the African Section Research Department to P. Hunt of the East African Department on the Mauritian Agreement to Detachment of Chagos, FCO 31/3834 (9 Mar. 1983), para. 2 (**Annex 127**). *See also* Written Statement of Mauritius, paras. 3.73-3.81.

a) At a Cabinet meeting on 2 June 1965, Colonial Secretary Greenwood explained to *inter alia* Prime Minister Wilson that: "It would… be necessary to consider whether the detachment of the Island dependencies from Mauritius… should not be raised and decided either before or during the conference and as part of any agreement leading to independence for Mauritius."[50]

b) At a Cabinet meeting a few hours after Premier Ramgoolam's meeting with Prime Minister Wilson on 23 September 1965, Colonial Secretary Greenwood informed his Cabinet colleagues that "the Parti Mauricien had informed him that since they were opposed to independence they could not agree to the detachment of the islands."[51] This was reiterated by Governor Rennie in January 1967.[52]

c) In mid-November 1965, Governor Rennie reported to Colonial Secretary Greenwood that:

> there is a strong belief in certain quarters, even among those well-disposed to Britain, that there has been a deal between the British Government and the Mauritius Labour Party in which independence has been granted for the sake of Diego Garcia. The deal

[50] U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Wednesday, 2nd June, 1965, at 10:30 a.m.*, OPD (65) 28th Meeting (2 June 1965), p. 10 (emphasis added) (**Annex 207**).

[51] U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Thursday, 23rd September, 1965, at 4 p.m.*, OPD (65) 41st Meeting (23 Sept. 1965), pp. 5-6 (emphasis added) (**Annex 209**).

[52] *Report* from J. Rennie, Governor of Mauritius, to H. Bowden, Secretary of State for Commonwealth Affairs (23 Jan. 1967), para. 8 ("An all-party Government held office from March 1964 to November 1965, when the PMSD Ministers resigned, ostensibly over the terms of the Chagos (of British Indian Ocean Territory) settlement but really for local political reasons arising out of the British Government's decision that Mauritius should become independent.") (emphasis added) (**Annex 213**).

> is said to have been arranged when the Premier met the Prime Minister.[53]

d) In 1967, the Assistant Under-Secretary of State for Commonwealth Affairs (Trafford Smith) and the Head of the Pacific and Indian Ocean Department in the Colonial Office (Anthony Fairclough) both confirmed that independence was dependent on "agreement" to detachment. Upon considering whether the U.K. could renege on the Colonial Secretary's public announcement at the close of the 1965 Constitutional Conference, Trafford Smith concluded that:

> the most compelling reasons why we cannot upset the 1965 Conference and look at the problem de novo are (1) it would be impossible effectively to rebut charges of bad faith on the part of H.M.G., especially by Sir S. Ramgoolam and his Labour and M.C.A. colleagues in the context of the agreement to detach the Chagos Archipelago…[54]

e) In a Cabinet Committee paper prepared by Anthony Fairclough it is explained that:

> Attention should also perhaps be drawn to a further element in the bargain which was struck in 1965. Simultaneously with the Constitutional Conference negotiations proceeded in September 1965 between British and Mauritius Ministers about the separation from Mauritius of the Chagos Archipelago to form part of the British Indian Ocean Territory which was in due course established by Order in Council in November 1965. … The Mauritius Ministers demanded astronomical sums by way of compensation for the separation of Chagos and far

[53] *Letter* from J. Rennie, Governor of Mauritius, to A. Greenwood, U.K. Secretary of State for the Colonies, CO 1036/1253 (15 Nov. 1965), p. 2 (emphasis added) (**Annex 211**).

[54] *Note* from T. Smith to Sir Arthur Galsworthy (14 Feb. 1967) (emphasis added; "de novo" underlined in original) (**Annex 215**).

> more than the British Government was prepared to contemplate. Arising out of these discussions and of an interview which Sir Seewoosagur Ramgoolam had with the Prime Minister on [sic] September 1965, the former may well have formed the impression that it would be prudent for him to acquiesce in the compensation offered by the British Government (£3m. as opposed to the £20+m. which Mauritius Ministers had sought) if he hoped to secure a favourable response from the British Government over his demand for independence and his wish for an undertaking that assistance would be available after independence to deal with external and internal security threats. Certainly Sir Seewoosagur was subsequently accused in Mauritius, at the stage when the Parti Mauricien resigned from the All-Party Government to go into opposition over the issue of the amount of compensation for Chagos, of having 'sold out' on Chagos far too cheaply in order to get a decision in favour of independence. Against this background the importance to Sir Seewoosagur of the undertakings in relation to external and internal security threats is obvious; without them all he would be able to show for having accepted what is regarded locally as far too little compensation for Chagos would be an independence for which Mauritius is in fact ill equipped economically and financially.[55]

f) In a note dated 14 February 1967 addressed to Mr Fairclough it is further explained that:

[55] United Kingdom, OPD Paper, *Mauritius Defence Agreement* (undated), para. 9 (emphasis added) (**Annex 201**). Another version of this Paper has handwritten annotations to the effect that: "After an interview which Sir Seewoosagur Ramgoolam had with the Prime Minister on 23rd September 1965, he agreed to accept the compensation offered by the British Government (£3m. as a single outright grant as opposed to the £7m. p.a. for 20 years which Mauritius Ministers had originally sought). It is clear that one of his reasons [illegible] so [sic] was that he hoped to secure a favourable response from the British Government over his demand for independence". *See* United Kingdom, Draft OPD Paper, *Mauritius Defence Agreement* (including handwritten annotations) (undated), para. 9 (**Annex 202**).

> I am told that it was a Cabinet decision that this undertaking should be given… and that in addition H.MG.'s decision to come out publicly in favour of independence for Mauritius was part of the deal between our own present Prime Minister and the Premier of Mauritius regarding the detachment of certain Mauritius dependencies for Biot. [56]

g) In a House of Lords debate in 1982, Lord Brockway, referring to a report by the Minority Rights Group, said that: "the British Government offered Mauritius its independence but it did so only on the condition that Mauritius surrendered the Chagos Archipelago."[57]

1.25 More recently, a former "Commissioner" of the "BIOT", Nigel Wenban-Smith, has confirmed the point, endorsing the view of Jocelyn Chan Low, a leading Mauritian historian, that Sir Seewoosagur "understood perfectly what was at stake" when he met with Prime Minister Wilson on 23 September 1965.[58] Referring to Chan Low's "impressively balanced and objective account", Mr Wenban-Smith recounts that the detachment of the Chagos Archipelago "remained unresolved" up until the Premier's meeting with Prime Minister Wilson on 23 September 1965, which then "opened the way for Greenwood to close the conference the following morning with an announcement inviting the Mauritians to decide upon

[56] United Kingdom, *Minute from M. Z. Terry to Mr. Fairclough - Mauritius: Independence Commitment*, FCO 32/268 (14 Feb. 1967), para. 4 (emphasis added) (**Annex 86**). *See also Note* from E. M. Rose to Sir Burke Trend (20 Oct. 1967), by which the British Cabinet Secretary was informed that: "The decision to grant independence to Mauritius was taken, I think by OPD, in 1965" (**Annex 217**).

[57] U.K. House of Lords, Debate, *Diego Garcia: Minority Rights Group Report*, Vol. 436, cc397-413 (11 Nov. 1982), p. 1 (**Annex 225**).

[58] N. Wenban-Smith & M. Carter, *Chagos: A History – Exploration, Exploitation, Expulsion* (2016), p. 473 (**Annex 235**). The preface makes clear that this part of the book is exclusively the work of Mr Wenban-Smith. It should also be noted that Sir Oliver Wright was consulted by Mr Wenban-Smith. *See ibid*., Preface, p. vii and p. 477, fn. 30.

independence at their next general elections".[59] Chan Low's account of the constitutional talks concludes that:

> A study of the records pertaining to the making of the Chagos affair reveals the close links between the British decision to publicly declare itself in favour of the independence of multi-ethnic Mauritius – bedevilled by inter-ethnic tensions aggravated by an acute crisis of underdevelopment – and the excision of the Chagos archipelago. The British authorities skilfully and deceitfully manoeuvred to blackmail Sir Seewoosagur Ramgoolam – heading a divided Mauritian delegation and with allies lukewarm in their support for independence – into accepting the illegal dismemberment of Mauritian territory prior to independence.[60]

1.26 There are two ancillary arguments, both of which can be addressed briefly. **First**, ignoring the material described above, the U.K. Written Statement asserts – without any supportive material – that Mauritius "invented" the claim that independence was granted on condition of "agreement" to detachment, and that 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* – to the effect that the consent given in 1965 to detachment… was not valid due to duress or other reasons."[61]

1.27 This is totally inaccurate. Immediately after the 1965 Constitutional Conference, Governor Rennie informed Colonial Secretary Greenwood of the

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[59] *Ibid*., pp. 472-473.

[60] Jocelyn Chan Low, "The Making of the Chagos Affair: Myths and Reality" in EVICTION FROM THE CHAGOS ISLANDS (S. Evers & M. Kooy eds., 2011), p. 79 (emphasis added) (**Annex 233**). Chan Low further explains that: "According to Sir John Rennie, if Ramgoolam finally surrendered Diego Garcia it was because he had become convinced (or the British had manoeuvred brilliantly to make him convinced) that if he proved conciliatory on this issue the British government would finally decide in favour of Mauritius' independence at the close of the Constitutional Conference". *Ibid*., p. 77 (emphasis added).

[61] Written Statement of the United Kingdom, paras. 1.4, 3.8, 3.17.

"strong belief" that there had been "a deal between the British Government and the Mauritius Labour Party in which independence has been granted for the sake of Diego Garcia."[62] Mauritius made clear its belief that the "agreement" to detachment was obtained under conditions amounting to duress, and challenged its validity, soon after the events took place and consistently thereafter:

a) In February 1971 the Foreign Office became aware that the Mauritian Government "had it in mind to revoke the Agreement which had been reached in the pre-Independence era in regard to BIOT."[63]

b) On 26 July 1980, Prime Minister Ramgoolam said at a press conference that:

> After the representatives of the other parties who did not want independence had walked out of the 1965 constitutional conference, I as head of Government had to take a decision. I had to choose between independence and Diego Garcia. What would you have done? I opted for independence and freedom and I take full

[62] *Letter* from J. Rennie, Governor of Mauritius, to A. Greenwood, U.K. Secretary of State for the Colonies, CO 1036/1253 (15 Nov. 1965), p. 2 (emphasis added) (**Annex 211**). Moreover, in 1981 the U.S. sought guidance from the Foreign Office so as to help "combat the allegation sometimes made that because Mauritius was still a colony when Diego Garcia was detached the agreement reached with Mauritian Ministers must have been made under duress and is therefore not valid." *See Telegram* from Thomson to the U.K. Foreign and Commonwealth Office East African Department, No. 42 (19 Jan. 1981) (**Annex 223**).

[63] *Letter* from P. A. Carter to E. G. Le Tocq of the U.K. Foreign and Commonwealth Office East African Department, FCO 83/18 (5 Feb. 1971), para. 2 (**Annex 218**).

> responsibility for that. Mauritius acquired status and dignity.[64]

c) Since 1980, Mauritian politicians, including Prime Minister Ramgoolam, have frequently explained and described the events of the 1965 Constitutional Conference.[65]

d) In its report dated 1 June 1983, the Mauritian Parliamentary Select Committee, having heard evidence from seven Mauritian Ministers who attended the 1965 Constitutional Conference, concluded that the "blackmail element" which had prevailed at the talks "puts in question the legal validity of the excision".[66]

1.28 **Second**, the U.K. Written Statement asserts that Mauritius' "allegation of duress" is inconsistent with the "timing of the key events", because the "agreement" of Mauritian Ministers on 23 September 1965 was followed up by a

[64] United Kingdom, *Diego Garcia: Translation of Ramgoolam's remarks at a press conference (given in Creole) on 26 July 1980* (26 July 1980) (**Annex 220**). *See also* Written Statement of Mauritius, paras. 4.4-4.16.

[65] *See, e.g.*, Mauritius Legislative Assembly, *Speech from the Throne – Address in Reply: Statement by the Prime Minister of Mauritius* (11 Apr. 1979), p. 456 ("We had no choice") (**Annex 115**); Mauritius Legislative Assembly, *The Interpretation and General Clauses (Amendment) Bill (No. XIX of 1980), Committee Stage* (26 June 1980), p. 3413 ("We had no choice!") (**Annex 117**); Mauritius Legislative Assembly, *Reply to PQ No. B/1141* (25 Nov. 1980), p. 4223 ("There was a nook [sic] around my neck. I could not say no. I had to say yes, otherwise the noose could have tightened") (**Annex 123**). *See also* Written Statement of Mauritius, paras. 4.4-4.16.

[66] Mauritius Legislative Assembly, *Report of the Select Committee on the Excision of the Chagos Archipelago*, No. 2 of 1983 (June 1983), p. 37, para. 52E (**Annex 129**). Shortly before the publication of the Report of the Mauritian Parliamentary Select Committee on the detachment of the Chagos Archipelago, the British High Commissioner in Port Louis warned the Foreign Office that "we may well be faced with embarrassing assertions about the connection between the excision of the Chagos Archipelago and the British Government's undertaking to give Mauritius independence." *See Letter* from J. N. Allan of the British High Commission in Port Louis to P. Hunt of the East African Department, FCO 31/3622 (11 Nov. 1982) (**Annex 125**). *See also* Written Statement of Mauritius, para. 4.11.

decision of the Council of Ministers on 5 November 1965, six weeks after Colonial Secretary Greenwood publicly announced that he was in favour of independence.[67]

1.29 As explained fully in Chapter 3 below, the "agreement" of the Council of Ministers cannot be treated as the freely-expressed will of the people of Mauritius for the purposes of self-determination.[68] The Council of Ministers was presided over by Governor Rennie and was composed of the British Deputy-Governor (T. D. Vickers) and 14 Mauritian Ministers (including Premier Ramgoolam).[69] Of those 14 Mauritian Ministers, 13 were present at the 1965 Constitutional Conference.[70] Mauritian members of the Council of Ministers "agreed" to the

[67] Written Statement of the United Kingdom, paras. 3.8, 3.19, 3.28, 3.35-3.37.

[68] *See* paras. 3.76-3.92 below. Under the 1964 Constitution, the British Governor in Mauritius was empowered to appoint the members of the Council of Ministers, and the Governor "acting in his discretion" could "grant leave of absence from his duties to any member of the Council of Ministers." *See* Written Statement of the United Kingdom, Annex 10, Sections 58, 61, 70. Colonial Secretary Greenwood considered that internal self-government would require the "withdrawal of the Governor from the Council of Ministers and the limitation on his discretionary powers to such matters as defence, external affairs and internal security only". *See* U.K. Defence and Oversea Policy Committee, *Mauritius – Constitutional Developments: Note by the Secretary of State for the Colonies*, OPD (65) (May 1965), para. 8 (**Annex 206**). *See also* U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Wednesday, 2nd June, 1965, at 10:30 a.m.*, OPD (65) 28th Meeting (2 June 1965), p. 10 (**Annex 207**).

[69] Written Statement of the United Kingdom, Annex 10, Section 68. Shortly after the 1965 Constitutional Conference, Premier Ramgoolam met with Colonial and Foreign Office officials and is recorded to have "appeared distressed that full internal self-government would not be introduced until after [the] election." It was noted that one of the points "exercising" the Premier was "presiding in Council of Ministers". *See Telegram* from T. Smith to J. Rennie, Governor of Mauritius, No. 234 (1 Oct. 1965) (**Annex 210**).

[70] *See* United Kingdom, *Mauritius Constitutional Conference Report* (24 Sept. 1965), p. 8, List of Those Attending Conference (**Annex 64**). *C.f.* Mauritius Legislative Assembly, *Report of the Select Committee on the Excision of the Chagos Archipelago*, No. 2 of 1983 (June 1983), p. 61, Appendix N (**Annex 129**). *See also Letter* from R. C. Masefield, for the U.K. Secretary of State for Home Affairs, to J. F. Doble, of the Information Department, U.K. Foreign and Commonwealth Office (9 Aug. 1982), in which it was acknowledged that there would be "inevitable allegations" that the Mauritius Council of Ministers "were a group of 'yes-man'." (**Annex 224**).

detachment on the basis that it had been made clear six weeks earlier by Prime Minister Wilson that this was a precondition to the grant of independence.

1.30 Whereas Colonial Secretary Greenwood announced on 24 September 1965 that independence for Mauritius was expected "before the end of 1966", it did not actually occur until 12 March 1968.[71] During this period, independence remained uncertain and it was solely at the discretion of the British Government.[72] As the Report of the 1965 Constitutional Conference makes clear, the grant of independence to Mauritius remained conditional on the findings of an electoral Commission, after which a date would be fixed for a general election, and only after six months of internal self-government could the Legislative Assembly ask for independence from the United Kingdom.[73] Colonial Office officials openly discussed the possibility of independence being withheld or delayed.[74] Only six months before the 1967 election, the Head of the Pacific and Indian Ocean Department in the Colonial Office reported to the Assistant Under-Secretary of State for Commonwealth Affairs that:

> As always these days in any survey of the Mauritius scene, economic problems and financial difficulties loom large and are the most depressing part of the picture. I would agree with Miss Terry that, as the picture now looks, it would be in Mauritius' best interests not to proceed to independence.[75]

[71] United Kingdom, *Mauritius Constitutional Conference Report* (24 Sept. 1965), p. 6, para. 20 (**Annex 64**).

[72] *See* Written Statement of Mauritius, paras. 3.40-3.45.

[73] United Kingdom, *Mauritius Constitutional Conference Report* (24 Sept. 1965), pp. 5-6, para. 20 (**Annex 64**).

[74] *See, e.g.*, *Note* from A. J. Fairclough to T. Smith, attaching a note on *Considerations arising from and since the 1965 Constitutional Conference related to the question of Independence* (14 Feb. 1967) (**Annex 216**); *Note* from T. Smith to Sir Arthur Galsworthy (14 Feb. 1967) (**Annex 215**).

[75] *Note* from A. J. Fairclough to T. Smith (7 Feb. 1967), para. 4 (emphasis added) (**Annex 214**).

1.31 In light of this overwhelming material, along with the materials set out in its Written Statement, Mauritius can see no plausible basis for the assertion in the U.K. Written Statement that the grant of independence was not made conditional on Ministers' "agreement" to detachment. The U.K.'s contention that independence and detachment were entirely separate matters is not supported by any other Written Statement, and is inconsistent with the views expressed by those best placed to know what transpired during the 1965 Constitutional Conference, including participants in the Conference,[76] and senior British officials, diplomats and politicians with unfettered access to the historical record.[77]

[76] This includes Colonial Secretary Greenwood, Governor Rennie, the Assistant Under-Secretary of State for the Colonies/Commonwealth Affairs (Trafford Smith) and the Head of the Pacific and Indian Ocean Department in the Colonial/Commonwealth Office (Anthony Fairclough). *See* U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Wednesday, 2nd June, 1965, at 10:30 a.m.*, OPD (65) 28th Meeting (2 June 1965) (**Annex 207**); U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Thursday, 23rd September, 1965, at 4 p.m.*, OPD (65) 41st Meeting (23 Sept. 1965) (**Annex 209**); *Letter* from J. Rennie, Governor of Mauritius, to A. Greenwood, U.K. Secretary of State for the Colonies, CO 1036/1253 (15 Nov. 1965) (**Annex 211**); *Report* from J. Rennie, Governor of Mauritius, to H. Bowden, Secretary of State for Commonwealth Affairs (23 Jan. 1967), para. 8 (**Annex 213**); *Note* from T. Smith to Sir Arthur Galsworthy (14 Feb. 1967) (**Annex 215**); *Defence Facilities in the Indian Ocean* (23-24 Sept. 1965), Record of a Meeting with an American Delegation headed by Mr. Kitchen, on 23 September, 1965, Mr. Peck in the chair (**Annex 62**); U.K. Colonial Office, *Minute from A. J. Fairclough of the Colonial Office to a Minister of State, with a Draft Minute appended for signature by the Secretary of State for Commonwealth Affairs addressed to the Foreign Secretary*, FCO 16/226 (22 May 1967), para. 7 (**Annex 89**); United Kingdom, OPD Paper, *Mauritius Defence Agreement* (undated) (**Annex 201**); United Kingdom, Draft OPD Paper, *Mauritius Defence Agreement* (including handwritten annotations) (undated) (**Annex 202**).

[77] This includes Commonwealth Secretary Herbert Bowden, the Assistant Under-Secretary of State for Asia and the Far East (Edward Peck), Ms Walawalkar of the Foreign Office African Section Research Department and a former "Commissioner" of the "BIOT" (Nigel Wenban-Smith). *See* U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1., on Thursday, 25th May 1967 at 9:45 a.m.*, OPD(67) (25 May 1967), p. 2 (**Annex 90**); *Secretary of State's Private Discussion with the Secretary of State for Defence* (15 Sept. 1965), para. 1 (**Annex 55**); *Letter* from M. Walawalkar of the African Section Research Department to P. Hunt of the East African Department on the Mauritian Agreement to Detachment of Chagos, FCO 31/3834 (9 Mar. 1983), para. 2 (**Annex 127**); N. Wenban-Smith & M. Carter, *Chagos: A History – Exploration, Exploitation, Expulsion* (2016), pp. 472-473 (**Annex 235**).

1.32 As described in the Chapters that follow, in the absence of the freely expressed will of the Mauritian people, the detachment of the Chagos Archipelago was carried out in manifest violation of the principles of self-determination and territorial integrity. As a result, the decolonisation of Mauritius remains incomplete. This has obvious legal consequences, not least the obligation to bring to an immediate end the administering power's administration of the Chagos Archipelago.

II. Summary of Mauritius' Written Comments

1.33 Mauritius' Written Comments are set out in four Chapters. Following this Introduction, **Chapters 2 to 4** address the legal and factual matters pertaining to the Court's jurisdiction and the two questions referred by the General Assembly.

1.34 **Chapter 2** responds to points raised in the other Written Statements in relation to the Court's jurisdiction to answer the two questions set out in Resolution 71/292, and the propriety of doing so. The Chapter is in two parts: Section I demonstrates that the Court undoubtedly has jurisdiction to render the Advisory Opinion,[78] and Section II shows that there are no compelling reasons for the Court to decline to answer the two questions.[79] In particular, it is clear that an overwhelming number of States which submitted Written Statements recognise that:

[78] *See* paras. 2.20-2.24 below.

[79] *See* paras. 2.25-2.76 below.

a) the questions posed by the Court do not concern a mere bilateral dispute between two States;[80]

b) rendering the Advisory Opinion would not have the effect of circumventing the principle of consent to judicial settlement;[81]

c) the Court's answers to the two questions will be helpful to the General Assembly (as the General Assembly itself has already indicated) in connection with its mandate to bring decolonisation to an end;[82]

d) the Court has before it sufficient factual material to enable it to properly and fully answer the questions posed by the General Assembly;[83] and

e) the matter is not *res judicata* because the Court is not dealing with a bilateral dispute involving the same parties and entailing the same issues, and because the Tribunal in the *Chagos Marine Protected Area Arbitration* did not address or decide the questions presented by the General Assembly in Resolution 71/292.[84]

1.35 **Chapter 3** addresses the factual and legal issues relevant to the first of the General Assembly's questions; namely whether the process of decolonisation of Mauritius was lawfully completed. As to the legal framework, there was a well-established right to self-determination – including a corollary right of territorial integrity – when the Chagos Archipelago was excised in 1965 and when Mauritius gained its independence in 1968.[85] The right of self-determination was binding on

[80] *See* paras. 2.26-2.51 below.

[81] *Ibid*.

[82] *See* paras. 2.52-2.61 below.

[83] *See* paras. 2.62-2.66 below.

[84] *See* paras. 2.67-2.73 below.

[85] *See* paras. 3.7-3.41, 3.56-3.67 below.

the administering power at the relevant time, and the U.K. Written Statement cannot support the conclusion that the U.K. was, or could be, a persistent objector in respect of that right. The doctrine of persistent objector has no application to peremptory norms, and in any event the conduct of the administering power falls far short of meeting the stringent requirements of the doctrine.[86] Accordingly, and consistent with the overwhelming majority of the other Written Statements, it is shown that the decolonisation of Mauritius was not lawfully completed in 1968. By reference to all the documentary material before the Court, it is established that:

a) the Chagos Archipelago was – in law and in fact – always treated as an integral part of Mauritius;[87]

b) the administering power's decision to detach the Chagos Archipelago was taken unilaterally and irrevocably, and made as a requisite condition for the grant of independence;[88]

c) the Mauritian people, either as a whole or through their representatives, were never given an opportunity to choose to retain the Archipelago;[89]

d) the fact that maintaining the territorial integrity of Mauritius was never an option fundamentally undermines any attempt to argue that either the talks in London in September 1965, the decision of the Council of Ministers in November 1965, or the 1967 general election amounted to the free expression of the will of the Mauritian people;[90]

[86] *See* paras. 3.42-3.55 below.

[87] *See* paras. 3.69-3.75 below.

[88] *See* para. 3.96 below. *See also* Written Statement of Mauritius, paras. 1.12, 3.18-3.20, 3.46-3.50.

[89] *See* paras. 3.76-3.98 below.

[90] *Ibid*.

e) no referendum or plebiscite was held, contrary to the overwhelming practice of the U.N. in cases where the division of a colonial territory was contemplated;[91] and

f) Mauritius did not "reaffirm" the detachment of the Chagos Archipelago post-independence.[92]

1.36 **Chapter 4** focuses on the second question referred to the Court by the General Assembly, concerning the consequences under international law arising from the continued administration by the U.K. of the Chagos Archipelago. There is an overwhelming consensus among the Written Statements that the consequences under international law include an obligation:

a) to complete the decolonisation of Mauritius with immediate effect;[93]

b) not to aid or abet the maintenance of the colonial administration of Mauritius;[94] and

c) in the short period of time necessary to complete decolonisation, to administer the Chagos Archipelago in the best interests of the Mauritian people and to take all steps necessary to ensure the right of return of Mauritians of Chagossian origin who were forced to abandon their homes in the Archipelago.[95]

[91] *See* paras. 3.93-3.98 below.

[92] *See* paras. 3.99-3.106 below.

[93] *See* paras. 4.89-4.110 below.

[94] *See* paras. 4.135-4.143 below.

[95] *See* paras. 4.111-4.134 below.

1.37 This Chapter also explains why the Court should answer the second question as drafted by the General Assembly without limitation, addressing all the legal consequences arising from the administering power's continued administration of the Chagos Archipelago.[96] As such, and by reference to the practice adopted in prior advisory opinions, there is no need for the Court to reformulate the second question so as to avoid giving an opinion on the legal consequences for States.[97]

* * *

1.38 This Written Statement is accompanied by one volume of Annexes (numbered 201-235), comprising documents that may be of assistance to the Court and that are not included in the Dossier which the Secretariat of the United Nations has compiled for the purposes of the present Request.

[96] *See* paras. 4.10-4.68 below.

[97] *See* paras. 4.69-4.88 below.

CHAPTER 2

THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION REQUESTED BY THE GENERAL ASSEMBLY, AND THERE ARE NO REASONS FOR THE COURT TO DECLINE TO GIVE IT

2.1 In this Chapter, Mauritius responds to points raised by other Written Statements in relation to the Court's jurisdiction to give the Advisory Opinion requested by the General Assembly in Resolution 71/292 of 22 June 2017, and the propriety of the exercise of this jurisdiction.

2.2 As regards the Court's jurisdiction, Mauritius notes that 31 of the 32 Written Statements recognise that the Court has jurisdiction to give the Advisory Opinion requested. The solitary exception is Australia, which argues that while the questions posed "*ostensibly* concern decolonization, their *true* purpose and effect is to seek the Court's adjudication over a question of sovereignty."[98] This unfortunate and misconceived contention, which conveys doubt about the General Assembly's good faith, cannot deprive the Court of jurisdiction, as will be shown in Section I.

2.3 As regards the propriety of the exercise of the Court's jurisdiction, 23 of the 32 Written Statements conclude that there is no reason to prevent the Court from giving the Advisory Opinion requested and answering both questions. Beyond the African Union, whose "membership considers that the resolution of the questions asked to the Court constitute a matter of systemic importance in

[98] Written Statement of Australia, para. 21 (emphasis added).

international law,"[99] the States urging the Court to answer the questions put to it by the General Assembly represent all regions of the world:

Africa	Asia and the Pacific	South and Central America	Europe
Djibouti	India	Argentina	Cyprus
Lesotho	The Marshall Islands	Belize	Germany
Madagascar	Vietnam	Brazil	Liechtenstein
Mauritius		Cuba	Netherlands
Namibia		Guatemala	Serbia
Niger		Nicaragua	
Seychelles			
South Africa			

2.4 This overwhelming global support for the issuance of the requested Advisory Opinion reflects the fact that decolonisation is a matter of direct and longstanding concern to the General Assembly. The Written Statements reflect the wide support of Member States for the adoption of Resolution 71/292 itself: 94 in favour, and only 15 opposed, with 65 abstentions. Notably, five States that had

[99] Written Statement of the African Union, para. 9.

abstained from voting (China, Germany, Liechtenstein,[100] Netherlands[101] and the Russian Federation) have submitted Written Statements which may reasonably be seen as supportive of the proposition that the Court should give an Advisory Opinion on the questions posed, so as to assist the General Assembly in discharging its functions in this field.

2.5 In these proceedings, only six States have argued that the Court should not answer the questions posed. Apart from the administering power, they are: Australia, Chile, France, Israel, and the United States. These States argue that questions relating to the completion of the decolonisation of Mauritius raise issues that touch upon a bilateral dispute over territorial sovereignty between Mauritius and the U.K., and for this reason they should not be answered. They claim that Resolution 71/292 is an attempt to circumvent a rule that consent of the parties to such a dispute is required before an international court or tribunal may exercise its jurisdiction. Australia and the United States appear to express doubt that the General Assembly has a real interest in the subject matter of its request, and that the opinion sought would be helpful to it.

2.6 That is *not*, however, the position of China, the Russian Federation, and South Korea. Each of those States recognises that the General Assembly has a leading role in matters of decolonisation, and that the questions presented by Resolution 71/292 clearly fall within its mandate. None of the three States invites the Court to refrain from issuing the requested opinion. At the same time, each

[100] Liechtenstein expressly supports the Court's jurisdiction to answer the questions put to it by the General Assembly and the propriety of its exercise in the present proceedings. *See* Written Statement of Liechtenstein, para. 18.

[101] The Netherlands answers the two questions posed by the General Assembly, thus implicitly recognizing that the Court has and may exercise its jurisdiction in the present case. *See generally* Written Statement of the Netherlands.

urges the Court to exercise a degree of caution as to the manner in which it proceeds. Mauritius is sensitive to these views and considers that they merit serious attention, without preventing the Court from answering in full the two questions posed.

2.7 The Russian Federation recognises that "self-determination in the decolonization context is firmly established as part of the mandate of the UN General Assembly",[102] and that "the General Assembly may have an institutional interest in the decolonization process given its mandate and activities in this sphere."[103] The Russian Federation recognises that the Advisory Opinion may be rendered if "[t]he object of the request is 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."[104]

2.8 China agrees that "[t]he Court, as the principal judicial organ of the United Nations, has dealt with issues related to decolonization and self-determination on a number of occasions, and played an important role in the performance of the United Nations' function of decolonization."[105] South Korea also agrees that "the General Assembly is entitled to request an advisory opinion from the Court on issues relating to the process of decolonization. … To deny the General Assembly the competence to request an opinion of the Court on such matters would run against well-established principles and long-standing judicial practice."[106]

[102] Written Statement of the Russian Federation, para. 22.

[103] *Ibid.*, para. 25.

[104] *Ibid.*, para. 24.

[105] Written Statement of China, para. 9.

[106] Written Statement of the Republic of Korea, para. 6.

2.9 At the same time, these three States invite the Court to exercise care in ensuring that purely bilateral disputes – which are not, like this one, about decolonisation – do not come to the Court by means of advisory proceedings. As the Russian Federation puts it: "The mandate of the United Nations General Assembly… does not encompass questions concerning legal status of territories, with exception related to the powers of the Assembly with respect to the Trusteeship system and related issues of the mandate system."[107] The Court should not, therefore, render an advisory opinion on a matter outside the mandate of the General Assembly, which "'relate[s] to a territorial dispute, in the proper sense of the term, between interested States'",[108] and for which "the consent of a State to adjudication of [such a] dispute… is always necessary."[109]

2.10 Likewise, China considers that "[w]hile providing legal guidance to assist the General Assembly in fulfilling its function of decolonization, the Court should continue to uphold and respect the principle of consent when a *purely bilateral dispute* is involved, thus to ensure that its opinion should not have the effect of circumventing or prejudicing this principle."[110] To the same effect, South Korea observes that "it is necessary in the advisory proceedings to carefully examine the propriety of giving an advisory opinion when one sees the possibility of infringing upon or circumventing the principle of consent to judicial settlement."[111]

[107] Written Statement of the Russian Federation, para. 5.

[108] *Ibid.*, para. 32 (quoting *Western Sahara, Advisory Opinion, I.C.J. Reports 1975* (hereinafter "*Western Sahara (Advisory Opinion)*"), p. 12, para. 43).

[109] Written Statement of the Russian Federation, para. 32.

[110] Written Statement of China, para. 18 (emphasis added).

[111] Written Statement of the Republic of Korea, para. 12.

2.11 Mauritius takes note that all three of these States have an understandable concern about the setting of a precedent that would allow advisory proceedings to be used by neighbouring States to adjudicate "purely bilateral disputes" over territorial sovereignty. All have such disputes with neighbouring States, and none has consented to have them adjudicated by the Court or any other international tribunal. These are, in Mauritius' view (and the Russian Federation's words), "territorial dispute[s], in the proper sense of the term, between interested States," or "purely bilateral dispute[s]" (in China's words). Mauritius agrees that they have no place in advisory proceedings. Mauritius also believes, for the reasons set out below, that the questions posed by the General Assembly in this matter do not relate to a "territorial dispute" or a "purely bilateral dispute".

2.12 Germany expresses a different concern about expansion of the Court's advisory jurisdiction. Although it expressly supports the issuance of the Advisory Opinion that has been requested here, it proposes that, in answering the second question, the Court limit its answer to the legal consequences for *the General Assembly*, and avoid setting out the legal consequences for *individual States*. Because this argument relates to how the Court should answer the second question, Mauritius addresses it in Chapter 4.

2.13 Mauritius has taken careful note of all the Written Statements: by the four States that express concerns without objecting to the Court rendering an Advisory Opinion, by the six States that oppose the issuance of an Advisory Opinion, and also by the African Union and the 20 other States that expressly support the issuance of an Advisory Opinion. Mauritius agrees that advisory proceedings should not be used as a pretext for bringing purely bilateral disputes before the Court, including bilateral disputes relating to territorial sovereignty. Mauritius has no doubt, however, that the Court can issue an opinion that responds to the General

Assembly's questions on decolonisation and self-determination, and can set out the legal consequences for Member States as well as the General Assembly in answer to the second question, without compromising the principle that contentious bilateral disputes may be adjudicated only with the consent of the parties.

2.14 This is because, as elaborated below, the matter put to the Court by the General Assembly is *not*, as the administering power contends, a bilateral dispute over territorial sovereignty. This case is about decolonisation and self-determination, and the questions addressed to the Court focus directly and exclusively on those subjects, which plainly fall within the "competence" of, and "are firmly established as part of the mandate" of, the General Assembly – to quote Germany and the Russian Federation, respectively.[112] As China rightly points out, the Court has previously issued advisory opinions on these subjects, and in doing so has "played an important role in the performance of the United Nations' function of decolonization."[113]

2.15 The Written Statements have been helpful in clarifying the issues, and in particular the relationship between decolonisation and a purely bilateral dispute about title over territory. Decolonisation will necessarily involve at least two parties (the administering power and the former colony) with direct interests in a defined territorial area (the entity that is the subject of the process of decolonisation). But those factors alone do not – as the Russian Federation rightly puts it, referring to the *Western Sahara* case – turn an issue of decolonisation or

[112] Written Statement of Germany, para. 48; Written Statement of the Russian Federation, para. 22.

[113] Written Statement of China, para. 9.

self-determination in the context of decolonisation into "'a territorial dispute, in the proper sense of the term'".[114]

2.16 Unlike in "'a territorial dispute, in the proper sense of the term,'" or, as China puts it, a "purely bilateral [territorial] dispute"[115], there is in this matter no freestanding dispute over legal title to territory. To the contrary, in these proceedings sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by the question of whether decolonisation has or has not been lawfully completed. There exists no distinct dispute for the Court to resolve, by reference to the applicable law relating to territorial sovereignty. The Court is called upon only to determine whether decolonisation has been lawfully completed, and the legal consequences of the answer to that question.

2.17 In contrast to a dispute between two States over title to a contested land or insular feature, the territorial dimension here is completely and fully resolved exclusively by reference to the rules of international law on decolonisation and self-determination. The Court is not called upon to address the law on, for example, acquisition of title to territory. Rather, in this decolonisation matter, in particular, the lawful completion of the decolonisation process, in and of itself, brings to an end the issues relating to territorial sovereignty. In short, if the Court determines that decolonisation has *not* been lawfully completed, and that as a legal consequence it *must* be completed, no other question of title to territory arises. Equally, if the Court determines that decolonisation was lawfully completed in

[114] Written Statement of the Russian Federation, para. 32 (quoting *Western Sahara (Advisory Opinion)*, p. 12, para. 43).

[115] Written Statement of China, para. 18.

1968, when Mauritius became independent, notwithstanding the detachment of the Archipelago, then, too, there is no issue of title to territory to resolve.

2.18 In addition to their expressed concerns about the principle of consent, some of the States opposing the issuance of an Advisory Opinion have argued that:

- the Court's responses to the questions presented by Resolution 71/292 will not assist the General Assembly in the performance of its functions, because it has no real or ongoing interest in the matters raised by them (Australia and the United States);[116]

- the questions require the Court to address voluminous and complex facts that are unsuitable for determination in the compressed proceedings of the Court's advisory jurisdiction (the U.K., Australia, and Israel); [117] and

- the principle of *res judicata* precludes the Court from giving an Advisory Opinion because it would reopen issues already decided in the *Chagos Marine Protected Area Arbitration* (U.K., Australia, and France).[118]

2.19 Mauritius regards each of these concerns as unfounded, and responds to them in Section II of this Chapter.

[116] Written Statement of Australia, para. 31(b); Written Statement of the United States of America, para. 3.23.

[117] Written Statement of the United Kingdom, paras. 7.11, 7.18(f); Written Statement of Australia, para. 31(c); State of Israel's Statement, para. 3.1.

[118] Written Statement of the United Kingdom, paras. 7.11, 9.5; Written Statement of Australia, para. 39; Exposé écrit de la République Française, para. 17.

I. The Court has jurisdiction to give the Advisory Opinion requested by the General Assembly in Resolution 71/292

2.20 In its Written Statement, Mauritius demonstrated that the two requirements for the exercise of advisory jurisdiction under Article 65(1) of the Statute of the Court are fulfilled in the present case.[119] Specifically, the request was validly adopted by the General Assembly, as a duly authorised organ acting within its competence and raising questions directly relating to its mandate on decolonisation; and the request presents questions of a legal character.[120]

2.21 As noted above, Australia is alone in reaching a different conclusion. It does not contest that the request was validly adopted by the General Assembly within its mandate on decolonisation. Nor does it contest that the request presents questions of a legal character. Its only argument is that the legal questions put to the Court "do not raise – and, in fact, obscure – *the real issue* of international law with respect to the Chagos Archipelago for which an answer is sought."[121] Australia contends that while those questions "ostensibly concern decolonisation, their true purpose and effect is to seek the Court's adjudication over a question of sovereignty."[122] According to Australia, "[t]his point is jurisdictional," because the opinion sought is a "proxy" for other issues.[123]

2.22 Aside from being unsupported by any other State, the argument is unpersuasive. Australia reads into the General Assembly's questions its own,

[119] Written Statement of Mauritius, paras. 5.2-5.17.

[120] *Ibid.*

[121] Written Statement of Australia, para. 21 (emphasis added).

[122] *Ibid.*

[123] Written Statement of Australia, para. 24.

subjective understanding as to the "real issues" presented in the request, and accuses the General Assembly of disingenuousness by submitting to the Court a "proxy" for its "true" questions. Yet the terms of the questions referred to the Court plainly indicate that they seek answers as to whether decolonisation was lawfully completed with respect to Mauritius, and what legal consequences follow if it has not been lawfully completed. Indeed, that is how these questions have been understood by the overwhelming majority of Written Statements.[124] The plain meaning of these questions is dispositive and should be given effect.[125]

2.23 The Court has also made clear that "[i]n considering what questions are 'really in issue', the Court must… have regard… to the *intentions of the requesting body as they emerge from such records as may be available of the discussions leading up to the decision to request an opinion.*"[126] Records of the discussions leading up to the decision to request an Advisory Opinion indicate that the purpose was to obtain the Court's opinion in order to assist the General Assembly in exercising its functions related to decolonisation under the U.N. Charter, and not

[124] *See generally*, *e.g.*, Written Statement of the African Union; Written Statement of the Argentine Republic; Written Statement of Brazil; Written Statement of Cyprus; Written Submission of Djibouti; Written Statement of Guatemala; Written Statement of Liechtenstein; Written Comments of the Marshall Islands; Written Statement of Namibia; Written Statement of Niger; Written Statement by Serbia; Written Statement of South Africa.

[125] *See*, *e.g.*, *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J. Series B, No. 11*, p. 39 ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010* (hereinafter "*Declaration of Independence in Respect of Kosovo (Advisory Opinion)*"), p. 417, para. 33; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996* (hereinafter "*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*"), p. 237, para. 16; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980* (hereinafter "*Agreement between the WHO and Egypt (Advisory Opinion)*"), p. 87, para. 33.

[126] *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 42, para. 44 (emphasis added).

for any other reason. This is made clear by numerous statements made when the draft General Assembly resolution was introduced, including by the Republic of Congo.[127] The request for an Advisory Opinion was supported by a great number of States, and it is not for Australia to substitute its view for those of others.

2.24 The Court plainly has jurisdiction to give the Advisory Opinion requested by the General Assembly in Resolution 71/292.

II. There are no compelling reasons for the Court to decline to give the Advisory Opinion that has been requested

2.25 In this Section, Mauritius responds to certain concerns raised in some Written Statements and shows that: (1) giving the Advisory Opinion in this case would not circumvent the principle of consent to judicial settlement; (2) the Court's responses to the questions presented by Resolution 71/292 will be helpful to the General Assembly in fulfilling its functions related to the decolonisation of Mauritius; (3) the questions put to the Court do not involve voluminous and complex facts that cannot be established in the context of advisory proceedings; and (4) the principle of *res judicata* has no application in the present case.

A. THE REQUEST DOES NOT CONCERN A PURELY BILATERAL DISPUTE, AND FULLY ANSWERING THE TWO QUESTIONS WOULD NOT CIRCUMVENT THE PRINCIPLE OF CONSENT FOR THE ADJUDICATION OF SUCH DISPUTES

2.26 In its Written Statement, Mauritius showed that in the *Western Sahara* and *Wall* cases the Court decided that "the principle of consent to judicial settlement is not circumvented if: (i) the advisory opinion is requested on questions located in a broader frame of reference than a bilateral dispute; and (ii) the object of the request

[127] Written Statement of Mauritius, paras. 1.20-1.26.

is to obtain from the Court an opinion which the General Assembly deems of assistance for the proper exercise of its functions".[128]

2.27 Relying on that two-prong test, Mauritius' Written Statement demonstrated that the Court should give the Advisory Opinion requested, because: (i) the General Assembly's questions concern the decolonisation of a territory, which is a predicate matter that entails obligations of an *erga omnes* character and clearly falls within the mandate of the General Assembly, and is not a bilateral territorial dispute; and (ii) the object of the request is to obtain from the Court an opinion that the General Assembly has deemed important to allow it to exercise its mandate with respect to the completion of the process of decolonisation.[129]

2.28 The U.K., Australia, Chile, Israel, France, and the United States offer a minority view to the contrary. In so doing, they fail to engage with the relationship between decolonisation, which falls within the advisory function of the Court, and a purely bilateral dispute over territory, which does not.

2.29 An overwhelming majority of Written Statements support the conclusions of Mauritius:[130]

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[128] *See ibid.*, para. 5.29 (citing *Western Sahara (Advisory Opinion)*, pp. 26-27, paras. 38-39); *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territories, Advisory Opinion, I.C.J. Reports 2004* (hereinafter ("*Construction of a Wall (Advisory Opinion)*"), p. 159, para. 50.

[129] Written Statement of Mauritius, paras. 5.18-5.27. *See also Western Sahara (Advisory Opinion)*, p. 27, para. 39; *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19 ("The object of this request for an Opinion is to guide the United Nations in respect of its own action.")

[130] *See, e.g.*, Written Statement of the African Union; Written Statement of the Argentine Republic; Written Statement of Brazil; Written Statement of Cyprus; Written Submission of Djibouti; Written Statement of Guatemala; Written Statement of Liechtenstein; Written Comments of the Marshall Islands; Written Statement of Namibia; Written Statement of Niger; Written Statement by Serbia; Written Statement of South Africa.

- The **African Union**, on behalf of its 55 Member States, observes that "[t]he advisory opinion is requested on questions which are of particular concern to the United Nations, and which belong to a broader frame of reference than a simple bilateral dispute",[131] and emphasises that the object of the request "is to obtain from the Court an opinion, which the [General] Assembly deems of assistance to it for the proper exercise of its functions".[132]

- **Argentina** observes that "the question of the separation of the Chagos Archipelago from Mauritius is a matter of decolonization… fall[ing] within the powers of the General Assembly",[133] and does not concern a matter of a purely bilateral character. This is because decolonisation "constitutes a matter of international concern."[134]

- For **Brazil**, the General Assembly's request "transcends the realm of any bilateral relationship, as it deals with matters that are 'directly of concern to the United Nations.'"[135] It concerns the implementation of "the right of peoples to self-determination in colonial contexts", an "*erga omnes* obligation[]… owed to all, and to the international community as a whole."[136]

[131] Written Statement of the African Union, para. 31.

[132] *Ibid.*, para. 30.

[133] Written Statement of the Argentine Republic, paras. 11, 23.

[134] *Ibid.*, para. 29.

[135] Written Statement of Brazil, para. 12 (citing *Construction of a Wall (Advisory Opinion)*, pp. 158-159, para. 49).

[136] Written Statement of Brazil, para. 12 (citing *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995* (hereinafter "*East Timor, Judgment*"), p. 102, para. 29).

- **Cyprus** concludes that "the subject-matter of the present request for an advisory opinion cannot be regarded as a purely bilateral matter between Mauritius and the United Kingdom."[137] This is because "[m]atters pertaining to decolonization are proper subjects for an advisory opinion, given the critical role of the General Assembly in this process, the *jus cogens* nature of self-determination, and the *erga omnes* nature of the obligations with respect to decolonization."[138]

- **Djibouti** concludes that "the subject matter of the request before the Court concerns the 'right of peoples to self-determination', which this Court has found 'has an *erga omnes* character'".[139] Accordingly, the questions raised in the General Assembly's request "cannot 'be regarded as only a bilateral matter', but [are] instead of concern to the international community as a whole."[140]

- **Guatemala** concludes that the current proceeding is about decolonisation, a legal question – like others in the past – that is "located in a broader frame of reference than the settlement of a particular dispute and embrace other elements."[141]

- **Liechtenstein** observes that the General Assembly's questions raise "important issues relating to the right to self-determination,"[142] and that "[e]ven if there is an underlying bilateral aspect to a question that is

[137] Written Statement of Cyprus, para. 26.

[138] *Ibid*.

[139] Written Submission of Djibouti, para. 22 (quoting *East Timor, Judgment*, p. 102, para. 29).

[140] Written Submission of Djibouti, para. 22 (quoting *Construction of a Wall (Advisory Opinion)*, para. 49).

[141] Written Statement of Guatemala, para. 25.

[142] Written Statement of Liechtenstein, para. 16.

posed to the Court, the jurisprudence is clear that it should still issue an Advisory Opinion if the matter is 'deemed to be directly of concern to the United Nations.'"[143] In this case, "the request concerns decolonization, a matter that falls within the core competence of the General Assembly."[144]

- The **Marshall Islands** assert that the questions do not have "a purely bilateral dimension" because they are situated in "a much wider framework" relating to "multilateral aspects of decolonization", which "is of more general interest to the United Nations and in particular "to relevant issues and agenda items within the UN General Assembly".[145]

- **Namibia** observes that "the questions addressed to the Court are located in a 'broader frame of reference than the settlement of a particular dispute'" because they concern decolonisation. This matter "fall[s] within the competence of the UNGA" and concerns "the entire international community".[146]

- **Niger** observes that because the questions posed to the Court concern decolonisation they are located "'dans un cadre plus large que celui d'un règlement d'un différend particulier'", and "'intéressent directement l'Organisation des Nations Unies'."[147]

- **Serbia** makes clear that "[t]he issues connected with decolonization could not be treated as of a bilateral concern, but as of concern for the

[143] *Ibid.* (quoting *Construction of a Wall (Advisory Opinion)*, p. 159, para. 49).

[144] Written Statement of Liechtenstein, para. 16.

[145] Written Comments of the Marshall Islands, para. 15.

[146] Written Statement of the Republic of Namibia (1 Mar. 2018), p. 2.

[147] Written Statement of Niger, p. 2 (quoting *Western Sahara (Advisory Opinion)*).

whole international community",[148] and that even if "[a]ll disputes of this kind have a bilateral dimension", "this is not a purely bilateral dispute" because it concerns the "international community as a whole."[149]

2.30 These and the great majority of Written Statements rightly recognise that legal issues arising from the process of decolonisation fall within the mandate of the United Nations and the General Assembly because they concern the international community as whole. They will inevitably have a bilateral aspect, because of the relationship between the administering power and the Non-Self-Governing Territory. But that aspect is not the defining one, and does not give rise to a purely bilateral dispute. This is for two overriding reasons:

- *First*, the right to self-determination in the context of decolonisation has created *erga omnes* obligations, which the U.K., as the administering power, owes to the international community as a whole;[150]

- *Second*, decolonisation falls within the mandate of the General Assembly and constitutes a matter of direct concern to the United Nations in light of its declared goal to end colonialism. The General Assembly's questions reflect the need of the requesting organ to obtain

[148] Written Statement by Serbia, para. 25.

[149] *Ibid.*, para. 26.

[150] *See Construction of a Wall (Advisory Opinion)*, p. 199, para. 156 (recalling that "'[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle'"). *See also ibid*., p. 199, para. 155 ("The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection'. … The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.") (italics in original; underlining added).

from the Court an Advisory Opinion for the proper exercise of its functions concerning the decolonisation of the territory.

2.31 The great majority of Written Statements correctly conclude that the Court's reply to the General Assembly's questions would not circumvent the principle of consent. The obligation owed to the international community dominates any bilateral aspect, and the latter cannot take precedence over the former.

2.32 This proposition is reflected in the Court's jurisprudence. This confirms that, even when the subject-matter of a request may be considered as having a bilateral element, that fact alone will not bar the Court from exercising its advisory jurisdiction where the question before the Court is located in a broader frame of reference relating to an obligation owed to the international community as a whole and falling within the mandate of the organ making the request. This is reflected in, for example, the *Wall* and *Western Sahara* cases. The *rationes decidendi* of those decisions have been ignored or mischaracterised in the few Written Statements that invite the Court to decline to exercise its jurisdiction in this matter.

2.33 In the *Wall* case, the Court was presented with the General Assembly's question on the legal consequences arising from the construction of the wall built by Israel, the occupying power, in the Occupied Palestinian Territory. Israel contended that "the subject-matter of the question posed by the General Assembly [was] 'an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters'."[151] The bilateral dispute, according to Israel, also involved claims that the construction of the wall "'is an attempt to annex the territory [in the West Bank]

[151] *Construction of a Wall (Advisory Opinion)*, p. 157, para. 46.

contrary to international law', and that 'the *de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination'."[152] Israel emphasized that it had never consented to the settlement of its bilateral dispute with Palestine by the Court or by other means of compulsory jurisdiction.[153] Accordingly, Israel submitted, the Court should decline to give the Advisory Opinion, because "responding to the question put to the Court would be substantially equivalent to deciding" the various elements comprising the Israel-Palestine dispute.[154]

2.34 The U.K. also argued that the construction of the wall had "undoubtedly given rise to a bilateral dispute between Israel and Palestine", with "title to territory hav[ing] been identified as a principal concern",[155] so that the Court should decline to exercise jurisdiction. The U.K. contended, as it does here, that answering the question put to the Court "would be deciding an issue in a bilateral dispute and thereby circumventing the requirement of consent in the contentious jurisdiction."[156]

2.35 The Court rejected the arguments made by Israel and the U.K. While "acknowledg[ing] that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the

[152] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Written Statement of the Government of Israel on Jurisdiction and Propriety* (30 Jan. 2004), para. 7.6.

[153] *Ibid.*, paras. 7.11-7.15.

[154] *Ibid.*, para. 7.9.

[155] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for an Advisory Opinion by the United Nations General Assembly), Written Statement of the United Kingdom of Great Britain and Northern Ireland* (Jan. 2004), p. 21, para. 3.32.

[156] *Ibid.*, p. 21, para. 3.31.

Court has been asked to pronounce",[157] the Court emphasised that the subject-matter of the General Assembly's request could not "be regarded as only a bilateral matter between Israel and Palestine."[158] The Court explained that "[g]iven the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations."[159] On that basis, the Court concluded that:

> The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is <u>located in a much broader frame of reference than a bilateral dispute</u>. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.[160]

2.36 No judge dissented from this aspect of the Court's decision.[161]

2.37 The *Wall* case offers clear authority for the proposition that the mere existence of a bilateral dispute does not bar the Court from giving an advisory opinion on questions that are located within a broader frame of reference, affecting

[157] *Construction of a Wall (Advisory Opinion)*, p. 158, para. 48.

[158] *Ibid.*, pp. 158-159, para. 49.

[159] *Ibid.*, p. 159, para. 49.

[160] *Ibid.*, p. 159, para. 50 (emphasis added).

[161] Judge Buergenthal was the only judge to dissent from the Court's decision on discretion, but he did so for a reason unrelated to the principle of consent. According to Judge Buergenthal, the Court should have declined jurisdiction for reason of the alleged insufficiency of the requisite information and evidence. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, Separate Opinion of Judge Buergenthal, I.C.J. Reports 2004*, p. 240.

the concerns of the international community. The point was dealt with precisely by Judge Kooijmans, in a separate opinion. He observed that "[a] situation which is of legitimate concern to the organized international community and a bilateral dispute with regard to that same situation may exist simultaneously."[162] However, "[t]he existence of the latter cannot deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments."[163] By giving an opinion in such circumstances "the Court therefore in no way circumvents the principle of consent to the judicial settlement of a bilateral dispute which exists simultaneously."[164]

2.38 Exactly the same conclusion should be reached in the present case. Neither the U.K. nor any other State urging the Court to decline the exercise of jurisdiction has offered any reason why the Court's reasoning in the *Wall* case should not apply to this request by the General Assembly. Nor have they argued that the Court's approach in the *Wall* case was wrong and should be overturned.

2.39 The Court's decision in the *Wall* case was fully consistent with its earlier decision in *Western Sahara*. There, the General Assembly, recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)), requested that the Court give an Advisory Opinion on two questions related to the on-going decolonisation efforts in regard to Western Sahara: whether Western Sahara was *terra nullius* at the time of its colonisation by

[162] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, Separate Opinion of Judge Kooijmans, I.C.J. Reports 2004,* p. 227, para. 27.

[163] *Ibid.*

[164] *Ibid.*

Spain, and if not, what the legal ties were between Western Sahara and the Kingdom of Morocco and the Mauritanian entity.

2.40 At the time of the General Assembly's request, there was a dispute between Spain and Morocco regarding territorial sovereignty over Western Sahara. As the Court noted, "when resolution 3292 (XXIX) [requesting the Advisory Opinion] was adopted, there appeared to be a legal dispute between Morocco and Spain regarding the Territory of Western Sahara".[165] The Court added that "the questions contained in the request for an opinion may be considered to be connected with that dispute", and that "the advisory opinion requested in that resolution appears to be one 'upon a legal question actually pending between two or more States.'"[166]

2.41 The legal dispute between Morocco and Spain involved Morocco's claim to Western Sahara as being an integral part of its national territory.[167] This claim was opposed by Spain, which declined to consent to Morocco's invitation to submit the dispute to the Court for adjudication.[168]

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[165] *Western Sahara, Advisory Opinion, Order of 22 May 1975, I.C.J. Reports 1975*, p. 7.

[166] *Ibid.*, pp. 7-8.

[167] *Western Sahara (Advisory Opinion)*, p. 25, para. 34. Spain in its communication addressed on 10 November 1958 to the Secretary-General of the United Nations stated: "Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain." *Western Sahara (Advisory Opinion)*, p. 25, para. 34 (quoting letter from the Government of Spain dated 10 Nov. 1958). "This gave rise to the 'most explicit reservations' of the Government of Morocco, which, in a communication to the Secretary-General of 20 November 1958, stated that it 'claim[ed] certain African territories at present under Spanish control as an integral part of Moroccan national territory'." *Western Sahara (Advisory Opinion)*, p. 25, para. 34 (quoting letter from the Government of Morocco dated 20 Nov. 1958).

[168] On 23 September 1974, several months before the General Assembly's submission of its request for the Advisory Opinion, Morocco proposed to Spain the joint submission to the Court of a dispute expressed in the following terms: "You, the Spanish Government, claim that the Sahara was *res nullius.* You claim that it was a territory or property left uninherited, you claim that no power and no administration had been established over the Sahara: Morocco claims the contrary. Let us request

2.42 The territorial sovereignty dispute between Morocco and Spain was inextricably linked to the decolonisation and self-determination of Western Sahara. If Morocco was correct – that Western Sahara had been under the sovereignty of the Kingdom of Morocco at the time of Spanish colonisation – then, as a legal consequence, in Morocco's view, Western Sahara would have to be reintegrated with Morocco as part of the completion of the decolonisation process. In contrast, if Spain was correct – that Western Sahara had not been under the sovereignty of the Kingdom of Morocco at the time of Spanish colonisation – then, to complete the decolonisation process, the people of Western Sahara would be entitled to exercise their right of self-determination by freely determining whether to emerge from colonisation as a sovereign independent State, enter into free association with an independent State, or integrate with an independent State.[169]

2.43 The Court gave its Advisory Opinion in *Western Sahara* notwithstanding Spain's objection to the propriety of its exercise of advisory jurisdiction. Spain argued that the subject-matter of the request for the Advisory Opinion was substantially identical to its bilateral territorial dispute with Morocco over Western Sahara; that the case involved a dispute concerning the attribution of the territorial sovereignty over Western Sahara, and Spain did not consent to the submission of

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the arbitration of the International Court of Justice at The Hague… It will state the law on the basis of the titles submitted'." *Western Sahara (Advisory Opinion)*, p. 22, para. 26 (quoting letter from the Minister of Foreign Affairs of Morocco dated 23 Sept. 1974).

[169] As Judge Gros observed, "[t]he object of the request [for the advisory opinion] was to obtain the opinion of the Court on a claim of the Government of Morocco to the reintegration of the Territory in the national territory of Morocco, and on a parallel claim by the Government of Mauritania based on the concept of the Mauritanian entity at the time in question, which advisory opinion was necessary prior to pursuit of the decolonization of the territory." *Western Sahara, Advisory Opinion, Declaration of Judge Gros, I.C.J. Reports 1975*, p. 75, para. 10.

that dispute to compulsory jurisdiction; and that the Court's advisory jurisdiction was being abused to circumvent the principle of consent to judicial settlement.[170]

2.44 The Court rejected Spain's objection. It did so for two main reasons (which are ignored by those States which invite the Court in the present case to decline to exercise its jurisdiction). *First*, the Court stressed that the General Assembly's request contained "a proviso concerning the application of General Assembly Resolution 1514 (XV)." On that basis, the Court concluded that "the legal questions of which the Court ha[d] been seized [were] located in a broader frame of reference than the settlement of a particular dispute and embrace[d] other elements."[171] *Second*, the Court pointed out that the object of the request for the Advisory Opinion was "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."[172] In this connection, the Court stressed that "[t]he legitimate interest of the General Assembly in obtaining an opinion from the Court in respect of its own future action cannot be affected or prejudiced by the fact that

[170] Spain argued: "[T]he subject of the dispute which Morocco invited it to submit jointly to the Court for decision in contentious proceedings, and the subject of the questions on which the advisory opinion is requested, are substantially identical; thus the advisory procedure is said to have been used as an alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question. Consequently, to give a reply would, according to Spain, be to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's jurisdiction. … Such circumvention of the well-established principle of consent for the exercise of international jurisdiction would constitute, according to this view, a compelling reason for declining to answer the request." *Western Sahara (Advisory Opinion)*, pp. 22-23, para. 27. A second way in which Spain put the objection of the lack of its consent was "to maintain that the dispute is a territorial one and that the consent of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary." *Western Sahara (Advisory Opinion)*, pp. 27-28, para. 43.

[171] *Western Sahara (Advisory Opinion)*, p. 26, para. 38 (emphasis added).

[172] *Ibid.*, pp. 26-27, para. 39.

Morocco made a proposal, not accepted by Spain, to submit for adjudication by the Court a dispute raising issues related to those contained in the request."[173]

2.45 The same approach is applicable here. *First*, the terms of the General Assembly's request for an Advisory Opinion in respect of the decolonisation of Mauritius contain a proviso concerning the full and immediate implementation of Resolution 1514 (XV). Indeed, in the present case the Court is specifically asked to render an Advisory Opinion on whether the process of decolonisation of Mauritius was lawfully completed having regard to international law, including the obligations reflected in Resolution 1514 (XV) and other related resolutions of the General Assembly. This locates the legal questions of which the Court has been seized "in a much broader frame of reference than a bilateral dispute."[174]

2.46 *Second*, as in *Western Sahara*, the object of the present request for an Advisory Opinion is "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 Mauritius.[175] The General Assembly indisputably has a direct institutional interest in this matter.

2.47 The present case is even further removed from a purely bilateral territorial dispute than *Western Sahara*. To issue its opinion on decolonisation in *Western Sahara*, the Court first had to determine the validity of Morocco's claim of territorial sovereignty over Western Sahara. Such a determination was necessary to

[173] *Ibid.*, p. 27, para. 41.

[174] *Construction of a Wall (Advisory Opinion)*, p. 159, para. 50. *See also Western Sahara (Advisory Opinion)*, p. 26, para. 38.

[175] *Western Sahara (Advisory Opinion)*, p. 27, para. 39. *See also Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19 ("The object of this request for an Opinion is to guide the United Nations in respect of its own action.")

allow the Court to render its opinion on the completion of the decolonisation process. In these proceedings, the opposite is true: the question of whether decolonisation has been lawfully competed comes first and, once determined, leaves no territorial issue to be resolved. Here, in contrast to *Western Sahara,* sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonisation issue. There is no basis for a separate consideration or determination of any question of territorial sovereignty.

2.48 What do those urging the Court not to issue an Advisory Opinion have to say about *Western Sahara*? They say absolutely nothing about the "broader frame of reference" point. Instead, the U.K., the United States and Australia argue that in *Western Sahara* the request for the Advisory Opinion was related to a dispute that arose during the proceedings of the General Assembly, while in the present case, they contend, the dispute arose independently in bilateral relations.[176] This is manifestly wrong, as well as irrelevant. As Mauritius demonstrated in its Written Statement, the issues giving rise to the General Assembly's request originated in the 1960s, well before Mauritius attained independence, when the General Assembly addressed the dismemberment of Mauritius by calling upon the administering power to comply with its obligations under the U.N. Charter and Resolution 1514 (XV) to respect the territorial integrity of Mauritius.[177] In this respect, the present case is similar to *Western Sahara.*

[176] Written Statement of the United Kingdom, para. 7.17(c); Written Statement of the United States of America, para. 3.22.

[177] U.N. General Assembly, 20th Session, *Question of Mauritius*, U.N. Doc. A/RES/2066(XX) (16 Dec. 1965) (hereinafter "*Question of Mauritius* (16 Dec. 1965)") (**Dossier No. 146**); U.N. General Assembly, 21st Session, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, U.N. Doc. A/RES/2232(XXI) (20 Dec. 1966) (**Dossier No. 171**);

2.49 The U.K., the United States and Australia seek to distinguish *Western Sahara* by arguing that the earlier case concerned sovereignty rights over the disputed territory *at the time of its colonisation*, which had no effect on the *present day right*s of States in regard to that territory.[178] This argument ignores the fact that, although the Court had to examine the titles prior to and at the time of colonisation, the Court's reply had critical consequences for *present day rights*. As Judge Gros observed, "the Court's reply concerns a claim of right to re-integration of the Territory *at the present time*," even though "the first test of that right was that of the *titles prior to colonization.*"[179] Judge Singh elaborated on this point: "Those legal ties which the Court found to exist *at the time* of Spanish colonization between Western Sahara and Morocco or Mauritania were not of such a character as *to justify today* the reintegration or retrocession of the territory without consulting the people."[180] In the present case, this leads to the obvious conclusion: if it is determined by the Court that the decolonisation of Mauritius has not been lawfully completed because the U.K. failed to comply with its obligation not to dismember the territory of Mauritius without the freely expressed consent of its

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U.N. General Assembly, 22nd Session, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Swaziland, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, U.N. Doc. A/RES/2357(XXII) (19 Dec. 1967) (**Dossier No. 198**).

[178] Written Statement of the United Kingdom, para. 7.18(c); Written Statement of the United States of America, para. 3.29; Written Statement of Australia, para. 47(c).

[179] *Western Sahara, Advisory Opinion, Declaration of Judge Gros, I.C.J. Reports 1975*, p. 73, para. 6 (emphasis added).

[180] *Western Sahara, Advisory Opinion, Declaration of Judge Nagendra Singh, I.C.J. Reports 1975*, p. 79 (emphasis added). Judge Singh also noted that the Court's response to the General Assembly's request in *Western Sahara* did not have effect of circumventing the principle of consent: "No such bypassing of this salutary principle has taken place in the present proceedings because the object of the request for an opinion has been to obtain from the Court legal advice which the General Assembly considers of assistance in the discharge of its functions in relation to the pending decolonization of a territory." *Ibid.*, p. 82.

people *in 1965*, the U.K. must, as a legal consequence, proceed to complete the decolonisation process *at the present time*.

2.50 Both the *Western Sahara* and *Wall* cases thus offer clear authority in support of the Court's right to exercise its advisory jurisdiction in the present matter. As each case shows, the Court has not hesitated to render an opinion that impacts on the territorial sovereignty claims of a State, where, as here, the "territorial dispute" is not purely bilateral in nature, but is located in the broader frame of decolonisation and self-determination, falling within the mandate of the General Assembly, in circumstances in which the Court's opinion is requested by the General Assembly to assist it in the fulfilment of its recognised functions.

2.51 Here, it is obvious that the task before the Court is not (as Israel incorrectly contends in its Written Statement[181]) to assess competing claims between the U.K. and Mauritius to sovereign title over territory, as would happen in a purely bilateral dispute as to title to territory. Rather, the task before the Court is to answer a predicate question of whether the administering power has lawfully completed the process of decolonisation of Mauritius, by reference to the law on self-determination and decolonisation. This question has nothing to do with which State has a better claim to title, and everything to do with the question of whether the decolonisation of Mauritius has been lawfully completed.

[181] Israel contends that the questions the General Assembly put before the Court "inevitably require an assessment of the competing claims of the United Kingdom and Mauritius with respect to sovereign title over the territory." State of Israel's Statement, para. 3.09 (emphasis added).

B. THE COURT'S RESPONSES TO THE QUESTIONS WILL BE HELPFUL TO THE GENERAL ASSEMBLY

2.52 Australia and the United States contend that, because "no U.N. organ has considered Mauritius or its claim to the Chagos Archipelago as falling within the United Nations' decolonization agenda since Mauritius gained its independence in 1968,"[182] "the request for an advisory opinion… will not assist [the General Assembly] in the performance of its functions".[183]

2.53 The contention is wrong. Australia and the United States are mistaken in asserting that the General Assembly has shown no interest in the decolonisation of Mauritius since 1968. As Mauritius demonstrated in its Written Statement, since its independence, the General Assembly and other U.N. bodies (including the Committee of 24 and the Human Rights Committee) have remained actively engaged in matters concerning the decolonisation of Mauritius, including the detachment of the Chagos Archipelago, the creation of the "BIOT", the construction and maintenance of military facilities on Diego Garcia, and the forcible removal of the Chagossians and prevention of their return.[184] Mauritius itself has raised these matters before the General Assembly on more than 30 occasions since 1980.[185] A multitude of examples – across more than five decades – are included in the Dossier prepared by the U.N. Secretariat and are set out in Mauritius' Written Statement.[186] It is unclear how the contentions of Australia and

[182] Written Statement of the United States of America, para. 3.23.

[183] Written Statement of Australia, para. 31(b).

[184] Written Statement of the Mauritius, para. 4.40.

[185] *Ibid.*, paras. 4.5, 4.15. *See also* Republic of Mauritius, *References to the Chagos Archipelago in Annual Statements Made by Mauritius to the United Nations General Assembly (extracts)* (1974-2017) (**Annex 100**).

[186] Written Statement of Mauritius, paras. 4.40(a)-4.40(h), 4.41.

the U.S. can be made in the face of a Dossier submitted by the U.N. that runs to nearly 6,000 pages, and covers the period from 1946 to 2017.

2.54 The record shows that the General Assembly has undertaken a continuing responsibility to ensure that the decolonisation of Mauritius is lawfully completed. By putting to the Court the two questions pertaining to the decolonisation of Mauritius, the General Assembly has itself determined that it would benefit from the Court's Advisory Opinion, as Resolution 71/292 makes clear. There is no merit in the contention that the Court's opinion would be unhelpful to the General Assembly.

2.55 The best judge of whether the General Assembly would be helped by the Advisory Opinion is the General Assembly itself.[187] Indeed, after recalling all its resolutions in which it invited the U.K. "to take effective measures with a view to the immediate and full implementation of resolution 1514(XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity," the General Assembly emphatically expressed its view that the Court's answers to the two questions would be helpful to it in fulfilling its important mandate to ensure "the immediate and full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples".[188] That view

[187] *See Western Sahara (Advisory Opinion)*, p. 37, para. 72; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, p. 237, para. 16 (stating that it is for the Assembly "to decide for itself on the usefulness of an opinion in the light of its own needs").

[188] U.N. General Assembly, 71st Session, *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*, U.N. Doc. A/RES/71/292 (22 June 2017) (hereinafter "*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* (22 June 2017)), p. 1 (**Dossier No. 7**).

was supported by an overwhelming vote of the membership. Only 15 Member States out of 193 opposed it.

2.56 Not surprisingly, the great majority of States that have submitted Written Statements agree that the Court's Advisory Opinion would be helpful to the General Assembly. For example:

- The **African Union** observes that "[t]he advisory opinion is requested on questions which are of particular concern to the United Nations,"[189] and that the Court's opinion would assist the General Assembly in exercising its functions in relation to decolonisation.[190]

- **Brazil** observes that the questions raised by the General Assembly "reflect a broad concern of the international community regarding the need for legal clarity with regard to the scope and application of a set of norms of international law – such as territorial integrity and the right of peoples to self-determination – in the context of decolonization."[191]

- **Cyprus** observes that "[t]he UN, as a whole, and the General Assembly in particular, shall benefit substantially from the guidance of and clarification by the UN's principal judicial organ on the legality of the decolonization process and its consequences."[192]

- **Germany** observes that "the General Assembly has, time and again, actively played its paramount role in the process of decolonization", so

[189] Written Statement of the African Union, para. 31.

[190] *Ibid.*, para. 30.

[191] Written Statement of Brazil, para. 11.

[192] Written Statement of Cyprus, para. 26.

that "[l]egal guidance by the Court could thus assist the General Assembly with regard to any possibly incomplete decolonization processes, including the particular situation concerning the Chagos archipelago".[193]

- **Guatemala** observes that "the General Assembly has come to the Court looking for clarity and guidance in order to discharge its own functions".[194]

- **Liechtenstein** observes that "[t]he questions put to the ICJ are both urgent and relevant, and are likely to have a practical and contemporary effect in light of the General Assembly's role in overseeing decolonization as well as to contribute to the general development of international law."[195]

- **Serbia** observes that "[i]n the case where the General Assembly invited the Government of the United Kingdom 'to take no action which would dismember the Territory of Mauritius and violate its territorial integrity' (UN General Assembly resolution 2066 (XX) of 16 December 1965 reaffirmed by other resolutions, including resolution 71/292 of 22 June 2017), providing [an] advisory opinion on the issues that arose at the time of separation of Chagos Archipelago in 1965 and that are still pending… seem[s] to be of paramount importance."[196]

2.57 As these and many other Written Statements confirm, there is a clear view that the Court's Advisory Opinion on the two questions posed would be helpful to

[193] Written Statement of Germany, para. 150.

[194] Written Statement of Guatemala, para. 26.

[195] Written Statement of Liechtenstein, para. 16.

[196] Written Statement by Serbia, para. 28.

the General Assembly to determine its future course of action in respect of the decolonisation of Mauritius.

2.58 In regard to the first question, the Written Statements have confirmed that conflicting views continue to persist among the members of the General Assembly as to whether the process of decolonisation of Mauritius has actually been completed. The U.K. and the U.S. argue that there was no right of self-determination in customary international law at the relevant time. By contrast, every other Written Statement that addresses the first question concludes that the right of self-determination was well-established in international law by the time that Mauritius was dismembered, and that the right of self-determination was violated in Mauritius' case. As a consequence, its decolonisation was not lawfully completed in 1968 and has not been lawfully completed to date.[197]

2.59 In these circumstances, the Court's response to the first question would be helpful because the Court would authoritatively establish whether or not under international law the process of decolonisation of Mauritius was lawfully completed when Mauritius was granted independence in 1968. The Court's authoritative answer on this issue would assist the General Assembly to determine whether, and how, it should continue to address the situation of the Chagos Archipelago in the context of its responsibility and functions related to decolonisation.

2.60 If the answer to the first question is in the affirmative, then the Court's response to the second question would assist the General Assembly to determine the legal consequences under international law that follow from the continued

[197] *See* Chapter 3 below.

administration of the Chagos Archipelago by the administering power. As the Court explained in *South West Africa*, "the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end."[198]

2.61 Understanding both the legal consequences for the administering power and the legal consequences for States can assist the General Assembly in discharging its functions in relation to the decolonisation of Mauritius. Specifically, the Court's authoritative opinion on the legal consequences for the administering power would guide the General Assembly in determining what future actions it may or may not take to assist in completing the decolonisation of Mauritius. Similarly, the Court's authoritative opinion on what States (and other actors) are required to do or to refrain from doing until the process of the decolonisation of Mauritius is completed would help the General Assembly determine the extent to which it may request the cooperation of member States to bring the colonisation of Mauritius to an end.

C. THE QUESTIONS PUT TO THE COURT DO NOT INVOLVE VOLUMINOUS AND COMPLEX FACTS THAT CANNOT BE ESTABLISHED IN THE CONTEXT OF ADVISORY PROCEEDINGS

2.62 Three States – Australia, Israel, and the U.K. – have argued that the Court should decline to exercise its jurisdiction because the questions posed by the General Assembly require it to address voluminous and complex facts that are

[198] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* (hereinafter "*South West Africa (Advisory Opinion)*"), p. 52, para. 111.

unsuitable for determination in advisory proceedings.[199] This argument is unpersuasive.

2.63 *First*, the Court has previously issued advisory opinions in cases involving facts that are far more complex and voluminous than in this case. For example, in *Western Sahara* the Court had to examine, *inter alia*, what legal ties existed between the Kingdom of Morocco and Western Sahara at the time of Spanish colonisation of that territory.[200] Morocco claimed that those were "ties of sovereignty" on the basis of "an alleged immemorial possession of the territory" and an uninterrupted exercise of authority.[201] As evidence of its display of sovereignty in Western Sahara, Morocco presented extensive materials on its alleged acts of internal display of authority.[202] Morocco also relied on certain international treaties said to constitute recognition by other States of its sovereignty over Western Sahara.[203] The Court had no difficulty addressing these facts, and did so in nearly 100 paragraphs of its Advisory Opinion. There is no indication, in that case or in any other advisory opinion, that the Court was unable to master complex or voluminous facts that were properly related to the legal questions posed, or that any States were prejudiced by the manner in which the evidence was received and analysed by the Court.

[199] Written Statement of the United Kingdom, paras. 7.11, 7.18(f); Written Statement of Australia, para. 31(c); State of Israel's Statement, para. 3.1.

[200] *Western Sahara (Advisory Opinion)*, pp. 42-56, paras. 90-129.

[201] *Ibid.*, p. 42, para. 90.

[202] *Ibid.*, pp. 42-56, paras. 90-129.

[203] Morocco invoked (a) certain treaties concluded with Spain, the United States and Great Britain between 1767 and 1861; and (b) certain treaties of the later 19th and early 20th centuries whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended over the claimed territory. *See ibid.*, pp. 42-56, paras. 90-129.

2.64 *Second*, the present case, unlike *Western Sahara*, does not entail extensive fact-gathering or fact-finding relating to competing claims to sovereignty. Indeed, the Court has ample evidentiary material to resolve the factual issues in this case, many of which are not contested. The Court has at its disposal, for example, the voluminous Dossier submitted by the U.N. Secretariat to the Court, comprising detailed information on the matters pertaining to the process of decolonisation of Mauritius. The Court also has the material submitted by Mauritius, the U.K. and other States. There is no indication that it lacks any evidence that it needs to issue the requested Advisory Opinion. The fact that Mauritius has been able to prepare this further Statement, without having to introduce voluminous new material, or devote many pages to the factual issues, confirms that the facts should not pose any difficulties for the Court.

2.65 *Third*, most of the relevant facts are well-established and undisputed.[204] To be sure, the U.K. argues that the Chagos Archipelago was not an integral part of the colony of Mauritius.[205] But the facts, including the pertinent legal documents, are either not contested or not difficult to ascertain. It is the conclusion to be drawn from those facts, not the establishment of the facts themselves, that requires the attention of the Court. Similarly, the facts surrounding the detachment of the Chagos Archipelago from Mauritius are largely undisputed, including the circumstances in which the 1965 "agreement" of Mauritian Ministers was obtained. What is to be decided by the Court is largely a matter of interpretation, and deciding whether, on the material before it, the right of the Mauritian people to self-

[204] *See* paras. 1.9-1.32 above.

[205] Written Statement of the United Kingdom, para. 2.38.

determination was respected, and whether the decolonisation of Mauritius was lawfully completed.

2.66 Accordingly, this case is unlike *Eastern Carelia*, where one of the interested States not only refused to participate in the proceedings but also declined to cooperate with the PCIJ and refused to provide the Court with relevant information necessary to address the question put to it.[206] Here, by contrast, there is no shortage of relevant material. There is thus no merit to the contention that the Court lacks any factual materials that it needs to issue an Advisory Opinion, or that any State would be deprived of the opportunity to submit supporting factual material.

D. THE PRINCIPLE OF *RES JUDICATA* DOES NOT APPLY IN THIS CASE

2.67 Four States (Australia, France, the U.K. and the U.S.) argue that the principle of *res judicata* bars the Court from exercising jurisdiction in the present case because it would reopen issues already decided in the *Chagos Marine Protected Area Arbitration* between Mauritius and the U.K.[207] There is no merit to this argument: *res judicata* has no application in the present case.

[206] *See* the discussion of *Eastern Carelia* in *Western Sahara (Advisory Opinion)*, pp. 28-29 paras. 45-46.

[207] Written Statement of the United Kingdom, paras. 7.11, 9.5; Written Statement of Australia, para. 39; Exposé écrit de la République Française, para. 17; Written Statement of the United States of America, paras. 2.10-2.14.

2.68 As the Court has explained, *res judicata* applies in situations where the same parties seek to relitigate the same issue that "has already been definitively settled" between them in an earlier case.[208] These elements are not present here.

2.69 *First*, this case does not involve the same parties. Instead, the Court is presented with a request by the General Assembly seeking an Advisory Opinion on legal questions, which are located in a broader frame of reference than the *Chagos Marine Protected Area Arbitration*, in order to obtain guidance from the Court on future action related to decolonisation.

2.70 *Second*, the questions put to the Court do not involve issues that have "already been definitively settled" between Mauritius and the U.K. in the *Chagos Marine Protected Area Arbitration.* Specifically, the Arbitral Tribunal, by a majority, decided that it did not have jurisdiction to decide whether the excision of the Chagos Archipelago was lawful under international law, or in conformity with the applicable legal obligations relating to decolonisation and self-determination.

2.71 Australia and the U.K. argue that the Arbitral Tribunal, by deciding that upon Mauritian Independence the 1965 "agreement" became a matter of international law between the Parties, resolved "any concerns about defects in

[208] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast, Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 126, para. 59 ("It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent the first claim has already been definitively settled.") (emphasis added); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 437, para. 76 ("There can be no doubt that for purposes of the present case the aforementioned Judgments of 2004 do not have force of *res judicata* on this – or any other – point, since they were given in different cases which did not involve the same parties, as has already been noted above with respect to another aspect of those Judgments").

Mauritius' consent" to the 1965 "agreement."[209] This is wrong. As elaborated in Chapter 3 of these Written Comments, the Arbitral Tribunal expressed no opinion whatsoever on whether Mauritius validly "consented" to the dismemberment of its territory.[210] Rather, the Tribunal in its unanimous Award was careful to make clear that the commitments that the U.K. gave at Lancaster House were unilateral undertakings binding as against the U.K. The Tribunal held that because the U.K. repeated and reaffirmed those unilateral undertakings to Mauritius after its independence, the U.K. was estopped from acting inconsistently with them.[211] This finding on the basis of the principle of estoppel made it unnecessary to address the question of whether Mauritius' "consent" to the detachment of the Chagos Archipelago was validly procured.

2.72 This question was addressed by only two members of the Tribunal, Judges Kateka and Wolfrum, who joined in the unanimous Award. They said in their separate opinion that the so-called "consent" expressed by Mauritian Ministers was legally invalid because, *inter alia*, it was procured by the U.K. under duress. They saw no contradiction between the unanimous Award, which represented their views, and their separate opinion.

2.73 There has thus been no decision on the validity of Mauritius' "consent" to the detachment of the Chagos Archipelago – whether final, or binding or otherwise – or the lawfulness of the decolonisation process. Accordingly, there is no *res*

[209] Written Statement of the United Kingdom, para. 9.12; Written Statement of Australia, para. 39.

[210] *See* paras. 3.79-3.86 below.

[211] *The Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, UNCLOS Annex VII Tribunal (18 Mar. 2015) (hereinafter "*The Chagos Marine Protected Area Arbitration*, Award (18 Mar. 2015)"), para. 448 (**Dossier No. 409**).

judicata effect that would preclude the Court from issuing the Advisory Opinion requested by the General Assembly in these proceedings.

* * *

2.74 In conclusion, the Court has jurisdiction to give the Advisory Opinion requested by the General Assembly in Resolution 71/292 of 22 June 2017: the General Assembly is an organ duly authorised to seek an advisory opinion from the Court, and the request raises questions of a legal character.

2.75 There is no "compelling reason" for the Court to decline to exercise the advisory jurisdiction which the Charter and the Statute have conferred upon it. The Court's exercise of its advisory jurisdiction will not circumvent the principle of consent to judicial settlement: the questions put to the Court are located in a broader frame of reference, and the object of the request is to obtain from the Court an opinion that the General Assembly deems of assistance for the full and immediate implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Court's responses to the questions will be helpful to the General Assembly because it has a real and ongoing interest in matters related to decolonisation, both generally and in regard to Mauritius. The questions put to the Court do not involve voluminous and complex facts that cannot be established in the context of advisory proceedings. And the principle of *res judicata* does not apply in this case.

2.76 On this basis and in keeping with past precedent, the Court should exercise its jurisdiction and render the Advisory Opinion that the General Assembly has requested.

CHAPTER 3

THE DECOLONISATION OF MAURITIUS WAS NOT LAWFULLY COMPLETED WHEN MAURITIUS WAS GRANTED INDEPENDENCE IN 1968

I. Introduction

3.1 In this Chapter, Mauritius responds to a number of points raised in the other Written Statements in relation to the first of the General Assembly's two questions.

3.2 Mauritius notes that, of the Written Statements which address this question, only two – those of the administering power (the U.K.) and the U.S. – argue that there was no right of self-determination in customary international law at the relevant time. And only one Written Statement – that of the U.K. – argues that, on the facts, the decolonisation of Mauritius was lawfully completed in 1968.[212]

3.3 Every other Written Statement which addresses this issue concludes that the right of self-determination was well-established in international law by the time that Mauritius was dismembered. And every other Written Statement which moves on from an analysis of the legal framework to put forward an answer to the General Assembly's first question concludes that the right of self-determination was violated in Mauritius' case, with the consequence that its decolonisation was not lawfully completed in 1968 (and has not been lawfully completed to date). Not a

[212] The U.S. also suggests that the decolonisation of Mauritius was lawfully completed in 1968, but does so on the basis of the logic of its legal argument rather than by reference to the facts. For the U.S., the absence of a right to self-determination in international law at the relevant time meant that there were no legal conditions governing the modalities by which decolonisation would be achieved, and hence any transfer of power would suffice.

single State or organisation, other than the U.K. and the U.S., puts forward a contrary answer to this question, on the law or the facts.

3.4 In light of this overwhelming consensus, Mauritius' observations in this Chapter focus in particular on the Written Statements of the U.K. and the U.S., referring where appropriate to the other Written Statements. For clarity, Mauritius adopts the same structure as in Chapter 6 of its Written Statement of 1 March 2018. Thus this chapter begins by addressing the legal framework which applied at the time of Mauritius' dismemberment and independence, and in particular by responding to the arguments in the Written Statements of the U.K. and the U.S., in contrast to the clear view of other States and the African Union, that (a) there was no right of self-determination when Mauritius gained its independence in 1968, and (b) any right of self-determination which may have existed at that time did not prohibit the dismemberment of Mauritius, in particular because of the absence of a corollary right of territorial integrity. Given the clarity of the law on this issue, Mauritius is able to deal with it relatively briefly, focusing on the specific legal, historical and factual points which have been raised.

3.5 Mauritius then considers the argument that the Mauritian people somehow "consented" to the dismemberment, through the Council of Ministers in 1965 or subsequently in the 1967 general election. The evidence to the contrary is also overwhelming; it has been considered in detail in Mauritius' Written Statement of 1 March 2018. In summary, the evidence demonstrates that:

(1) The Chagos Archipelago has always been an integral part of Mauritius.

(2) The administering power's decision to detach the Chagos Archipelago was unilateral and irrevocable. At no point were the Mauritian people,

either as a whole or through their representatives, given the opportunity to choose to retain the Archipelago. Such choice as was given was between independence (without the Archipelago) and remaining a colony (without the Archipelago).

(3) The fact that maintaining the territorial integrity of Mauritius was never an option fundamentally undermines any attempt to argue that either the talks in London in September 1965, the decision of the Council of Ministers in November 1965, or the 1967 general election amounted to the free expression of the will of the Mauritian people. Such a free expression of will could only have taken place in a situation where the people could choose between (a) detachment, and (b) maintenance of the integrity of the territorial unit. No such choice was ever given.

(4) No referendum or plebiscite was held, contrary to the overwhelming practice of the U.N. in cases where the division of territory was contemplated.

(5) Such consultations as were carried out with the Mauritian Ministers in 1965 fell far short of allowing a free expression of will, as required by the right of self-determination. They were purely presentational – the administering power, by its own declarations, was prepared to carry out the detachment without any acquiescence from the Ministers – and independence was made conditional on acquiescence to the detachment.

3.6 Accordingly, the Chapter concludes that – as the overwhelming majority of Written Statements also conclude – the decolonisation of Mauritius was not lawfully completed in 1968.

II. The relevant legal framework

A. THERE WAS A BINDING RIGHT OF SELF-DETERMINATION AT THE RELEVANT TIME

1. The position taken in the other Written Statements

3.7 As noted above, apart from the U.K. and the U.S., every Written Statement which addresses the first question: (a) concludes that there was a binding right of self-determination at the relevant time; and (b) those which go on to apply this legal framework to the facts further conclude that that right was violated in Mauritius' case, and that the decolonisation of Mauritius is accordingly incomplete. In the following Section, Mauritius briefly summarises the relevant conclusions.

3.8 The **African Union** considers that "there existed by 1960, and in any case in 1965, when the United Kingdom separated the Chagos Archipelago from Mauritius, an enforceable right to self-determination of colonised peoples and territories and a correlated obligation of administering powers to give effect to that right, as part of customary international law."[213] The right to self-determination is "intrinsically linked to the notion of territorial integrity, in that it can only be exercised by peoples within specific territorial units. This, in turn, means that the territorial unit cannot be dismembered prior to the exercise of the right to self-determination by the people of that territory."[214] The essential feature of the right of self-determination is that "its application requires free and genuine expression

[213] Written Statement of the African Union, para. 127.

[214] *Ibid.*, paras. 130-131.

of the peoples concerned."[215] On the facts, the African Union concludes that the decolonisation of Mauritius was not lawfully completed.[216]

3.9 **Argentina** considers that:

(1) An analysis of the legal framework "demonstrates that it is beyond question that States have the obligation to respect the territorial integrity not only of other States but also that of the non-self-governing territories in which peoples still have to exercise their right to self-determination. This is particularly true for those administering them. Mauritius, even though it had not yet achieved statehood and was still under colonial rule in 1965, was and still is entitled to respect for its territorial integrity. The administering Power did not have the right to retain part of the territory of one of its colonies at the time of granting it its independence."[217]

(2) The exercise of self-determination by Mauritius "was not permitted to be complete: part of its territory was separated in order to be kept under the control of the administering Power and the native population of the territory was deported to other areas. The breach of the territorial integrity of Mauritius led at the same time to a breach of the obligation to fully respect the right of peoples to self-determination."[218]

[215] *Ibid.*, para. 135.

[216] *Ibid.*, para. 186.

[217] Written Statement of the Argentine Republic, para. 47.

[218] *Ibid.*, para. 49.

Therefore, Argentina concludes that the process of decolonisation of Mauritius is not fully completed.[219]

3.10 **Belize** considers that:

(1) "The right to self-determination under customary international law is reflected in the Charter of the United Nations, in resolutions of the General Assembly of the United Nations, in other State practice, and in the jurisprudence of the Court. It is an *erga omnes* right and a peremptory norm of international law from which no derogation is permitted."[220] The right "began to be articulated as a legal right in the 1950s and its reaffirmation in numerous subsequent concordant General Assembly resolutions adopted by an overwhelming majority of States indicates that it reflected customary international law in 1965, when the United Kingdom separated the Chagos Archipelago from Mauritius."[221] Territorial integrity is "one of the core aspects of the right to self-determination".[222]

(2) The right of self-determination "prohibits the taking by the administering power of any measures prior to the exercise of the right to self-determination that would put the people in question in a position whereby they would not be able freely and genuinely to express their will as regards their political future. This includes measures that affect the territory with respect to which the right to self-determination is to be exercised, such as the severing of part of the territory of the colonial

[219] *See ibid*., paras. 67-68.

[220] Statement of Belize, para. 2.1.

[221] *Ibid*., para. 2.2.

[222] *Ibid*., para. 3.3.

unit, as contemplated and prohibited by the rule reflected in paragraph 6 of resolution 1514 (XV). Only where the continued territorial unity of the colony would be contrary to the freely expressed wishes of the people of that colony has partition been accepted by the United Nations."[223]

3.11 **Brazil** considers that:

(1) "[T]he right of colonial peoples to self-determination was already established in international law by the time of the excision by the administrative power of the Chagos Archipelago from Mauritius (8 November 1965). Much of the history of international law during that period dealt with the law of self-determination and decolonization, as the independence of a number of states in the 1960s clearly demonstrates. The independence of new colonies did not derive from comity or courtesy of the former colonial powers. It was rather the due exercise of a right, whose application should lead to 'bringing all colonial situations to a speedy end'."[224]

(2) "The right of peoples to self-determination has a territorial projection: the people must be able to exercise their rights over the entire territory. Territorial integrity is therefore not only a corollary of sovereignty but also a corollary of self-determination."[225]

[223] *Ibid.*, para. 3.9.

[224] Written Statement of Brazil, para. 18.

[225] *Ibid.*, para. 20.

(3) Accordingly, the decolonisation of Mauritius "was not lawfully completed".[226]

3.12 **Cuba** considers that there has been a violation of Mauritius' right to self-determination and territorial integrity, and that its decolonisation has therefore not been lawfully completed.[227]

3.13 **Djibouti** considers that "the right to self-determination had already crystalized before the Chagos Archipelago was excised in 1965. The corollaries of that right had crystalized as well. As expressed in the Colonial Declaration, those corollaries included the right to 'territorial integrity' and the right of peoples to 'freely determine their political status'…"[228] Djibouti goes on to conclude that, on the facts, the right of self-determination was violated in Mauritius' case because of the lack of any plebiscite on the question of detachment[229] and, additionally, because "even if the Mauritian leadership could have given valid consent, no such consent was given. On the contrary, the pressure placed on the Mauritian representatives constituted duress sufficient to undermine the validity of the agreement purportedly reached."[230] Accordingly, Djibouti concludes that the decolonisation of Mauritius has not been lawfully completed.[231]

[226] *Ibid.*, para. 24.

[227] Written Statement of Cuba.

[228] Written Submission of Djibouti, para. 33.

[229] *Ibid.*, para. 36.

[230] *Ibid.*, para. 37.

[231] *Ibid.*, para. 42.

3.14 **Guatemala** considers that the decolonisation of Mauritius remains incomplete, on the basis that:

> There is ample evidence that the Chagos Archipelago formed part of Mauritius before it was severed from it by the United Kingdom of Great Britain and Northern Ireland ahead of granting independence to Mauritius. There is also sufficient evidence of the United Kingdom's attempts to disguise its actions as lawful albeit being aware they were contrary to what was mandated through the United Nations' guided process of decolonization, especially regarding the principle of territorial integrity as consecrated in the Charter of the United Nations and United Nations General Assembly Resolution 1514 (XV).[232]

3.15 **India** considers that the international community, through Resolution 1514 (XV), "demonstrated the strong resolve that all colonial countries and Trust and Non-Self Governing Territories must be granted forthwith complete independence and freedom to build their own national states in accordance with the freely expressed will and desire of their peoples… All countries must observe strictly and steadfastly the provisions of the UN Charter and the resolution (Declaration) concerning equality and respect for the sovereign rights and territorial integrity of all states."[233] India concludes that the U.K. violated these requirements by dismembering the territory of Mauritius, so that the decolonisation of Mauritius remains incomplete.[234]

3.16 **Madagascar** considers the Chagos Archipelago to be an integral part of the territory of Mauritius.[235] It notes that the Chagos Archipelago was excised in

[232] Written Statement of Guatemala, para. 34.

[233] Written Statement of India, para. 32.

[234] *Ibid*., para. 65.

[235] Written Submission of Madagascar, p. 2.

violation of international law and resolutions 1514 (XV) and 2066 (XX); accordingly, the decolonisation of Mauritius remains incomplete.[236]

3.17 **The Marshall Islands** considers that "[a] situation wherein a territory was allegedly segmented – by or otherwise for the primary self-benefit of the administering authority, would be one in which decolonization is incomplete, as this would not address the concerns of the UN General Assembly".[237] It also considers that "[h]eightened scrutiny should be afforded to certain outcomes achieved during the decolonization process, including those where there is a clear situation of inequality between the administering authority and colonized peoples."[238]

3.18 **Namibia** considers that the decolonisation of Mauritius was not lawfully completed when it was granted independence in 1968. The right of self-determination was "firmly established at the relevant time"; this required the free and genuine consent of the population as to the future of the territory, and "should not be impeded by the arbitrary partition or division of a territory" before independence.[239] The dismemberment of Mauritius was carried out in violation of this right, and the associated right of territorial integrity.[240]

3.19 **The Netherlands** submits a detailed statement which goes in the same direction and does not contradict Mauritius. It concludes that "there was not only *opinio juris* in regard of the character of the right of self-determination as a right

[236] *Ibid.*, pp. 1-2.

[237] Written Comments of the Marshall Islands, para. 32.

[238] *Ibid.*, para. 33.

[239] Written Statement of Namibia, p. 3.

[240] *Ibid.*

under customary international law in the course of the 1950s, but also widespread state practice" and that "[i]n any event, it would appear that the right of self-determination in the sense of a right of peoples in a colonial context to choose either independence, association or integration developed into a rule of customary international law in the course of the 1960s."[241] The Netherlands' Written Statement is considered further below.[242]

3.20 **Nicaragua** considers that the right of territorial integrity was violated by the dismemberment of Mauritius, and that the decolonisation of Mauritius therefore remains incomplete.[243]

3.21 **Serbia** considers that the "[t]erritorial integrity of a country is one of the basic values of contemporary international legal and political order and a peremptory norm of general international law."[244] It considers that the "[e]xcision of the Chagos Archipelago from Mauritius by the former colonial Power (the United Kingdom) prior to the independence of Mauritius was in violation of international law, particularly in violation of its territorial integrity and the right to self-determination."[245] Thus the decolonisation of Mauritius remains incomplete.[246]

3.22 **South Africa** considers that self-determination as a legal right "clearly existed by the time of Mauritian independence in 1968", and was a *jus cogens*

[241] Written Statement of the Netherlands, paras. 3.7-3.8.

[242] *See* paras. 3.27-3.29, 3.39, 3.59, and 3.64-3.66 below.

[243] Written Statement of Nicaragua, para. 13.

[244] Written Statement by Serbia, para. 32.

[245] *Ibid*., para. 39.

[246] *Ibid*., para. 44.

norm.[247] Self-determination "goes hand in hand with the customary law principle of territorial integrity."[248] And "[w]ithin the context of decolonization such territory must necessarily be the whole territory that was under colonial rule and which includes the Chagos Archipelago in the present instance."[249] It considers that "the detachment of the Chagos Islands… means that the independence of Mauritius and the exercise of sovereignty over its territory is incomplete and in clear violation of a basic international law rule relating to statehood."[250]

B. THE RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW IN 1965/1968

3.23 It is the contention of the Written Statements of the U.K. and the U.S. that no right of self-determination existed in international law as at the date of the excision of the Chagos Archipelago from Mauritius in 1965 or at independence in 1968. According to the U.K., it only affirmatively became a right in 1970 with the adoption of the General Assembly Declaration on Friendly Relations (2625 (XXV)).[251]

3.24 Mauritius does not dispute that the Declaration on Friendly Relations was an important milestone in the development of the law of decolonisation. It also agrees that, as the Declaration makes clear, the right of self-determination was definitively part of customary international law in 1970. In contrast to the position adopted by the U.K. and the U.S., however, Mauritius contends that the right was not suddenly legislated into being with the adoption of that Declaration, but had

[247] Written Statement of South Africa, para. 63.

[248] *Ibid*., para. 64.

[249] *Ibid.*

[250] *Ibid*., para. 65.

[251] Written Statement of the United Kingdom, para. 8.75.

already been established as part of the accepted corpus of customary international law by the time of the excision of the Chagos Archipelago in 1965.

3.25 Before turning to the evidence, it is pertinent to note that both the U.S. and the U.K. place considerable emphasis upon the existence of an apparent distinction between the principle of self-determination, as recognised as one of the purposes and principles of the U.N. Charter, and the right of self-determination. The purported absence of an explicit reference to a "right" of self-determination in the U.N. Charter (despite its clear presence in the French text, which is equally authoritative) leads them to the apparent conclusion that administrative authorities bore no obligations to act in conformity with the principle of self-determination in their conduct under Chapters XI-XIII of the Charter. Such an interpretation deprives those Chapters of the Charter of much of their meaning and effect, and ignores, in the process, the emergent practice of the United Nations throughout the 1950s and 1960s.

3.26 Indeed, the main cause of opposition to recognition of a "right" to self-determination (as opposed to its existence as an operative principle) was that it might be conceived as imposing an obligation on administering authorities to proceed immediately with the process of decolonisation, without consideration as to the preparedness of the territories concerned for independence. The U.K. argues in its Written Statement that it took the view that self-determination "was a principle not a right" and that its objection to the recognition of a right to self-determination was conditioned upon the perception that not all "dependent territories" were "ready to choose their eventual status".[252] The position adopted by Mauritius, however, is that given that the issue in question is not one as to the

[252] *Ibid*., para. 8.73 (quoting from Written Statement of the United Kingdom, Annex 86).

timing of independence, it matters little whether self-determination is described as a principle or a right at the relevant moment in time. On either approach, administrative authorities were under an obligation, as established in U.N. practice, to comport themselves in accordance with the right/principle of self-determination when fulfilling their obligations under Chapter XI of the U.N. Charter, and that included an obligation not to interfere with the territorial integrity of Non-Self-Governing Territories in the absence of the free and full consent of the population.

3.27 As the Written Statement of the Netherlands makes clear, "Chapter XI and Chapter XII of the U.N. Charter became the background for the evolution of self-determination from a principle into a positive legal right in the field of decolonization in the first two decades after the establishment of the United Nations".[253] Although self-determination was not explicitly mentioned in those Chapters, the practice of the General Assembly in ensuing years made clear that the principle of self-determination was to inform the gradual movement of Non-Self-Governing Territories towards self-government[254] and that that principle was to evolve ultimately into a legal right by the time of the adoption of the Colonial Declaration (General Assembly Resolution 1514 (XV)) in 1960.

3.28 The evidence for this, as the Netherlands makes clear in its Written Statement,[255] is to be found in the series of resolutions adopted by the General Assembly from 1952 onwards. These repeatedly asserted that State Members of the United Nations were under an obligation to recognise and promote the

[253] Written Statement of the Netherlands, para. 3.2.

[254] *See*, *e.g.*, U.N. General Assembly, 12th Session, *Recommendations concerning international respect for the right of peoples and nations to self-determination*, U.N. Doc. A/RES/1188(XII) (11 Dec. 1957).

[255] Written Statement of the Netherlands, para. 3.5.

realisation of the right of self-determination of peoples of Non-Self-Governing and Trust Territories who are under their administration.[256]

3.29 The Netherlands goes on to explain that while Resolution 1188 (XII) was opposed by some of the administering authorities, this was not such as to preclude the emergence of an *opinio juris* as to the customary status of the right of self-determination. Far from being premised upon the inexistence of a right to self-determination, it explains, opposition to the resolution was merely premised upon a concern that it should not be limited to Non-Self-Governing Territories.[257] The Netherlands concludes by pointing out, therefore, that "there was not only *opinio juris* in regard of the character of the right of self-determination as a right under customary international law in the course of the 1950s, but also widespread State practice reflected in the fact that some thirty non-self-governing and Trust Territories achieved independence prior to the adoption of Resolution 1514 on 14 December 1960".[258]

3.30 Further confirmation as to the customary status of the right of self-determination may be found in the adoption by the General Assembly of Resolution

[256] *See*, *e.g.*, U.N. General Assembly, 7th Session, *The right of peoples and nations to self-determination*, U.N. Doc. A/RES/637(VII) (16 Dec. 1952); U.N. General Assembly, 8th Session, *Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government*, U.N. Doc. A/RES/742(VIII) (27 Nov. 1953) (**Dossier No. 42**); U.N. General Assembly, 12th Session, *Recommendations concerning international respect for the right of peoples and nations to self-determination*, U.N. Doc. A/RES/1188(XII) (11 Dec. 1957).

[257] Written Statement of the Netherlands, para. 3.6.

[258] *Ibid.*, para. 3.7.

1514 (XV) in 1960 by 89 votes, with a mere 9 abstentions. No State voted against.[259]

3.31 Both the U.S. and the U.K. argue that General Assembly Resolution 1514 (XV) is not legally binding. While it is evident enough that General Assembly Resolutions are not binding *per se*, it has long been recognised by the Court that they not only provide evidence of *opinio juris*[260] but "can, in certain circumstances, provide evidence important for establishing the existence of a rule" of customary international law.[261] They are also relevant, as will be detailed later, for purposes of the interpretation of the U.N. Charter.[262] On that basis, as Dame Rosalyn Higgins was able to conclude as early as 1963, well before the events in question in these proceedings, Resolution 1514 (XV), when "taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination."[263]

3.32 The U.S. seeks to cast doubt on the ample evidence that was already available in 1963 and the customary status of the terms of General Assembly

[259] U.N. General Assembly, 15th Session, 947th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.947 (14 Dec. 1960) (hereinafter "*Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (14 Dec. 1960)"), para. 34 (**Dossier No. 74**).

[260] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 188.

[261] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, pp. 253-254, para. 70.

[262] *See* paras. 3.40-3.41 below.

[263] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 104 (**Annex 19**).

Resolution 1514 (XV). It does so on the basis of differences of opinion reflected in debates as to the content of the right and as to the wording of specific clauses.[264]

3.33 Leaving aside the fact that divergences in opinion as to the strengths and weaknesses of a legal text drafted in a multilateral context are only to be expected, Resolution 1514 (XV) is actually remarkable in the broad unanimity that may be found around its core provisions. It was the product of a forty-three-power draft resolution put together by African-Asian States as an alternative to an earlier draft to similar effect sponsored by the U.S.S.R., and was supported by the vast majority of Member States of the United Nations.[265]

3.34 Even those States that abstained from voting in favour of the Resolution did so while supporting its general tenor. The representative of the U.K. (Ormsby-Gore), for example, had remarked in an early stage of the debate, that the United Kingdom was "in entire sympathy" with the authors of the Resolution: "there is no argument about the right of the people to independence; there is no argument whether the people will be independent or not. Certainly they will. The only question is when."[266]

3.35 Later, when explaining the vote of the U.K., he again insisted that the objectives of the sponsors of the forty-three-Power draft resolution (A/L.323 and Add.1-6) "are the same as ours. They are indeed the objectives set forth in the

[264] Written Statement of the United States of America, Chapter IV, Part D.

[265] U.N. General Assembly, 15th Session, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/L/323 (28 Nov. 1960), Add. 1-6 (28 Nov.-6 Dec. 1960) (**Dossier No. 76**).

[266] U.N. General Assembly, 15th Session, 925th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.925 (28 Nov. 1960), p. 983, para. 32; *ibid.*, p. 985, para. 50 (emphasis added) (**Dossier No. 56**).

Charter of the United Nations".[267] It was then suggested, that if the U.K. had been given the opportunity to contribute "some suggestions from our own experience which would not have derogated from the basic purpose of the draft" it would have been in a position to accept it.[268] None of the objections articulated concerned the principle found in paragraph 6, nor indeed the idea that the principle of self-determination should govern the U.K.'s activities as administering authority of Trust and Non-Self-Governing Territories. The objections related to matters of timing. Indeed, the British representative was to note: "The United Kingdom, of course, subscribes wholeheartedly to the principle of self-determination set out in the Charter itself, and we feel that we have done as much to implement this principle during the past fifteen years as any delegation in this Assembly."[269]

3.36 In similar manner, the U.S., while abstaining, expressed its clear support for the recognition of the right of self-determination. It began by declaring that:

> In the fifteen years of the United Nations, Article 73 has been put into effect with greater speed and on a grander scale than any other provision of the Charter. Some thirty-four countries, containing over 775 million people, have attained independence since 1946. Nearly all are Members of the United Nations with representatives in this hall. In Africa alone no less than twenty-one States have

[267] *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (14 Dec. 1960), p. 1275, para. 47 (**Dossier No. 74**).

[268] *Ibid.*, para. 48. The main objections formulated by the United Kingdom were as follows: (a) that the term "alien domination" should not be used in reference to Trust and Non-Self-Governing Territories; (b) that the reference to colonialism impeding the "development of international economic cooperation" was inapplicable to U.K. territories; (c) that paragraph 3 could have been made more "constructive"; (d) that the reference to a right to self-determination was misplaced; and (e) that paragraph 5 could have been expressed more clearly. No objection was made to the terms of paragraph 6. *Ibid.*, p. 1275, paras. 49, 50, 52, 53.

[269] *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (14 Dec. 1960), p. 1275, para. 53 (**Dossier No. 74**).

made this transition, until two thirds of the whole of Africa is free and independent.[270]

3.37 It continued by condemning colonialism and colonisation on the grounds that it:

> is the denial of the right of self-determination…. Neither the most benevolent paternalism by a ruling Power, nor the most grateful acceptance of those benefits by indigenous leaders can meet the test of the Charter or satisfy the spirit of this age. In fact, the only colonial rule which can meet that test is that which energetically works to turn over full power to the indigenous people and thus seeks to bring itself to an end as soon as possible.[271]

It then concluded that:

> The vital test for the administering authority of every dependent area is the test of free consultation with the people through free elections or through some equally valid means of self-determination. This means more than a ceremony in which the people are permitted to ratify a single predetermined decision. It means an actual choice among alternatives. That is the essence of the principle of self-determination of peoples which is included among the Purposes of the United Nations.[272]

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[270] U.N. General Assembly, 15th Session, 937th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.937 (6 Dec. 1960), p. 1158, para. 15 (**Dossier No. 68**).

[271] *Ibid.*, para. 27 (emphasis added).

[272] *Ibid.*, p. 1159, para. 27. Whilst it later declared itself to have certain reservations as to the wording of the Resolution, it nevertheless was content to observe:

> One thing is clear, however. This resolution applies equally to all areas of the world which are not free… It speaks of freedom from alien subjugation, domination and exploitation for all peoples. It proclaims that all people have the right to self-determination. It condemns colonialism in all its manifestations. Members of the United Nations would not be true to their trusts and responsibilities under the Charter if they failed to consider the plight of some of the peoples to whom the Charter's provisions and those of the new declaration are clearly relevant.

Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples (14 Dec. 1960), p. 1283, para. 145 (emphasis added) (**Dossier No. 74**).

Thus, far from objecting to the existence of a right of self-determination, the U.S. perceived it to be an integral component of the United Nations Charter.[273]

3.38 No other State expressed any reservation as to the applicability of the right of self-determination to Non-Self-Governing Territories, or objected to the terms of paragraph 6 concerning the applicability of the principle of territorial integrity to those territories. Even if the wording of the Resolution was occasionally couched in "aspirational" terms,[274] that was only because of a sense that administering powers had not, until that moment, shown full willingness to abide by their obligations under the Charter.[275]

3.39 As the Netherlands points out, and as detailed in Mauritius' Written Statement, subsequent practice of both the General Assembly and Security Council

[273] The objections of the United States to the Resolution were a) that it was too "heavily weighted towards complete independence as the only acceptable goal" and b) that paragraphs 3, 4 and 5 might be "misinterpret[ed]". *Ibid*., paras. 147, 149.

[274] Written Statement of the United Kingdom, para. 8.33.

[275] *See, e.g.*, U.N. General Assembly, 15th Session, 934th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.934 (3 Dec. 1960), p. 1127, paras. 125-126 (Brazil) (**Dossier No. 65**); U.N. General Assembly, 15th Session, 933rd Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.933 (2 Dec. 1960) (hereinafter "*Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (2 Dec. 1960)"), p. 1098, para. 136 (Guatemala) (**Dossier No. 64**); U.N. General Assembly, 15th Session, 929th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.929 (30 Nov. 1960) (hereinafter "*Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960)"), p. 1035, paras. 22-26 (Libya) (**Dossier No. 60**); U.N. General Assembly, 15th Session, 928th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.928 (30 Nov. 1960) (hereinafter "*Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960)"), pp. 1027-1028, paras. 84-91 (Yugoslavia) (**Dossier No. 59**); U.N. General Assembly, 15th Session, 945th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.945 (13 Dec. 1960), p. 1256, para. 107 (Cyprus) (**Dossier No. 72**).

largely aligned itself to the terms of the Colonial Declaration.[276] This was repeatedly invoked in all subsequent Resolutions relating to decolonisation, such that there could be no doubt that by 1965 the Declaration was expressive of customary international law.

3.40 Leaving aside the status of General Assembly Resolution 1514 (XV) as expressive of existing customary international law, there is also ample evidence to suggest that it was intended to reiterate and elucidate the obligations found within the U.N. Charter itself. Many delegations affirmed, during the debate, not just the conformity of the Declaration with the terms of the Charter,[277] or the way in which the Declaration followed the Charter's letter and spirit,[278] but its role in

[276] Written Statement of Mauritius, paras. 6.20-6.39; Written Statement of the Netherlands, paras. 3.1-3.33.

[277] *See, e.g., Agenda Item 87: Declaration on the granting of the independence to colonial countres and peoples* (30 Nov. 1960), p. 1025, paras. 66-67 (Poland) (**Dossier No. 59**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1035, para. 26 (Libya) (**Dossier No. 60**); U.N. General Assembly, 15th Session, 931st Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.931 (1 Dec. 1960), p. 1067, para. 54 (Liberia) (**Dossier No. 62**).

[278] *See*, *e.g.*, U.N. General Assembly, 15th Session, 930th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.930 (1 Dec. 1960), p. 1060, para. 85 (Peru) (**Dossier No. 61**); U.N. General Assembly, 15th Session, 935th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.935 (5 Dec. 1960) (hereinafter "*Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (5 Dec. 1960)"), p. 1139, para. 117 (Malaya) (**Dossier No. 66**); U.N. General Assembly, 15th Session, 946th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.946 (14 Dec. 1960), p. 1266, para. 11 (Sweden) (**Dossier No. 73**).

interpreting,[279] crystallizing,[280] or clarifying[281] the application of the Charter and its provisions.

3.41 It has been a consistent feature of the jurisprudence of the Court, that the practice of United Nations organs can constitute relevant evidence for purposes of the interpretation of the U.N. Charter. This was affirmed in the *Certain Expenses* Advisory Opinion,[282] and subsequently re-affirmed, albeit in different contexts, in both the *Namibia* Advisory Opinion[283] and the Advisory Opinion on the *Construction of a Wall*.[284] In this context, there are reasonable grounds for asserting that, irrespective of the independent legal status of the right of self-determination in customary international law, the practice of the General Assembly as reflected in a long sequence of General Assembly resolutions dating back to 1960, has affirmed the relevance of the principle of self-determination for the purpose of interpreting the modalities under which Non-Self-Governing Territories will be afforded "full self-government" under Chapter XI of the U.N. Charter.

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[279] *See, e.g., Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), pp. 1027-1028, paras. 84-91 (Yugoslavia) (**Dossier No. 59**).

[280] *See, e.g.*, U.N. General Assembly, 15th Session, 932nd Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.932 (2 Dec. 1960), p. 1076, para. 36 (Turkey) (**Dossier No. 63**).

[281] *See, e.g., Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1042, paras. 99-102 (Tunisia) (**Dossier No. 60**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (2 Dec. 1960), p. 1103, para. 182 (Philippines) (**Dossier No. 64**).

[282] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962* (hereinafter "*Certain Expenses (Advisory Opinion)*"), pp. 178-179.

[283] *South West Africa (Advisory Opinion)*, p. 22, paras. 21-22.

[284] *Construction of a Wall (Advisory Opinion)*, pp. 149-150, paras. 27-28.

C. THE UNITED KINGDOM AS PERSISTENT OBJECTOR

3.42 The U.K.'s Written Statement argues, very briefly and without a single supporting citation, that even if the right of self-determination existed at the relevant time, it "would not be binding on the United Kingdom because it was a persistent objector".[285]

3.43 The concept of persistent objection is a controversial one: the doctrine has been described as "exceptional" and its requirements as "stringent".[286] Any such doctrine has no application to peremptory norms.[287] As the U.K. put it in the

[285] Written Statement of the United Kingdom, para. 8.59. The persistent objector argument is set out at *ibid.*, paras. 8.59-8.61.

[286] International Law Commission, 67th Session, *Identification of customary international law: Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau* (29 July 2015) (hereinafter "*Identification of customary international law: Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau*"), pp. 18-19 ("Even though in plenary some members expressed doubt as to the relevance of the persistent objector rule to the identification of customary international law, noting that it was seemed to be more related to application of such law, there was a preponderance in favour of a draft conclusion on the matter given the fact that, in practice, there was often reliance on persistent objector rule in cases where a determination of the existence of a customary rule is sought. At the same time, considering the exceptional nature of the rule, the Drafting Committee recognised the need to capture in the text the stringent requirements for a State to become a persistent objector.") (emphasis added).

[287] *See, e.g.*, John Tasioulas, "Custom, *jus cogens*, and human rights", forthcoming in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (20 Mar. 2015), p. 11 (**Annex 234**). One aspect of the "distinctive character" of peremptory norms is that "their binding character for any given state is independent of whether that state has accepted, or failed to object to, the norm in question. In particular, the 'persistent objector rule' for evading a law's opposability is inapplicable to *jus cogens* norms. So, for example, South Africa's supposed persistent objections to norms prohibiting racial discrimination and apartheid were legally nugatory". The matter has been considered by the ILC, which has described it as "inconceivable that a persistent objector could thwart such a norm [of *jus cogens*]". U.N. General Assembly, Official Records, 62nd Session, *Report of the International Law Commission: 59th Session*, U.N. Doc. A/62/10 (7 May-5 June and 9 July-10 Aug. 2007), p. 101. The 2015 Report of the Drafting Committee records that it discussed "whether there should be an additional paragraph [in the draft text on customary international law] to reflect the impossibility of having a persistent objector status with respect to a rule of *jus cogens*", but decided to resolve that issue under the separate *Jus Cogens* part of the ILC's work. *See Identification of customary international law: Statement of the Chairman of the Drafting Committee, Mr Mathias Forteau*, p. 20. However, the non-applicability of the persistent objector rule to *jus cogens* norms has been strongly expressed by a number of members of the ILC. *See* International Law Commission, 68th Session, *Provisional summary record of the 3316th meeting*,

Fisheries case, "where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle."[288]

3.44 It is well-established that the right of self-determination falls within the category of peremptory norms, or "fundamental principles".[289] The U.K.'s argument must therefore fail at this first step: regardless of the U.K.'s conduct during the development of the right of self-determination, the nature of the right is such that no State can claim to be a persistent objector to it, any more than a State could claim to be a persistent objector to the prohibitions on (for example) genocide, torture or aggression. It is surprising for the contrary to be argued by a State with a professed commitment to the international rule of law.

3.45 It is therefore unnecessary to go on to examine the U.K.'s conduct in relation to the right of self-determination. Even if it *were* legally possible for the

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U.N. Doc. A/CN.4/SR.3316 (18 Sept. 2016), Statement of Mr Park, p. 14 (Mr Park "agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* and believed that any such possibility should be categorically excluded."); International Law Commission, 68th Session, *Provisional summary record of the 3322nd meeting*, U.N. Doc. A/CN.4/SR.3322 (23 June 2017), Statement of Mr Petrič, p. 5 ("*A priori*, his response to the questions of whether regional *jus cogens* might exist and whether the persistent objector rule could be applied to *jus cogens* would thus be a categorical 'no', but he did not exclude the possibility of considering those questions at a later stage, as envisaged by the Special Rapporteur."); *Ibid.*, Statement of Mr Vázquez-Bermúdez, p. 7 (Mr Vázquez-Bermúdez "fully agreed … that *jus cogens* norms were, by their very nature, incompatible with the doctrine of the persistent objector. It was inconceivable, for instance, that a State could evade the prohibitions of genocide or of crimes against humanity because it had persistently opposed them, since that would be tantamount to allowing it to flout the fundamental values and essential interests of the international community as a whole without facing any legal consequences whatsoever.")

[288] *Fisheries (United Kingdom v. Norway)*, Reply of the United Kingdom (28 Nov. 1950), Pleadings, Vol. II, p. 429.

[289] *See, e.g.*, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 26, para. 5 ("The criteria for identifying peremptory norms of general international law are stringent… Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.")

U.K. to "isolate itself from the impact of the principle",[290] however, the U.K.'s Written Statement falls far short of demonstrating its persistent objection to the right of self-determination. The State which seeks to invoke the persistent objector doctrine bears the burden of fulfilling a stringent set of conditions. As expressed in the International Law Commission's *Text of the draft conclusions on identification of customary international law*: [291]

> (1) Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.[292]
>
> (2) The objection must be clearly expressed, made known to other States, and maintained persistently. [293]

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[290] *Fisheries (United Kingdom v. Norway),* Reply of the United Kingdom (28 Nov. 1950), Pleadings, Vol. II, p. 429.

[291] International Law Commission, *Report on the work of the 68th session - Chapter V: Identification of customary international law*, U.N. Doc. A/71/10 (2016), Conclusion 15.

[292] The 2015 Report of the ILC Drafting Committee states that: "As now formulated, paragraph 1 seeks to capture a process whereby the objection to the rule or its application is registered while the rule is forming, before it has crystallised into a rule of law, and then maintained thereafter. Accordingly, it provides that where a State objected to a rule of customary international law while the rule was in the process of formation the rule is not opposable to the State concerned for so long as it maintains its objection. In other words, there is a two-stage process whereby in the first instance, reflecting a temporal element, a State must have objected to the rule 'while [it] was in the process of formation'; once the rule is formed, the State would not be bound by the rule 'so long as it maintains its objection', thus denoting emergence of the rule and continuity of the objection. The objecting State would have the burden of proving the right to benefit from the persistent objector rule." *Identification of customary international law: Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau*, pp.19-20 (emphasis added).

[293] The Drafting Committee states that: "Paragraph 2, which is new, then seeks to set out the stringent requirements for a persistent objection to be effective, as described on the Special Rapporteur's third report. It provides for three essential elements, (a) the objection must be clearly expressed, (b) the objection made known to other States, and (c) the objection must be maintained persistently. The commentary will describe what each of the three elements entails. The objection must be unambiguously expressed and the legal position of the objecting State made clear. It may be verbal or written. The phrase 'made known to other States' is intended to bring a certain

3.46 The U.K. attempts to meet these requirements by stating that it "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."[294] Again, it cites no materials in support of this submission, and fails to consider the U.K.'s conduct in any other contexts. In paragraph 3.35 above, Mauritius has already noted that, at the time of the adoption of Resolution 1514 (XV) the U.K. representative stated very clearly that the United Kingdom "subscribes wholeheartedly to the principle of self-determination set out in the Charter".[295] That statement alone puts in question the United Kingdom's position as a persistent objector.

3.47 The United Kingdom, in fact, has itself invoked the right of self-determination in disputes with other States on numerous occasions during the 1960's. In the discussion of Gibraltar before the Committee of 24 in 1964-1965, the U.K. referred to the "principle" as well as the "right" to self-determination several times:

> 143. … It was surely the ultimate irony not only that the representative of Spain should claim that the United Kingdom was trying to deceive the United Nations by fulfilling its obligations towards Gibraltar under the Charter, but also that Spain should attempt to take over the people of Gibraltar under the cover of

flexibility as to the manner in which the statement of position of the objector is communicated to the States concerned. It is understood that the reference to 'maintained persistently' denotes, as noted by the Special Rapporteur in his third report, that State must maintain its objection both persistently and consistently, lest it be taken as having acquiesced. The 'persistence' relates to all the temporal phases of the rule's formation and existence. It was noted, nevertheless, that it may be unrealistic to demand total consistency." *Identification of customary international law: Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau*, p. 20 (emphasis added).

[294] Written Statement of the United Kingdom, para. 8.61.

[295] *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (14 Dec. 1960), p. 1275, para. 53 (**Dossier No. 74**).

General Assembly resolution 1514 (XV), which proclaimed the right of all peoples to self-determination.

…

148. The representative of Spain had also based his case for denying the application of the principle of self-determination to Gibraltar on his own interpretation of paragraph 6 of resolution 1514 (XV); he had quoted the interpretation of that paragraph which the United Kingdom delegation had given in Sub-Committee III during the discussion on the Falkland Islands (A/AC.109/102, p. 45) and he had suggested that the United Kingdom alone adhered to that interpretation. That was quite untrue. There could be no doubt about the meaning of paragraph 6 of resolution 1514 (XV), which obviously referred to attempts in the future to disrupt the national unity and territorial integrity of a country and could not be twisted to justify attempts by countries to acquire sovereignty over fresh areas of territory under centuries-old disputes. The paragraph in question was clearly aimed at protecting colonial territories or countries which had recently become independent against attempts to divide them or to encroach on their territorial integrity at a time when they were least able to defend themselves because of the stresses and strains of approaching or newly achieved independence. It was only necessary to recall that the question of the secession of Katanga had been before the General Assembly in 1960 when resolution 1514 (XV) had been prepared, discussed and adopted.

149. Contrary to what the representative of Spain had suggested, the interpretation of paragraph 6 given by the United Kingdom delegation was accepted by other delegations… In 1960, when Guatemala had submitted amendments to paragraph 6 which would have laid it down that territorial claims took precedence over the principle of self-determination, the Soviet Union delegation had opposed those amendments because they provided for a limitation of the fundamental right of all peoples to self-determination and were thus contrary to paragraph 2 of the proposed declaration, which quite rightly stated that all peoples had the right of self-determination (945th plenary meeting, para. 128).[296]

[296] U.N. General Assembly, 19th Session, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial*

3.48 As a further example, the U.K. made a proposal in 1967, which stated:[297]

> 1. Every State has the duty to respect the principle of equal rights and self-determination of peoples and to implement it with regard to the peoples within its jurisdiction, inasmuch as the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. The principle is applicable in the case of a colony or other Non-Self-Governing territory, a zone of military occupation, or a Trust Territory, or, subject to paragraph 4 below, a territory which is geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it.
>
> 2. In accordance with the above principle: …
>
> (b) Every State shall accord to peoples within its jurisdiction, in the spirit of the Universal Declaration of Human Rights, a right freely to determine their political status and to pursue their social, economic and cultural development without distinction as to race, creed or colour.[298]

3.49 Again in relation to Gibraltar, when the U.K. voted against General Assembly Resolution 2353 (XXII) (1967) in the plenary session, it stated:

> 97. ... Throughout the debates in the Fourth Committee, both this year and before, we have emphasized that there are two basic principles which we cannot betray: first, the principle that the interest of the people must be paramount and, second, that the people have the right freely to exercise their own wishes as to their future. Those principles have guided us and will continue to guide

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Countries and Peoples, U.N. Doc. A/5800/Rev.1 (1964-1965), paras. 143, 146, 148-149 and 151 (emphasis added) (**Dossier No. 251**).

[297] The proposal was submitted by the U.K. at the Special Committee's session. U.N. General Assembly, 24th Session, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/7619, Supplement No. 19 (1969), p. 51.

[298] *Ibid*., (emphasis added).

> us in our task of carrying out our responsibilities to the peoples of the dependent Territories for which we are responsible. In the whole process of decolonization we have adopted the methods of consultation and consent. We shall not abandon those principles in the few dependent Territories for which we are still responsible.[299]

There is a clear implication here that the U.K. accepted the existence of the right to self-determination.

3.50 Before the Committee of 24 in 1967, the U.K. stated:

> 36. There were other features of resolution 1514 (XV), besides paragraph 6 of the Declaration, that might be recalled. It was stated that all peoples had the right to self-determination and that the subjection of peoples to alien subjugation was a denial of fundamental human rights, and the importance of the freely expressed will of the peoples of Non-Self-Governing Territories was emphasized. It was against that background that one should view, first, the referendum, which allowed the people of Gibraltar to express their views as to where their interests lay in regard to one possible road to decolonization and, secondly, the Spanish proposition that such matters should be negotiated by the United Kingdom and the Spanish Governments.[300]

3.51 This again implies a recognition, in the particular context under consideration, that there was a right to self-determination. The U.K. was effectively asking for its conduct in holding the referendum to be considered as conduct taken in implementation of General Assembly Resolution 1514 (XV).

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[299] U.N. General Assembly, 22nd Session, 1641st Plenary Meeting, *Agenda Item 23: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc A/PV.1641 (19 Dec. 1967), para. 97 (emphasis added) (**Dossier No. 199**).

[300] U.N. General Assembly, 22nd Session, *Agenda Item 23: 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*, U.N. Doc. A/6700/Add.9 (28 Nov. 1967), para. 36 (underlining added).

3.52 On other occasions the United Kingdom has voted in favour of resolutions referring explicitly to the right to self-determination without offering any statement of reservation. This was the case, for example, in General Assembly Resolution 1803 (XVII) (1962) on permanent sovereignty over natural resources.[301] That resolution refers in its preamble to the permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination:

> *Bearing in mind* its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination…
>
> …
>
> *Considering* that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination…[302]

3.53 The U.K. made no comment or reservation regarding the use of the term "right" to self-determination when the matter was discussed before the Plenary or the Second Committee.[303]

3.54 In brief, the record shows that even if the U.K. has occasionally expressed a degree of dissent to the recognition of a right to self-determination – as a matter

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[301] U.N. General Assembly, 17th Session, 1194th Plenary Meeting, *Agenda Item 39: Permanent sovereignty over natural resources*, U.N. Doc. A/PV.1194 (14 Dec. 1962), para. 8 (**Dossier No. 134**).

[302] U.N. General Assembly, 17th Session, *Permanent sovereignty over natural resources*, A/RES/1803(XVII) (14 Dec. 1962), Preamble (emphasis added).

[303] U.N. General Assembly, 17th Session, 1194th Plenary Meeting, *Agenda Item 39: Permanent sovereignty over natural resources*, U.N. Doc. A/PV.1194 (14 Dec. 1962) (**Dossier No. 134**).

of the timing of its implementation – it has certainly not done so in any consistent manner. That itself disqualifies it from being a persistent objector to the formation of the rule of customary international law.

3.55 Indeed, as its position in relation to Gibraltar suggests, it appears to have accepted by 1965 at the very least that the terms of Resolution 1514 (XV), including its references to self-determination and territorial integrity, were relevant for purposes of measuring its conduct as an administering power in relation to Non-Self-Governing Territories.[304]

D. THE PRINCIPLE OF TERRITORIAL INTEGRITY

3.56 Both the U.K. and the U.S. argue that there was no rule of customary international law prohibiting changes to the boundaries of colonial territories prior to independence in 1965/68, and that paragraph 6 of Resolution 1514 (XV) was not part of the legal right of self-determination.[305]

3.57 As set out in Mauritius' Written Statement, even before the adoption of General Assembly Resolution 1514 (XV) in 1960 there was evidence of practice indicating that any attempt aimed at the "partial or total disruption of the national unity and territorial integrity" of a Non-Self-Governing (or Trust) Territory without the free consent of the population would be inadmissible.[306] This principle was incorporated within paragraph 6 of the forty-three-power draft resolution (A/L.323

[304] *See* paras. 3.47-3.51 above.

[305] Written Statement of the United Kingdom, paras. 8.46, 8.55-8.58; Written Statement of the United States of America, paras. 4.34, 4.50, 4.69, 4.73.

[306] *See* Written Statement of Mauritius, pp. 218-220.

and Add.1-6) and gained considerable support during debates.[307] The core of that principle was clear enough – that it should prohibit both the "division" of territory prior to independence contrary to the freely expressed wishes of the population and that it should prevent interventions post-independence with that same end in mind.[308] Indeed, it is hard to conceive what self-determination might mean in reality if it did not, at the very least, mean this.

3.58 That paragraph 6 employs the term "country" is instructive enough – it makes clear that the right is not simply a right of "States", but extends also to Non-Self-Governing Territories and others living under colonial rule. During the debates, a number of delegations made this clear in two different ways. On the one

[307] *See, e.g.*, U.N. General Assembly, 15th Session, 926th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.926 (28 Nov. 1960), p. 995, para. 71 (Iran) (**Dossier No. 57**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1049, para. 178 (United Arab Republic) (**Dossier No. 60**); U.N. General Assembly, 15th Session, 930th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.930 (1 Dec. 1960), p. 1059, para. 73 (Pakistan) (**Dossier No. 61**); U.N. General Assembly, 15th Session, 933rd Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.933 (2 Dec. 1960), p. 1102, para. 171 (Ecuador) (**Dossier No. 64**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (5 Dec. 1960), p. 1136, para. 74 (Nepal) (**Dossier No. 66**); *ibid.*, p. 1139, para. 112 (Ireland); U.N. General Assembly, 15th Session, 945th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.945 (13 Dec. 1960), p. 1249, para. 18 (Somalia) (**Dossier No. 72**); *ibid.*, p. 1263, para. 179 (Denmark); *ibid.*, p. 1259, para. 141 (France).

[308] *See, e.g., Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1044, para. 126 (Tunisia) (**Dossier No. 60**). A third implication supported by a number of States (Guatemala, Indonesia, Jordan, Morocco and Ireland) concerned the possibility of an independent state 'recovering' territory that continued to be held by a colonial power. *See Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (5 Dec. 1960), p. 1138, para. 103 (Ireland) (**Dossier No. 66**); U.N. General Assembly, 15th Session, 945th Plenary Meeting *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.945 (14 Dec. 1960), p. 1251, para. 45 (Morocco) (**Dossier No. 72**); U.N. General Assembly, 15th Session, 946th Plenary Meeting *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.946 (14 Dec. 1960), p. 1268, para. 39 (Jordan) (**Dossier No. 73**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (14 Dec. 1960), p. 1271, para. 9 (Indonesia) (**Dossier No. 74**); *ibid*., p. 1276, para. 64 (Guatemala).

hand, some spoke about the territorial integrity of "colonial countries"[309] – it being clear that "colonial countries" were those that had not already gained their independence. On the other hand, several delegations spoke strongly against the fiction that colonial territories constituted part of the territory of the metropolitan powers[310] – the implication of which being that the metropolitan powers did not enjoy the right to dispose of that territory or otherwise interfere with that territory prior to the attainment of independence.

3.59 Subsequent practice, as detailed in the Written Statements of both Mauritius and the Netherlands, for example, makes clear that the "right of self-determination was interpreted *in the light of* the principle of territorial integrity, which meant that the fragmentation of the colonial territory before the realization of independence (or integration or association) as a result of unilateral secession by a segment of the colonial population was not accepted by the United Nations and the international

[309] *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1049, para. 178 (United Arab Republic) (**Dossier No. 60**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (5 Dec. 1960), p. 1156, para. 74 (Nepal) (**Dossier No. 66**).

[310] *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1022, paras. 34-35 (Ethiopia) (**Dossier No. 59**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (30 Nov. 1960), p. 1049, paras. 174-177 (United Arab Republic) (**Dossier No. 60**); *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples* (2 Dec. 1960), p. 1100, para. 156 (Ecuador) (adding that "[t]he relationship between the Organization and the administering State established by the Charter – that of mandator and mandatory – creates a series of juridical ties… on the international plane, the administering State does not exercise sovereignty over the territories in respect of which it exercises a mandate. It has no vested rights in those territories either of ownership or sovereignty. Sovereignty implies a totality of rights which is incompatible with the simple exercise of administration. In this case sovereignty has been suspended until a condition is fulfilled – to wit, the attainment of self-government. Sovereignty belongs to the people whose territory is under administration even though they are unable to exercise it, just as the assets of a minor belong to him even though he cannot at the time exercise full rights over them. The legal status of the dependent peoples is that of incomplete States. Of the three elements of the modern State they have only two – a people and a territory – and they are lacking in the third element, which is self-government.") (**Dossier No. 64**).

community at large."[311] And it was this principle which informed Resolution 2066 (XX), in which it was stated – with absolute clarity – 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 [Resolution 1514] and in particular of paragraph 6 thereof".[312]

3.60 Both the U.S. and the U.K. insist that the wording of paragraph 6 was "problematic",[313] "highly political", and couched in political, not legal, terms.[314] They proceed to contrast Resolution 1514 (XV) with the later Friendly Relations Declaration, which they intimate was reflective of customary international law. The U.K., for example, states that:

> 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. The material differences between resolution 1514 (XV) and the Friendly Relations Declaration strongly suggest that the former did not reflect customary international law.[315]

3.61 This is a complete misrepresentation of the terms of the Friendly Relations Declaration. In its preamble, that Resolution states, in language strikingly similar to paragraph 6 of Resolution 1514 (XV), that:

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[311] Written Statement of the Netherlands, para. 3.16 (emphasis in the original).

[312] *Question of Mauritius* (16 Dec. 1965) (**Dossier No. 146**).

[313] Written Statement of the United States of America, para. 4.47.

[314] Written Statement of the United Kingdom, para. 8.36.

[315] *Ibid*., para. 8.48 (emphasis in the original).

> any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter.[316]

The only material difference between the texts, here, is the inclusion of the words "State" and "political independence" in the Friendly Relations Declaration. It goes on, furthermore, to reiterate in its operative paragraphs on self-determination that:

> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.[317]

Rather than departing from the terms of Resolution 1514 (XV), and in particular paragraph 6, the Friendly Relations Declaration thus merely affirms that it was already an accepted principle in customary international law by the time in which the latter was being drafted.

3.62 The U.K. and the U.S. both insist that State practice in the 1950s and 1960s indicated that there was no prohibition on the adjustment of the territorial borders of Non-Self-Governing Territories prior to independence, and that there was no right to territorial integrity.[318] They cite, in that respect, the separation of the Trust Territories of British Cameroons and of Ruanda-Urundi, the separation of Jamaica from the Cayman Islands and the Turks and Caicos, the adjustment to the

[316] U.N. General Assembly, 25th Session, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. Doc. A/RES/2625(XXV) (24 Oct. 1970), Preamble.

[317] *Ibid*., para. 1.

[318] Written Statement of the United Kingdom, paras. 8.55-8.58; Written Statement of the United States of America, paras. 4.65-4.72.

administration of the Esparses Islands, and the merging of British Somaliland and Italian Somaliland.

3.63 It is clear that none of these examples substantiates their arguments. In fact, all tend to confirm the opposite – that territorial change was only permissible with the full and free consent of the entirety of the population concerned. In the case of the British Cameroons[319] plebiscites were held prior to the administrative divisions of the territories concerned, and Ruanda-Urundi was reluctantly divided when that arrangement appeared to be the expressed wish of the populations concerned.[320] In the case of the Turks and Caicos and Cayman Islands, a partial administrative separation was initially undertaken on a consensual basis in 1958,[321] in order to provide for "increased local autonomy",[322] and they only became *de facto* separated after Jamaica decided to withdraw from the West Indies Federation following the holding of a referendum in 1961. Changes in respect of the administration of the Esparses Islands did not entail any division (or relocation) of the population as they were, at that time, uninhabited; and the merger of British Somaliland with the former Italian Trust Territory of Somaliland occurred post-independence, not pre-independence. As Waldock made clear in his report to the International Law Commission, "[b]oth of these Territories had become independent States before

[319] The General Assembly decided in Resolution 1350 (XIII) (13 May 1959), to hold separate plebiscites under UN supervision in Northern and Southern Cameroons. Plebiscites were held in both territories on 11 and 12 February 1961, and the results endorsed by the UN General Assembly in Resolution 1608 (XV) (21 Apr. 1961).

[320] U.N. General Assembly, 16th Session, *The future of Ruanda-Urundi*, U.N. Doc. A/RES/1746(XVI) (27 June 1962).

[321] United Kingdom, *Cayman Islands and Turks and Caicos Islands Act 1958* (20 Feb. 1958) (**Annex 205**).

[322] U.K. House of Lords, Debate, Second Reading, *Cayman Islands and Turks and Caicos Islands Bill*, Vol. 207, cc617-23 (11 Feb. 1958), p. 1 (**Annex 204**).

their uniting as the Somali Democratic Republic".[323] None of these cases thus provides evidence for the claim that the boundaries of Non-Self-Governing or Trust Territories were free to be changed by administrative powers absent the full and free consent of the local population.

3.64 It is clear that, as the Netherlands points out in its Written Statement, "[t]he United Nations' insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition," but only allowed the latter "if that was the clear wish of the majority of all inhabitants of the territory in question."[324] It goes on to detail this practice which included: the Ellice Islands,[325] Ruanda-Urundi,[326] the British Cameroons,[327] and the 'strategic' Trust Territory of the Pacific Islands.[328]

3.65 The Netherlands thus rightly concludes that "[p]artition of the colonial territory was only permitted if that was the clear wish of the majority of all

[323] International Law Commission, *Fifth Report on Succession in Respect of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, U.N. Doc. A/CN.4/256 and Add.1-4 (1972), p. 34, para. 9.

[324] Written Statement of the Netherlands, para. 3.18.

[325] U.N. General Assembly, 29th Session, *Question of the Gilbert and Ellice Islands*, U.N. Doc. A/RES/3288(XXIX) (13 Dec. 1974).

[326] U.N. General Assembly, 16th Session, *The future of Ruanda-Urundi*, U.N. Doc. A/RES/1746(XVI) (27 June 1962).

[327] U.N. General Assembly, 1st Session, *Approval of Trusteeship Agreements*, U.N. Doc. A/RES/63(I) (13 Dec. 1946); U.N. General Assembly, 13th Session, *The future of the Trust Territory of the Cameroons under United Kingdom administration*, U.N. Doc. A/RES/1350(XIII) (13 Mar. 1959); U.N. General Assembly, 15th Session, *The future of the Trust Territory of the Cameroons under United Kingdom administration*, U.N. Doc. A/RES/1608(XV) (21 Apr. 1961).

[328] *See* U.N. Security Council, 2972nd meeting, *Letter dated 7 December 1990 from the President of the Trusteeship Council addressed to the President of the Security Council*, U.N. Doc. S/RES/683 (22 Dec. 1990); U.N. Security Council, Official Records, 33rd year, Special Supplement No. 1, *Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands* (24 June 1977-8 June 1978), p. 75.

inhabitants of the territory in question. This condition of freely expressed wishes of the people concerned constitutes a core principle in the exercise of the right of self-determination".[329]

3.66 As Mauritius pointed out in its Written Statement,[330] and as has also been confirmed by the Netherlands,[331] "[i]n cases where the population of the colonial territory was expected to opt for independence, the wishes of the people were normally to be established by the usual political processes of the territory".[332] In all other cases, however, (such as for example where integration or association might be in contemplation) strict democratic standards were required for the exercise of free choice as might be best established through referenda or plebiscites. This was all the more so in cases in which the territory in question was to be divided or partitioned. The division of a Non-Self-Governing Territory, in other words, could only be contemplated pursuant to a process in which that is the express wish of the population concerned.

* * *

3.67 Contrary to the assertions of the U.K. and the U.S., it is clear that: (i) there was a right to self-determination in customary international law, as evidenced in the consistent practice of States dating from before the adoption of Resolution 1514 (XV), and firmly established by 1965, (ii) the United Kingdom could not regard itself as a persistent objector to the right to self-determination, and (iii) administrative authorities were under an obligation not to engage in activities

[329] Written Statement of the Netherlands, para. 3.19.

[330] Written Statement of Mauritius, paras. 6.43-6.44.

[331] Written Statement of the Netherlands, para. 3.29.

[332] *Ibid.*

directed towards the partial or total disruption of the territorial integrity of Non-Self-Governing Territories except in accordance with the wishes of the entirety of the population as might be established in a freely-exercised referendum or plebiscite.

III. The decolonisation of Mauritius was not lawfully completed in 1968

3.68 Mauritius' position on the facts was set out in detail in its Written Statement of 1 March 2018. The present Section deals with specific factual points raised in other Written Statements, in particular that of the U.K. (which is the only State to argue in its Written Statement in these proceedings that, on the facts, the decolonisation of Mauritius was lawfully completed in 1968).[333]

A. THE UNIT OF SELF-DETERMINATION WAS THE ENTIRE TERRITORY OF MAURITIUS

3.69 The U.K. argues that the Chagos Archipelago was administered "very loosely" and "purely as a matter of convenience" as a Dependency (or Lesser Dependency) of Mauritius, and that as such it 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 [of Resolution 1514 (XV)]."[334] This is said to be because:

> 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. It was a 'Lesser Dependency' with no economic relevance to Mauritius other than as a supplier of coconut oil.[335]

[333] *See* fn no. 212 above.

[334] Written Statement of the United Kingdom, paras. 2.17 and 8.62.

[335] *Ibid*., para. 8.63.

3.70 The U.K. is alone in portraying the Chagos Archipelago as an entity that is "quite distinct from Mauritius."[336] The overwhelming majority of Written Statements which address factual issues recognise that this claim is factually incorrect.[337] By way of example:

(1) **Guatemala** concludes that: "There is ample evidence that the Chagos Archipelago formed part of Mauritius before it was severed from it by the United Kingdom of Great Britain and Northern Ireland ahead of granting independence to Mauritius."[338]

(2) **India** affirms that: "The historical facts indicate that the Chagos Archipelago throughout, pre and post colonial era, has been part of the Mauritian territory. These islands came under the British colonial administration as part of Mauritian territory."[339]

(3) **Madagascar** adopts paragraph 3 of the African Union's *Resolution on the Chagos Archipelago*, which states that "l'archipel des Chagos

[336] *Ibid*., para. 2.38.

[337] It flows incontrovertibly from the position adopted by 13 States and the African Union (*i.e.*, the process of decolonisation of Mauritius is incomplete), and from the evidence that is before the Court, that prior to detachment the Chagos Archipelago was in fact and in law treated as an integral part of the dependant territory of Mauritius under British colonial rule. *See* Written Statement of the African Union; Written Statement of the Argentine Republic; Statement of Belize; Written Statement of Brazil; Written Statement of Cuba; Written Submission of Djibouti; Written Statement of Guatemala; Written Statement of India; Written Submission of Madagascar; Written Comments of the Marshall Islands; Written Statement of Namibia; Written Statement of Nicaragua; Written Statement by Serbia; Written Statement of South Africa.

[338] Written Statement of Guatemala, para. 34 (emphasis added).

[339] Written Statement of India, para. 57 (emphasis added). India also notes that the U.K.'s commitment to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is "in itself an evidence that Mauritius has been and continues to be the sovereign nation for the Chagos Archipelago, this being immaterial that by whom and for what purpose these islands are, for the time being, used or administered." *Ibid*., para. 58.

y compris Diego Garcia fait partie intégrante du territoire de la République de Maurice".[340]

(4) **South Africa** expresses the view that: "The Chagos Archipelago has been part of Mauritius since Mauritius came under the control of France in the 18th century. Following the conquest of Mauritius by the United Kingdom in 1810, Mauritius (including the Chagos Archipelago) was formally and validly ceded to the United Kingdom in 1814. Under British colonial rule, the Chagos Archipelago was administered as an integral part of Mauritius."[341]

(5) **Germany** states, without ambiguity, that the Chagos Archipelago "formed part of Mauritius" throughout British colonial rule.[342]

3.71 The administering power's characterisation of an island or group of islands as a "Dependency" or "Lesser Dependency" of Mauritius cannot be determinative of the relationship between the two.[343] What counts is substance, not form. In any

[340] Written Submission of Madagascar, p. 2 (emphasis added) (quoting African Union, 28th Session, *Resolution on Chagos Archipelago*, Doc. EX.CL/994(XXX), Assembly/AU/Res.1 (XXVIII) (30-31 Jan. 2017) ("the Chagos Archipelago, including Diego Garcia, forms an integral part of the territory of the Republic of Mauritius") (**Annex 190**)).

[341] Written Statement of South Africa, para. 12 (emphasis added).

[342] Written Statement of Germany, para. 3.

[343] The U.K. adopts the terms "Dependency" and "Lesser Dependency" interchangeably in relation to the Chagos Archipelago. *See, e.g.*, Written Statement of the United Kingdom, para. 2.13 ("the Archipelago was administered by the United Kingdom as a Dependency of Mauritius") and para. 2.1 ("The Archipelago was a French Dependency that was ceded to Great Britain by treaty in 1814… and was thereafter under British administration as a Lesser Dependency of Mauritius"). However, the latter term ("Lesser Dependency") is never actually defined in the Written Statement of the United Kingdom. In July 1983, a Foreign Office legal adviser, Christopher Whomersley, advising on the subject of the Mauritian Select Committee Report on the detachment of the Chagos Archipelago, queried: "Incidentally, what is a 'Lesser' Dependency? This is not a term I have encountered before, but perhaps it is blessed by long usage in this context." See *Note* from C.A. Whomersley, of the U.K. Foreign and Commonwealth Office Legal Advisers, to Mr Hunt of the U.K. Foreign and Commonwealth Office East African Department (21 July 1983), para. 4 (**Annex 228**). The response from another Foreign Office official was that: "As far as I am aware, we have always used the term 'Lesser' dependency in this context, although I am not sure how important it

event, the material before the Court shows without ambiguity that the consistent practice has been to characterise Dependencies and Lesser Dependencies as an integral part of Mauritius. Thus, as described in Mauritius' Written Statement, although the Island of Rodrigues was described as a "Dependency" of Mauritius in the 1814 Treaty of Paris, it remained an integral part of the territory of the State of Mauritius upon independence.[344] Likewise, Agalega and St Brandon (which like the Chagos Archipelago were defined as "Lesser Dependencies" in a 1904 Ordinance) also remain part of the territory of Mauritius today.[345] And after Mauritius' independence, it was recognised by a senior Foreign Office official and a former "Commissioner" of the "BIOT" that, if it had not been detached, the Chagos Archipelago would have remained a part of the new Mauritian State upon independence.[346]

3.72 The principle of territorial integrity in international law applies to all parts of a territory, irrespective of the label adopted by the administering power. The U.K. itself acknowledges that: "As the status of Dependency was an administrative

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is for us to do so." *See Note* from D.I. Campbell, of the U.K. Foreign and Commonwealth Office East African Department, to A. Watts, Deputy Legal Advisor, U.K. Foreign and Commonwealth Office (26 July 1983) (**Annex 229**).

[344] Written Statement of Mauritius, para. 2.38.

[345] *Note* by the Crown Law Office (undated) (**Annex 203**). *See* Written Statement of the United Kingdom, p. 28, fn. 62 ("From [December 1921] until 1965, the Lesser Dependencies of Mauritius consisted of the Chagos Islands, Agalega and St. Brandon.") *See also* United Kingdom, *The Mauritius Independence Order 1968 and Schedule to the Order: The Constitution of Mauritius* (4 Mar. 1968) (as amended, including by the Constitution of Mauritius (Amendment No. 3) Act of 17 Dec. 1991), Chapter XI, Section 111(1) ("'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 and areas as may be designated by regulations made by the Prime Minister, rights over which are or may become exercisable by Mauritius") (**Annex 96**).

[346] *See Letter* from W. N. Wenban-Smith of the Foreign and Commonwealth Office to M. J. Williams, with draft, FCO 31/3835 (25 Mar. 1983), para. 6 (**Annex 128**); *Note* from M. Walawalkar of the African Section Research Department to Mr Hewitt, FCO 31/2759 (8 July 1980), para. 2 (**Annex 119**). *See also* Written Statement of Mauritius, paras. 2.38-2.39.

convenience the nature of the relationship with its administering overseas territory was, by definition, variable."[347] It follows that the geographical extent of the territory of Mauritius falls to be determined by reference to the legal and historical evidence, including the constitutional, legislative and administrative arrangements, and the social, economic and cultural links.

3.73 In its account of the "British administration of the Chagos Archipelago as a Lesser Dependence (1814-1965)",[348] a period that covers no fewer than 141 years, the U.K. is able to make reference to only two legal texts and five legislative instruments. On the basis of this very limited survey, it baldly asserts that contact between the Chagos Archipelago and the rest of Mauritius "was minimal".[349] Yet, the evidence – all of which has long been available to the U.K. – clearly demonstrates the close and inextricable nexus between the Chagos Archipelago and the rest of the territory of Mauritius. It is a relationship that stretches back more than two centuries, to the earliest days of human settlement in Mauritius.[350] The U.K. passes over much of this material in complete silence.

[347] Written Statement of the United Kingdom, para. 2.15.

[348] *Ibid.*, Chapter 2, Part C.

[349] *Ibid.*, para. 2.17.

[350] Within only a few decades of French settlement on the main Island of Mauritius in 1715 (then called *Île de France*), a shortage of resources led the local representative of the French East Indies Company to identify the Chagos Archipelago to be "of importance both as an area of dangerous shoals and banks which needed to be properly mapped and as the potential source of [tortoise and turtle] meat valued for its supposed power to combat leprosy." *See* N. Wenban-Smith & M. Carter, *Chagos: A History - Exploration, Exploitation Expulsion* (2016), p. 30 (**Annex 235**). A French Sailor, Deschiens de Kérulvay, is said to have "made several visits to the Chagos archipelago in the 1770s both for the purpose of exploration and cartography and to exploit the produce of the atolls for the benefit of his sailors and the French settlers on the Isle of France. In 1776, he records that he set up an establishment there to capture turtles and to harvest coconuts, of which he delivered a large quantity to the Isle of France." *Ibid.*, pp. 47-48.

3.74 There are other equally striking silences in the U.K. Written Statement. Chapter II purports to address the history of the Chagos Archipelago, but it makes not a single reference to any of the cultural and social connections between the Chagos Archipelago and Mauritius. Most notably, there is no reference at all to the Chagossians – except for one quotation in which approximate population figures are mentioned.[351] The U.K. purports to express "deep regret for the way that the Chagossians were treated" and to acknowledge "callous disregard of their interests".[352] Yet even today, in 2018, fifty years after the Chagossians were forcibly removed, the U.K. chooses to remain silent as to the close ties which the Chagossians had – and continue to have – with Mauritius. Equally, it has nothing to say about the means by which they were forcibly removed from the Chagos Archipelago. The matters on which the U.K. Written Statement is silent include:

(1) The extensive **economic ties** between the Chagos Archipelago and Mauritius; including trade in guano, timber and other produce;[353]

(2) The close **social**, **cultural and transport links** between those who lived in the Chagos Archipelago and those in the main Island of

[351] Written Statement of the United Kingdom, para. 2.32. *See also* David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (2009), p. 29 (**Annex 151**).

[352] *See* Written Statement of the United Kingdom, para. 1.5 ("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."); *ibid.*, para. 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").

[353] Written Statement of Mauritius, para. 2.32.

Mauritius: the only way to and from the Chagos Archipelago was via Mauritius;[354]

(3) **Judicial and arbitral decisions**, both domestic and international, that the Chagos Archipelago has always been an integral part of Mauritius;[355]

(4) The **payment** by the administering power of £3 million in compensation **to Mauritius** following the detachment of the Chagos Archipelago;[356]

(5) The insistence of Colonial Secretary Greenwood to obtain the "agreement" of **Mauritian** Ministers to the detachment of the Chagos Archipelago;[357]

(6) The implications of the **undertaking to "return"** the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes;[358]

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[354] *Ibid.*, para. 2.30. For instance, the creole spoken by the inhabitants was similar to that spoken in the main Island of Mauritius. *See* David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (2009), p. 29 (**Annex 151**).

[355] Written Statement of Mauritius, paras. 2.44-2.47.

[356] *Ibid.*, paras. 2.34, 3.74, 3.83.

[357] *Ibid.*, paras. 3.53-3.58.

[358] As far as Mauritius is aware, the only time the U.K. has addressed this argument is in correspondence between the British High Commissioner in Mauritius and the "Commissioner" of the "BIOT" in 1983-1984. In a letter dated 16 December 1983, the British High Commissioner in Port Louis reported that:

> The Chagos/BIOT are not the principal point of interest at present – the country has quite enough to digest with the apotheosis of Ramgoolam and the claims by Ministers, particularly Sir Gaetan Duval, that as a result of their visits abroad, unemployment has somehow been brought to an end. But the Chagos never entirely disappears and at the annual diplomatic dinner the Governor General cornered me in the presence of the Prime Minister [Sir Anerood Jugnauth] saying that he could not agree to the phrase in Sir John Thomson's letter which said that the islands were

(7) The fact that most Chagossians were **forcibly removed to Mauritius**, and the legal provision being made for them to become **Mauritian nationals** automatically upon Mauritius' independence;[359]

(8) The **payments** by the administering power of £650,000 in 1973 and £4 million in 1982 **to Mauritius** for the purpose of compensating the Chagossians;[360]

(9) The fact of **recognition** of the Chagos Archipelago as an integral part of Mauritius by the vast majority of States;[361]

(10) Explicit **statements** by British politicians and officials at the highest levels that *inter alia* the Chagos Archipelago was "legally established" as being part of and "belonging to" Mauritius, and the need to compensate Mauritius for its "loss of territory."[362]

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administered for convenience by the Government of Mauritius. Warming to the general theme, Mr Jugnauth sought to imply that we were illogical in our position on sovereignty by asking why it was that we were to return the Chagos to Mauritius if no longer needed for defensive purposes. Since this was not the occasion to enter into a detailed discussion, I quickly replied 'because we love you': collapse of conversation amidst a lot of backslapping and hand-holding.

The response from the "Commissioner" of the "BIOT" on 10 February 1984 was that: "you were surely both right, however jesting your riposte." *See Letter* from J. N. Allan, British High Commissioner in Port Louis, to W. N. Wenban-Smith, "Commissioner" of the "BIOT" (16 Dec. 1983) (**Annex 230**); *Letter* from W. N. Wenban-Smith, "Commissioner" of the "BIOT", to J. N. Allan, British High Commissioner in Port Louis (10 Feb. 1984) (**Annex 231**).

[359] Written Statement of Mauritius, para. 2.35.

[360] *Ibid*., paras. 4.50-4.51.

[361] *Ibid*., Chapter 4, Part III.

[362] *Ibid*., para. 2.33. *See also* U.K. Defence and Oversea Policy Committee, *Defence Interests in the Indian Ocean: Legal Status of Chagos, Aldabra, Desroches, and Farquhar - Note by the Secretary of State for the Colonies*, O.P.D. (65) 73 (27 Apr. 1965), para. 2 (**Annex 32**); *Telegram* from the U.K. Foreign Office to the U.K. Embassy in Washington, No. 3582, FO 371/184523 (30 Apr. 1965), para. 3 (**Annex 33**); *Note* from Trafford Smith of the U.K. Colonial Office to J. A. Patterson of the Treasury, FO 371/184524 (13 July 1965), para. 3 (**Annex 36**); *Letter* from D. J. Kirkness, PAC.93/892/01 (10 May 1965), para. 1 (**Annex 35**); *Telegram* from the Secretary of the State for

3.75 In any event, the U.K. does not grapple with the consequences of this argument for the right of self-determination. If the Chagos Archipelago was not part of the self-determination unit of Mauritius, then it would follow that it was a separate self-determination unit. The people of the Archipelago would therefore have had a separate right of self-determination – which could not have been exercised through the "consent" of the Council of Ministers of Mauritius or through a Mauritian general election (since, on this argument, the Chagos Archipelago was not part of Mauritius). The U.K. singularly fails to explain how, on its view of the facts, the people of the Chagos Archipelago exercised their – on this view separate – right of self-determination.

B. THE RIGHT OF SELF-DETERMINATION HAD TO BE EXERCISED ACCORDING TO THE FREELY-EXPRESSED WILL OF THE PEOPLE OF THE TERRITORY CONCERNED

3.76 In Chapter 6 of its Written Statement, Mauritius set out in detail the practical requirements of the right of self-determination: the ultimate requirement is that the right be exercised according to the freely-expressed will of the people of the territory concerned. Mauritius notes that the U.K. accepts this point as a matter of principle, recognising that: "What matters is the process should be based on [an] 'informed, free and voluntary choice by the peoples concerned'."[363]

3.77 The question is whether, on the facts, the people of Mauritius made an "informed, free and voluntary choice" that the territory should be dismembered,

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the Colonies to Mauritius and Seychelles, Nos. 198 and 219, FO 371/184526 (19 July 1965), para. 2(ii) (**Annex 37**); *Memorandum* by the U.K. Deputy Secretary of State for Defence and the Parliamentary Under- Secretary of State for Foreign Affairs on Defence Facilities in the Indian Ocean, OPD(65)124 (26 Aug. 1965), paras. 1 and 5(c) (**Annex 48**).

[363] Written Statement of the United Kingdom, para. 8.22.

the Chagos Archipelago turned into a new colony, and its people removed. This issue is addressed below.

C. THE "AGREEMENT" OF THE COUNCIL OF MINISTERS OF MAURITIUS WAS NOT CAPABLE OF MEETING THE REQUIREMENTS OF SELF-DETERMINATION

3.78 Central to the U.K.'s attempt to justify the detachment is the argument that it was carried out with the "consent" of the Mauritian Ministers. It appears to argue that (i) the Lancaster House undertakings were an "international agreement"; (ii) that "agreement" is not vitiated by duress within the meaning of Articles 51 and 52 of the Vienna Convention on the Law of Treaties; (iii) accordingly, the Lancaster House undertakings constitute Mauritius' lawful exercise of its right of self-determination. Those points are considered in turn below.

1. The Lancaster House undertakings

3.79 The U.K. seeks to argue that the Lancaster House undertakings became an "international agreement" when Mauritius gained independence.[364] The U.K.'s argument on this point relies heavily on the finding of the UNCLOS Tribunal that "[t]he independence of Mauritius in 1968… 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."[365]

3.80 It is important to emphasise that, in Mauritius' submission, the legal characterisation of the Lancaster House undertakings does not assist in answering the central question posed by the General Assembly's first question: whether the

[364] *Ibid*., para. 8.17.

[365] *The Chagos Marine Protected Area Arbitration*, Award (18 Mar. 2015), para. 425 (**Dossier No. 409**).

people of Mauritius made an "informed, free and voluntary choice" to agree to the dismemberment of Mauritius, the creation of a separate colony consisting of the Chagos Archipelago, and the removal of its inhabitants. What is important is to consider whether the eventual acquiescence of the Mauritian Ministers can, in all the circumstances, be treated as the freely-expressed will of the people of Mauritius, in accordance with the requirements of international law.

3.81 The findings of the UNCLOS Tribunal at paragraph 425 of the Award do not assist the Court in answering that question, for several reasons. **First**, two of the arbitrators who joined in the unanimous Award, Judges Kateka and Wolfrum,[366] also went on to find that the people of Mauritius had not validly consented to the detachment, precisely because of the coercion which was applied to their representatives at Lancaster House.[367] They saw no contradiction between the unanimous view and their separate opinions. It is impossible for the U.K. to attempt to use paragraph 425 of the Award as a basis for saying that the 1965 "agreement" embodied Mauritius' lawful exercise of its right of self-determination when two of the arbitrators who concurred in that paragraph – and the only arbitrators who expressed a view on the issue of the validity of the agreement – went on to hold just the opposite.

3.82 **Second**, it is important to look carefully at what the Award actually found. The Award made clear that the commitments which the U.K. gave in the Lancaster House Undertakings were binding as against the U.K., in the sense that it was not

[366] Although they dissented from certain aspects of the Award, this was not one of them: at paragraph 84 of their Dissenting and Concurring Opinion, they refer to the "package binding under national law which upon the independence of Mauritius devolved upon the international law level." *The Chagos Marine Protected Area Arbitration*, Dissenting and Concurring Opinion (18 Mar. 2015), para. 84 (**Dossier No. 409**).

[367] *Ibid.*, paras. 74-77.

at liberty to act inconsistently with them, as the Tribunal found that it had done in declaring the "Marine Protected Area" around the Chagos Archipelago in 2010.[368]

3.83 But critically, the Tribunal relied, in reaching this conclusion, on the fact that "since independence the United Kingdom has repeated and reaffirmed the Lancaster House Undertakings on multiple occasions."[369] Accordingly, in the Tribunal's view, "the United Kingdom's repetition of the undertakings, and Mauritius' reliance thereon, suffices to resolve any concern that defects in Mauritian consent in 1965 would have prevented the Lancaster House Undertakings from binding the United Kingdom."[370]

3.84 In other words, the Tribunal in its unanimous Award considered that the U.K.'s subsequent conduct, in reaffirming the commitments it had made at Lancaster House, made it unnecessary to deal with the validity or effectiveness of the original "agreement". As noted above, Judges Wolfrum and Kateka then went on separately to deal with that issue and found that the "agreement" certainly did not constitute a valid exercise of the right of self-determination.[371] They were not joined by the other arbitrators because the three others considered that the Tribunal lacked jurisdiction to address the issue.

3.85 In summary, the effect of the Award is therefore that the administering power, including through its course of conduct over the years since 1968, is bound by the specific undertakings given in the "agreement". However, the Award

[368] *See* paras. 2.70-2.72 above.

[369] *The Chagos Marine Protected Area Arbitration*, Award (18 Mar. 2015), para. 428 (**Dossier No. 409**).

[370] *Ibid.*

[371] *The Chagos Marine Protected Area Arbitration*, Dissenting and Concurring Opinion (18 Mar. 2015), paras. 74-77 (**Dossier No. 409**).

expressly leaves open the question of duress, and (because of the majority decision on jurisdiction) expresses no view on whether the requirements of self-determination were met. And the two arbitrators who did express a view on that point considered that the "agreement" did not constitute Mauritius' valid exercise of its right of self-determination.

3.86 Any attempt to argue that Mauritius validly consented to the dismemberment must, therefore, look elsewhere than to the UNCLOS Award, which did not address the issue (and cannot therefore amount to *res judicata*).[372] Ultimately, the question comes down to an assessment of whether, in all the circumstances, the administering power can be said to have afforded Mauritius the opportunity to take an "informed, free and voluntary" decision. Those circumstances are considered further below.

2. The question of duress

3.87 The U.K. argues that, because the Lancaster House undertakings amounted to an "international agreement" and were not vitiated by "duress" within the meaning of Articles 51 and 52 of the Vienna Convention on the Law of Treaties, then "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."[373]

3.88 However, as Mauritius has previously made clear,[374] it has never advanced an argument of "duress" within the meaning of Articles 51 and 52 of the Vienna

[372] *See* paras. 2.67-2.73 above.

[373] Written Statement of the United Kingdom, para. 8.18.

[374] *See* the submissions of Counsel for Mauritius in the UNCLOS Arbitration: "[T]he events of 1965 did not concern two independent States. The negotiations did not take place in the realm of

Convention on the Law of Treaties. The applicable legal framework is that of self-determination, not of the law of treaties; the relevant question is whether, in all the circumstances, the choice given to the Mauritian people was a free and voluntary one.

3. The circumstances were such as to deprive the Ministers of any free or fair choice

3.89 The U.K.'s Written Statement seeks to rewrite the factual record to persuade the Court that the discussions at Lancaster House were entirely proper and amounted to a valid exercise of the Mauritian people's right of self-determination. According to this argument, the people of Mauritius, through the Mauritian Ministers, agreed to the detachment of the Chagos Archipelago.

3.90 This issue turns on an analysis of the historical record of the Lancaster House talks and surrounding events. The relevant material is available to the Court, and has been analysed in detail in Chapter 3 of Mauritius' Written Statement of 1

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sovereign equality. When we look at the events of 1965, we are looking at the relations between a colony and its metropolitan State… As to these relations, it is not the legal regime of the Vienna Convention that applied. International law has developed a protective regime in relation to colonial peoples. Under this protective regime, metropolitan States are not at liberty to 'frighten' their colonies with hope of independence, nor are they at liberty to impose terms that compromise an ability to decide on the political future of the colony. Under the law of self-determination, the position of the colonial power is one of responsibility as well as authority… We must have clarity as to the applicable legal framework. The basis of our claim is not that consent was vitiated by duress as identified in Articles 52 and 53. Though we stand by the proposition that the term 'duress' provides an apt description of what happened, we have never suggested that the 'agreement' of 1965 was a treaty… Our legal claim is that the 'consent' purportedly given by the Mauritian Ministers did not meet the requirements of the law of self-determination, and is therefore vitiated. Under the law of self-determination with its accompanying guarantee of territorial integrity, the people of Mauritius had the right to decide whether or not to relinquish the Archipelago by expressing its free and genuine will. Under the law of self-determination, the United Kingdom had the obligation to enable the people to make this decision freely and to respect it." *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Hearing on Jurisdiction and the Merits, UNCLOS Annex VII Tribunal, Transcript (Day 8) (5 May 2014), pp. 969-970 (Crawford) (**Annex 171**).

March 2018, and addressed in Chapter 1 above.[375] There is no challenge to this account in the U.K. submissions. In summary, Mauritius submits that Judges Kateka and Wolfrum were correct to find that "Wilson's threat that Ramgoolam could return home without independence amounts to duress."[376] The record clearly demonstrates that Mauritius' independence was made conditional on "agreement" to detachment by Mauritian Ministers.[377] The evidence supporting this contention is overwhelming and incontrovertible. There is no plausible basis for asserting otherwise.

3.91 Most fundamentally, the U.K.'s Written Statement fails to grapple with the critical fact, namely that at no point was the U.K. open to reconsidering the decision to detach the Chagos Archipelago. For there to have been any possibility of valid consent, whether by the Mauritian people directly or through their representatives, the outcome being "consented" to would have had to be conditional: in other words, there would have had to be a commitment that detachment would not happen if the Mauritian people wished to keep their territory intact.

3.92 But in this case the record shows that "detachment of the Chagos Archipelago was already decided whether Mauritius gave its consent or not."[378] Keeping Mauritius intact was not an option that was ever presented, either to the Mauritian Ministers or to the Mauritian people directly. The U.K.'s Written

[375] *See* paras. 1.14-1.32 above.

[376] *The Chagos Marine Protected Area Arbitration*, Dissenting and Concurring Opinion (18 Mar. 2015), para. 77 (**Dossier No. 409**).

[377] *See* Written Statement of Mauritius, paras. 3.73-3.81. *See also* paras. 1.24-1.31 above.

[378] *The Chagos Marine Protected Area Arbitration*, Dissenting and Concurring Opinion (18 Mar. 2015), para. 76 (**Dossier No. 409**).

Statement offers no material that shows otherwise. The historical record before the Court stands unchallenged.

D. THE 1967 GENERAL ELECTION WAS NOT CAPABLE OF MEETING THE REQUIREMENTS OF SELF-DETERMINATION

3.93 The U.K. states that "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."[379] That is not correct. Mauritius' position has never been that *in no circumstances* could a people exercise its right of self-determination through elected representatives. However, the overwhelming practice of the United Nations has been to hold a plebiscite or referendum in circumstances where division of the territorial unit was in issue.[380]

3.94 In arguing that no referendum or plebiscite was necessary in the case of Mauritius, the U.K. relies on the following citation:

> 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.[381]

3.95 This sets up the U.K.'s argument that the Mauritian general election of 1967 was an additional, or perhaps alternative, means by which the people of Mauritius exercised their right of self-determination and freely agreed to the detachment of

[379] Written Statement of the United Kingdom, para. 8.19.

[380] *See* Written Statement of Mauritius, paras. 6.58-6.60.

[381] Written Statement of the United Kingdom, para. 8.20 (quoting I. Hendry, S. Dickson, *British Overseas Territory Law* (2011) p. 280).

the Chagos Archipelago. The U.K.'s Written Statement claims that "the General Election was won by those in favour of independence and who had agreed to the detachment of the Chagos Archipelago."[382] It argues that the election "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."[383]

3.96 This is a surprising argument. The fact that the detachment "was a matter of public record" meant precisely that the Mauritian electorate had no choice in the matter. Shortly after detachment, Ministers of the governing Mauritius Labour Party made statements in the Legislative Assembly, explaining that the detachment had been carried out unilaterally by the administering power.[384] The U.K.'s argument seeks to equate a *fait accompli* with a free choice. The Mauritian people's choice was precisely the same non-choice as had been offered to the Mauritian Ministers in 1965: to become independent without the Chagos Archipelago, or to remain a colony, also without the Chagos Archipelago. There was never any question of the Chagos Archipelago being returned to Mauritius in the event that the parties opposed to independence won the 1967 general election. As Lord Brockway noted in the House of Lords in 1980, the Chagos Archipelago was

[382] Written Statement of the United Kingdom, para. 8.15(d).

[383] *Ibid*., para. 3.8(f).

[384] *See, e.g.*, Mauritius Legislative Assembly, *Speech from the Throne – Address in Reply: Statement by the Prime Minister of Mauritius* (11 Apr. 1979), p. 456 (**Annex 115**); Mauritius Legislative Assembly, *The Interpretation and General Clauses (Amendment) Bill (No. XIX of 1980), Committee Stage* (26 June 1980), p. 3413 (**Annex 117**); Mauritius Legislative Assembly, *Reply to PQ No. B/1141* (25 Nov. 1980), p. 4223 (**Annex 123**). Mauritius Legislative Assembly, *Written Answers to Questions, Diego Garcia — Sale or Hire*, No. A/33 (14 Dec. 1965) (**Annex 212**). *See also* Written Statement of Mauritius, paras. 4.4-4.16.

detached from Mauritius before independence precisely so that "the nation could not take a decisive view".[385]

3.97 Contemporaneous records show that the major issues at the 1967 general election were independence, and the economic and social difficulties facing Mauritius.[386] The U.K.'s Written Statement recognises that the detachment of the Chagos Archipelago was of limited, if any, significance during the 1967 election: "There was no particular controversy over detachment during the General Election".[387] As Mauritian historian Jocelyn Chan Low put it:

> For the Mauritian political class, grappling with ethnic tensions that flared up in the deadly inter-ethnic rioting, living in a country deep in the throes of an acute crisis of underdevelopment, the Diego Garcia affair and fate of the *Ilois* was matter of detail.[388]

3.98 It is not clear whether the suggestion is that the people of Mauritius could have indicated their displeasure at the detachment by withholding their votes from the parties which had acquiesced in the detachment. Such a suggestion would clearly be absurd, especially since those parties also stood for independence: the

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[385] U.K. House of Lords, Debate, *Diego Garcia: Future*, Vol. 415, c389 (3 Dec. 1980) (**Annex 222**).

[386] In January 1967 Governor Rennie reported to the Secretary of State for Commonwealth Affairs that: "The major issue at the elections will be Independence, and the Premier knows marginal voters will be persuaded by his opponents to see current economic difficulties [as] a foretaste of what Independence will bring and a demonstration of the incapacity of the present Government to manage an independent Mauritius." *See Report* from J. Rennie, Governor of Mauritius, to H. Bowden, Secretary of State for Commonwealth Affairs (23 Jan. 1967), para. 7 (**Annex 213**).

[387] Written Statement of the United Kingdom, para. 3.36. Speaking at a Cabinet meeting shortly before the 1967 election, the Commonwealth Secretary recognised that the only political campaigning issue arising from the detachment of the Chagos Archipelago was the inadequacy of the compensation. *See* U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1., on Thursday, 25th May 1967 at 9:45 a.m.*, OPD(67) (25 May 1967), p. 2 (**Annex 90**).

[388] Jocelyn Chan Low, "The Making of the Chagos Affair: Myths and Reality" in EVICTION FROM THE CHAGOS ISLANDS (S. Evers & M. Kooy eds., 2011), p. 61 (**Annex 233**).

Mauritian people would therefore have had to vote to remain a colony in order to protest the dismemberment of their territory.

E. MAURITIUS DID NOT REAFFIRM THE DETACHMENT POST-INDEPENDENCE

3.99 The U.K. argues that Mauritius "did not challenge the United Kingdom's sovereignty over the Chagos Archipelago" until 1980 and that it "reaffirmed the detachment of the Chagos Archipelago on multiple occasions."[389] It is asserted that:

> The Chagos Archipelago was not part of the colony of Mauritius on 12 March 1968, a fact not in dispute. The [1968] 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.[390]

3.100 This is a somewhat disingenuous statement. Successive (British) constitutions of the dependent territory of Mauritius, from the 1885 Letters Patent until the 1964 Constitution, always defined Mauritius as a colony that included the Chagos Archipelago.[391] It was only upon the detachment of the Chagos Archipelago on 8 November 1965 that the administering power amended Section 90(1) of the 1964 Constitution so as to remove the Chagos Archipelago from the definition of "Mauritius".[392] The 1968 Constitution, which also excluded the Chagos Archipelago from the definition of Mauritius, was a "product of the

[389] Written Statement of the United Kingdom, paras. 3.38 and 5.6.

[390] *Ibid.*, para. 3.40.

[391] Written Statement of Mauritius, para. 2.16.

[392] *Ibid.*, para. 3.96.

Westminster export model factory",[393] imposed on Mauritius by the administering power by way of the 1968 Mauritius Independence Order in Council.[394]

3.101 It is not disputed that during the first years of its independence, Mauritius did not press the U.K. for the return of the Chagos Archipelago.[395] To understand that period, two factors must be taken into account:

a. The package of undertakings given by the U.K. at the 1965 Constitutional Conference and Mauritius' reliance on those undertakings; and

b. Mauritius' difficult socio-economic situation, and its dependence on the largesse of the U.K. to enable it to emerge from underdevelopment and become a viable and independent State.

3.102 In relation to the first point, the administering power insisted that Mauritius keep quiet about the detachment. On 23 September 1965 – the day that Mauritian Ministers "agreed" to detachment – Prime Minister Wilson told his Cabinet that "it would not be open to the Government of Mauritius to raise the matter, or press for

[393] Written Statement of the United Kingdom, Annex 21, p. 614.

[394] United Kingdom, *The Mauritius Independence Order 1968 and Schedule to the Order: The Constitution of Mauritius* (4 Mar. 1968), Section 20(4) (**Annex 95**).

[395] Written Statement of Mauritius, paras. 4.4-4.5. On 8 November 1977, the Mauritian Minister of Finance, answering a question in the Legislative Assembly on behalf of Prime Minister Ramgoolam, publicly stated that Mauritius was seeking the return of the Chagos Archipelago from the U.K. He called for "patient diplomacy at bilateral and international levels." *See* Mauritius Legislative Assembly, *Diego Garcia – Anglo-American Treaty*, No. B/539 (8 Nov. 1977), p. 3179 (**Annex 113**). This commitment to recover the Chagos Archipelago by diplomacy at bilateral and international levels was reiterated by the Prime Minister on 20 November 1979. *See* Mauritius Legislative Assembly, *Reply to PQ No. B/967* (20 Nov. 1979), p. 5025 (**Annex 116**).

the return of the islands, on its own initiative."[396] The UNCLOS Tribunal unanimously held that Mauritius' "comparatively restrained assertion of its sovereignty claim" was "a result of the undertakings given by the United Kingdom".[397] The Tribunal considered it beyond question that "[h]ad the package of undertakings not been given… Mauritius would have asserted its claim to the Archipelago earlier and more directly".[398]

3.103 As to the second point, a report by the economics Professor James Meade submitted to the Governor of Mauritius in September 1960 recognised that Mauritius was an extreme form of mono-crop economy, and that sugar accounted for 99% of the total value of its exports.[399] Mauritius faced a high rate of unemployment and had few natural resources.[400] At the time of independence, it was in a "state of near-bankruptcy".[401] The main priority of the post-independence Government of Mauritius was the economic and social rescue of the country. Prime

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[396] U.K. Defence and Oversea Policy Committee, *Minutes of a Meeting held at 10 Downing Street, S.W.1, on Thursday, 23rd September, 1965, at 4 p.m.*, OPD (65) 41st Meeting (23 Sept. 1965), p. 6 (**Annex 209**).

[397] *The Chagos Marine Protected Area Arbitration*, Award (18 Mar. 2015), para. 442 (**Dossier No. 409**).

[398] *Ibid*.

[399] J. Meade, et al., *The Economic and Social Structure of Mauritius* (1968). Mauritius sold 60% of its sugar to the U.K. at an agreed price, thereby benefiting from a stable source of revenue that was dependent on continued support from the former administering power. This was done under the Commonwealth Sugar Agreement, which would come to an end with the U.K.'s accession to the European Economic Community ("EEC") in 1973. Mauritius relied on preferential access and a guaranteed market under a new Sugar Protocol to be negotiated with the EEC, and had to ensure the support of the U.K. in obtaining the best possible terms for its sugar exports. Under the Sugar Protocol, which was signed in 1975, Mauritius continued to export most of its sugar to the U.K. at a guaranteed price. *See also* J. Addison & K. Hazareesingh, *A New History of Mauritius* (Part 2 of Extract) (1993) (**Annex 232**).

[400] J. Addison & K. Hazareesingh, *A New History of Mauritius* (Part 2 of Extract) (1993), pp. 98-100 (**Annex 232**).

[401] *Note* from A. J. Fairclough to T. Smith, attaching a note on *Considerations arising from and since the 1965 Constitutional Conference related to the question of Independence* (14 Feb. 1967), para. 3(ii) (**Annex 216**).

Minister Ramgoolam travelled to London in early 1969 to seek assistance for the development of Mauritius. Capital grants and other forms of financing from the U.K. played a vital role in financing the annual budgets of Mauritius in the late 1960s and early 1970s. The Overseas Development Administration and the Commonwealth Development Corporation financed projects in Mauritius, including key infrastructure projects such as the Northern Plains Irrigation Project and the construction of the M1 pipeline.[402] The U.K. itself has recognised "the stresses and strains of approaching or newly achieved independence", and the limitations that imposed.[403]

3.104 When Mauritius became more assertive in the early 1980s, Foreign Office officials sought to put pressure on the Mauritian Government. In anticipation of Prime Minister Ramgoolam's speech at the U.N. General Assembly on 9 October 1980, during which he called for the "BIOT" to be disbanded,[404] Foreign Office officials asked the U.K. Mission to the U.N. for information so as to "be in a better position to collar him as he transits London on his return to Mauritius."[405]

[402] Mauritius was also highly dependent on the U.K. for foreign exchange earnings. More than 70% of its export earnings were derived from trade with the U.K. Other forms of assistance received by Mauritius from the U.K. included food aid, training of specialist doctors, scholarships for Mauritian students to undertake higher studies at British Universities, and support to research institutions such as the Mauritius Sugar Industry Research Institute.

[403] U.N. General Assembly, 19th Session, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/5800/Rev.1 (1964-1965), para. 148 (**Dossier No. 251**). *See* para. 3.47 above.

[404] *See* Republic of Mauritius, *References to the Chagos Archipelago in Annual Statements Made by Mauritius to the United Nations General Assembly (extracts)* (1974-2017) (**Annex 100**). *See also* U.N. General Assembly, 35th Session, *Address by Sir Seewoosagur Ramgoolam, Prime Minister of Mauritius*, U.N. Doc. A/35/PV.30 (9 Oct. 1980), para. 40 (**Dossier No. 269**).

[405] *Letter* from S. H. Innes of the U.K. Foreign and Commonwealth Office East African Department to J. J. Bevan of the U.K. Mission to the U.N. in New York (7 Oct. 1980) (**Annex 221**).

3.105 In 1983, the "Commissioner" of the "BIOT", Mr Wenban-Smith, proposed informing Mauritius that repetition of the claim "would have a most severe effect on our bilateral relations."[406] The British High Commissioner in Mauritius, referring to the possibility of cutting aid to Mauritius and reducing the purchase of sugar, suggested that: "There must be a real temptation to use the stick".[407]

3.106 Nothing done by Mauritius since its independence has "reaffirmed" the "agreement" to detach the Chagos Archipelago. On the first occasion that the detachment was considered in detail by Mauritian parliamentarians post-independence – by reference to oral testimony and documentary evidence – they concluded without hesitation that "a choice was offered through Sir Seewoosagur to the majority of delegates supporting independence and which attitude cannot fall outside the most elementary definition of blackmailing."[408]

F. THE INTERNATIONAL COMMUNITY CONDEMNED THE DETACHMENT

3.107 In Chapter 4 of its Written Statement, Mauritius addressed the international community's condemnation of the detachment, both within and outside the United Nations. In this Section, Mauritius addresses the U.K.'s submissions on General Assembly Resolution 2066 (XX), and in particular the suggestion that Member States had by that time been informed of the detachment and did not condemn it, along with the suggestion that the wording of the Resolution demonstrates that the

[406] *Note* from W. N. Wenban-Smith, "Commissioner" of the "BIOT", to Mr Watts, Deputy Legal Adviser, U.K. Foreign and Commonwealth Office (15 Feb. 1983) (**Annex 226**).

[407] *Letter* from J. N. Allan, British High Commissioner in Port Louis to W. N. Wenban-Smith, "Commissioner" of the "BIOT" (10 Mar. 1983) (**Annex 227**).

[408] Mauritius Legislative Assembly, *Report of the Select Committee on the Excision of the Chagos Archipelago*, No. 2 of 1983 (June 1983), para. 52E (**Annex 129**). *See also* Written Statement of Mauritius, para. 4.14.

General Assembly did not at that time consider Resolution 1514 (XV) to be legally binding.

3.108 The U.K.'s Written Statement asserts that Mauritius "relies on [Resolution 2066 (XX)] to claim that there was a binding rule prohibiting detachment of the Archipelago in 1965".[409] The U.K. goes on to argue that Resolution 2066 (XX) "was not drafted in mandatory terms" and that it contains "no condemnation of the United Kingdom, nor any statement that it has acted in breach of international law."[410] It suggests that the language of the resolution "reaffirms the General Assembly's own understanding, at the time, that resolution 1514 (XV) itself was not legally binding."[411]

3.109 It is difficult to understand this submission. The U.K. appears to rely in support of its position on the use of the words "invites" and "requests", directed at the administering power in the operative clauses of the resolution. That is the language typically used by the General Assembly in such texts. Moreover, the text of Resolution 2066 (XX) directly contradicts the U.K.'s argument that the General Assembly considered Resolution 1514 (XV) not to be legally binding. This can be seen in, for example:

(1) The preambular paragraph of Resolution 2066 (XX), in which the General Assembly notes:

> *with deep concern* that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of

[409] Written Statement of the United Kingdom, para. 8.49.

[410] *Ibid*., para. 8.50.

[411] *Ibid*., para. 8.51.

> establishing a military base would be in contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples], and in particular of paragraph 6 thereof…[412]

(2) Paragraph 2 of the resolution, in which the General Assembly "*Reaffirms* the inalienable right of the people of the Territory of Mauritius to freedom and independence in accordance with General Assembly resolution 1514 (XV)".[413]

(3) Paragraphs 5 and 6, in which the U.K. is requested to report to the Special Committee and the General Assembly on the implementation of that Resolution, and the Special Committee is invited to keep the situation with respect to Mauritius under review.

Mauritius' position is not, of course, that Resolution 2066 (XX) created legal obligations in and of itself. Those legal obligations – in particular the obligations created by the right of self-determination and the associated principle of territorial integrity – had crystallised years beforehand, and had been reflected in Resolution 1514 (XV), which, as the language of Resolution 2066 (XX) illustrates, the General Assembly clearly considered to reflect binding obligations.

3.110 As to the factual background to the passing of Resolution 2066 (XX), the U.K. argues that:

> 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

[412] *Question of Mauritius* (16 Dec. 1965), Preamble (italics in original, underlining added) (**Dossier No. 146**).

[413] U.N. General Assembly, 15th Session, *Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/RES/1514(XV) (14 Dec. 1960), para. 2 (italics in original, underlining added) (**Dossier No. 55**).

> Committee had been informed by the United Kingdom on 16 November 1965 of the BIOT's creation.[414]

3.111 It is important to go back to the records of that meeting of the Fourth Committee in order to see what the Committee was actually told by the U.K.[415] Those records indicate that the U.K. representative told the Committee that a process was underway to decide on a new electoral system for Mauritius; after which there would be a general election, and independence would follow after a period of six months of full internal self-government.[416] In other words, independence was still some way off. The subsequent paragraph is worth reading in full. The U.K. representative went on to say that:

> Questions had been raised about the United Kingdom Government's plans for certain islands in the Indian Ocean. The facts were as follows. The islands in question were small in area, were widely scattered in the Indian Ocean and had a population of under 1,500 who, apart from a few officials and estate managers, consisted of labourers from Mauritius and Seychelles employed on copra estates, guano extraction and the turtle industry, together with their dependents. The islands had been uninhabited when the United Kingdom had first acquired them. They had been attached to the Mauritius and Seychelles Administrations purely as a matter of administrative convenience. After discussions with the Mauritius and Seychelles Governments – including their elected members – and with their agreement, new arrangements for the administration of the islands had been introduced on 8 November. The islands would no longer be administered by those Governments but by a Commissioner. Appropriate compensation would be paid not only to the Governments of Mauritius and Seychelles but also to any commercial or private interests affected. Great care would be taken to look after the welfare of the few local inhabitants, and suitable

[414] Written Statement of the United Kingdom, para. 8.52 (emphasis added).

[415] U.N. General Assembly, Fourth Committee, 20th Session, 1558th Meeting, *Agenda Item 23: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/C.4/SR.1558 (16 Nov. 1965) (**Dossier No. 152**); Written Statement of the United Kingdom, Annex 14.

[416] *Ibid*., para. 79.

> arrangements for them would be discussed with the Mauritius and Seychelles Governments. There was thus no question of splitting up natural territorial units. All that was involved was an administrative re-adjustment freely worked out with the Governments and elected representatives of the people concerned.[417]

3.112 It is difficult to characterise this statement as the U.K. "inform[ing] [the Fourth Committee] of the BIOT's creation", since the statement does not refer to the creation of a new colony, let alone mention the name "British Indian Ocean Territory". The creation of a new colony was hardly made clear by the euphemistic phrases "new arrangements for the administration of the islands" or "administrative re-adjustment". Nor was it made clear that the inhabitants were to be forcibly removed: this could not be inferred from the assertion that "[g]reat care would be taken to look after [their] welfare". Nor was it made clear that these arrangements were intended to be permanent: the statement could easily have implied that those "administrative" arrangements would come to an end when Mauritius gained its independence.

3.113 As Mauritius noted in its Written Statement, the claim that the islands had been administered by Mauritius and Seychelles simply for "administrative convenience" had been suggested by Lord Caradon, the U.K.'s Permanent Representative to the United Nations in New York, on 9 November 1965 as an "alternative line" against what he feared would be widespread recognition that the detachment violated paragraph 6 of Resolution 1514 (XV). This "alternative line" was strategic, designed to "direct attention from [the] status of the new territory".[418]

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[417] *Ibid*., para. 80 (emphasis added).

[418] *Telegram* from the U.K. Mission to the U.N. to the U.K. Foreign Office, No. 2837 (8 Nov. 1965), para. 7 (**Annex 77**). *See* Written Statement of Mauritius, para. 4.26.

3.114 The following September, the U.K. Government's assessment was that this strategy of misinformation had, so far, been largely successful:

> So far, the United Nations has dealt with the subject of B.I.O.T. almost entirely in the context of Mauritius. In last year's Fourth Committee and General Assembly no cognisance was taken of the existence of B.I.O.T. as a separate entity and many delegations may not then have tumbled to the fait accompli of separation.[419]

3.115 In these circumstances, it is extremely difficult for the U.K. to argue that the Fourth Committee had been properly informed of the situation. As the Tanzanian representative recognised on 24 November 1965, the situation as it was being presented by the U.K. "was still nebulous."[420] As the truth of the situation gradually became clearer to Member States, criticism at the United Nations mounted. As Mauritius summarised in its Written Statement, this included numerous statements by Sub-Committee I, the Committee of 24 and the General Assembly, all expressing the view that the dismemberment had violated Resolution 1514 (XV).[421] But even by 16 December 1965, and despite the U.K.'s deliberate misinformation, Member States knew or suspected enough to cause the General Assembly to pass Resolution 2066 (XX) in the strong terms considered above.

* * *

[419] U.K. Foreign Office, "*Presentation of British Indian Ocean Territory in the United Nations*", IOC (66)136, FO 141/1415 (8 Sept. 1966), para. 13 (emphasis in original) (**Annex 81**). *See also Despatch* from F. D. W. Brown of the U.K. Mission to the U.N. to C. G. Eastwood of the Colonial Office, No. 15119/3/66 (2 Feb. 1966), para. 3 ("Many delegations may not have tumbled to the fait accompli of separation") (emphasis in the original) (**Annex 80**).

[420] U.N. General Assembly, Fourth Committee, 20th Session, 1566th Meeting, *Agenda items 23, 69 & 70*, U.N. Doc. A/C.4/SR.1566 (24 Nov. 1965) (**Dossier No. 153**). *See also* Written Statement of Mauritius, para. 4.29.

[421] Written Statement of Mauritius, paras. 4.31-4.41.

3.116 In conclusion, Mauritius, like the overwhelming majority of other States and the African Union, considers it to be beyond doubt that there existed a firmly-established and binding right of self-determination by the time the Chagos Archipelago was excised from Mauritius in 1965. This included a right of territorial integrity.

3.117 In order for that right to have been fulfilled in Mauritius' case, the people of Mauritius would have had to be given a free choice about whether they wanted Mauritius to become an independent State, and whether they wanted the Chagos Archipelago to be excised to become a separate colony, with the inhabitants removed. No such choice was given, either at the talks in 1965 or in the 1967 general election. At no point was the administering power willing to end its plans for the dismemberment, or to reverse the dismemberment once it had taken place. The choice faced by the Mauritian people was independence without the Chagos Archipelago, or remaining a colony without the Chagos Archipelago. And, as the historical record demonstrates, even the former option was only given to the Mauritian representatives in London in 1965 in circumstances of coercion.

3.118 Given the administering power's failure to comply with its international legal obligations in respect of self-determination and territorial integrity, the decolonisation of Mauritius was not completed in 1968. It remains incomplete today.

CHAPTER 4

THE CONSEQUENCES UNDER INTERNATIONAL LAW ARISING FROM THE ADMINISTERING POWER'S CONTINUED ADMINISTRATION OF THE CHAGOS ARCHIPELAGO

I. Introduction

4.1 In this Chapter, Mauritius responds to the Written Statements of other States and the African Union in regard to the second question that the General Assembly has referred to the Court. That question asks:

> What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

4.2 The Written Statements submitted to the Court reflect an overwhelming consensus that the consequences under international law include:

(i) The obligation to complete the decolonisation of Mauritius, with immediate effect.

(ii) The obligation not to aid or abet the maintenance of the colonial administration of Mauritius.

(iii) In the short period pending the completion of decolonisation, (a) the obligation to administer the Chagos Archipelago in the best interests of Mauritius and the Mauritian people, and (b) the obligation not to hinder the resettlement of Mauritians of Chagossian origin who wish to return to the Chagos Archipelago.

4.3 Mauritius observes that *none* of the Written Statements – including that of the U.K. – challenges the well-established principle of international law that where decolonisation has not been lawfully completed, it must be completed immediately. To the contrary, the Written Statements that address the issue all conclude that, if the answer to the first question submitted to the Court is that decolonisation has not been lawfully completed, then the answer to the second question is necessarily that the consequences under international law include the obligation to complete the decolonisation process immediately.

4.4 There is no legal or practical reason why this cannot be done. To the contrary, no Written Statement identifies any obstacles that would prevent the immediate completion of the decolonisation process. None of the Written Statements – including that of the United Kingdom – asserts that the decolonisation of Mauritius cannot be completed within a very brief period of time. Indeed, the Written Statement of the United Kingdom confirms that there is very little by way of colonial administration, such that the administration as currently exists could be transferred to Mauritius or dismantled, as the case may be, in short order.

4.5 Likewise, no Written Statement challenges the principle that every State must refrain from aiding or abetting the continuance of the colonial administration, or from hindering the decolonisation process in any way, if the Court finds that decolonisation has not been lawfully completed.

4.6 Finally, no Written Statement disputes that, during the brief time it would take for decolonisation to be completed, the Chagos Archipelago must be administered in a manner that serves the best interests of Mauritius and the Mauritian people. Nor do the overwhelming majority of Written Statements take

issue with the proposition that, during this time, Mauritians of Chagossian origin may be resettled in the Archipelago.

4.7 Section 2 of this Chapter explains why the Court should answer the question *as drafted* by the General Assembly, which, by its express terms, seeks an Advisory Opinion that addresses *all* legal consequences arising from the administering power's continued administration of the Chagos Archipelago. In this Section, Mauritius addresses certain points raised by the Written Statement of Germany, which concurs with Mauritius (and the overwhelming majority of States) that the Court should answer both questions submitted to it, whilst suggesting that the Court might wish to limit its response to the second question to the consequences for the United Nations generally, and the General Assembly in particular, and avoid addressing all the consequences for individual States. Mauritius respectfully disagrees with Germany on this point, and provides, in Section 2, the reasons why the Court should fully answer the second question, including in regard to the legal consequences for individual States.

4.8 Sections 3 and 4 address the legal consequences – for the General Assembly and for individual States – that flow from a determination by the Court that the decolonisation of Mauritius has not been lawfully completed. Section 3 sets out the specific legal consequences of the administering power's continued administration of the Chagos Archipelago, in particular that it amounts to a continuing wrongful act that must cease immediately. Section 4 goes on to address on the legal consequences while decolonisation is being completed. It pays particular attention to the consequences for the General Assembly and States in regard to the resettlement of Mauritians of Chagossian origin, and the urgent need to address the consequences relating to the Chagossians.

4.9 The final Section sets out the conclusions of this Chapter.

II. The answer to question 2 should address the legal consequences for States as well as the General Assembly

4.10 The preponderance of views set out in the Written Statements urge the Court to: (i) answer the second question; and (ii) address the totality of legal consequences that arise from the administering power's continued administration of the Chagos Archipelago. For instance:

4.11 The **African Union** considers "that the conditions for the Court to answer the questions *in casu* are fully met".[422]

4.12 **Argentina** considers that "[t]he General Assembly has competence to request an advisory opinion and there are no compelling reasons not to respond to this request".[423]

4.13 **Brazil** considers that "the Court has and should exercise its advisory jurisdiction."[424]

4.14 **Cuba** "expects that the International Court of Justice presents the legal consequences derived from the non-compliance with the above-mentioned resolutions".[425]

[422] Written Statement of the African Union, para. 36.

[423] Written Statement of the Argentine Republic, p. 4.

[424] Written Statement of Brazil, para. 14.

[425] Written Statement of Cuba, p. 2.

4.15 **Cyprus** considers that "the Court… has jurisdiction" and there "are no 'compelling reasons' why the Court should not render the advisory opinion which has been requested of it."[426]

4.16 **Djibouti** considers that "the Court has jurisdiction and should exercise its discretion to answer the questions before it."[427]

4.17 **Guatemala** "expects the Court to find that the continued administration of the Chagos Archipelago by the United Kingdom constitutes a continued wrongful act" and considers that "it must be brought to an end in order to attain a complete decolonization of Mauritius; and that, consequently, the Chagos Archipelago must return immediately to Mauritius control and sovereignty as the only means to restore its territorial integrity."[428]

4.18 **Lesotho** considers that "the Court has jurisdiction to answer the questions that have been referred to it, and it should exercise its discretion to do so."[429]

4.19 **Liechtenstein** considers that "the Court has jurisdiction to answer the above-referenced questions and there are no compelling reasons for the Court to decline to give an advisory opinion."[430]

[426] Written Statement of Cyprus, para. 30.

[427] Written Submission of Djibouti, para. 5.

[428] Written Statement of Guatemala, para. 36.

[429] Written Statement of Lesotho, p. 2.

[430] Written Statement of Liechtenstein, para. 18.

4.20 **Namibia** considers that "[t]he Court has jurisdiction to answer the questions that have been referred to it, and it should exercise its discretion to do so."[431]

4.21 **Nicaragua** "considers that the Court has jurisdiction to give the advisory opinion in response to the questions submitted by the General Assembly under Resolution 71/292, and that there are no reasons that prevent the Court from giving the requested opinion."[432]

4.22 **Niger** considers that "la Cour est compétente pour répondre aux questions qui lui ont été posées et doit exercer son pouvoir discrétionnaire pour ce faire."[433]

4.23 **Serbia** considers that "the Court has jurisdiction to give [the] requested advisory opinion and that there is no reason to decline to exercise its jurisdiction."[434]

4.24 **South Africa** "submits that the Court should exercise its discretion in favour of providing an advisory opinion to the General Assembly."[435]

[431] Written Statement of Namibia, p. 2.

[432] Written Statement of Nicaragua, para. 5.

[433] Written Statement of Niger, p. 2.

[434] Written Statement by Serbia, para. 48.

[435] Written Statement of South Africa, para. 58.

4.25 **Vietnam** "requests the Court to give advisory opinions in response to the questions adopted by the General Assembly in resolution 71/292."[436]

4.26 None of these Written Statements suggests that the Court's answer to the second question should address anything less than the totality of the legal consequences that arise, for the General Assembly and for States.

4.27 Notwithstanding this widely shared view, Mauritius notes that Germany has suggested that the Court should, in answering the second question, limit itself to the legal consequences for the General Assembly alone and refrain from addressing the legal consequences for States.[437] In Mauritius' view, there is no reason for the Court to refashion Resolution 71/292 so as to exclude all the consequences identified by the General Assembly as needing to be addressed, including the legal consequences for States.

A. THE REQUEST BY THE GENERAL ASSEMBLY THAT THE COURT ADDRESS "THE CONSEQUENCES UNDER INTERNATIONAL LAW" REQUIRES AN ANSWER THAT ADDRESSES ALL THE CONSEQUENCES, INCLUDING FOR STATES

4.28 The scope of an advisory opinion should accord with the "actual terms of the question."[438] As the Court has explained on numerous occasions, "in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request."[439]

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[436] Written Statement of Viet Nam, para. 6.

[437] Written Statement of Germany, para. 155.

[438] *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931), Advisory Opinion of September 5th, 1931, P.C.I.J. Series A./B. No. 41*, pp. 51-52.

[439] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion of June 7th, 1955, I.C.J. Reports 1955,* p. 184, para. 41. *See also, e.g., Application*

4.29 In the *Kosovo* Advisory Opinion, the Court observed that when the General Assembly and Security Council have "wanted the Court's opinion on the legal consequences of an action," they "have framed the question in such a way that this aspect is expressly stated."[440] Here, that is precisely what the General Assembly did in Resolution 71/292, expressly asking the Court to explain "*the consequences under international law*… arising from" the administering power's "continued administration… of the Chagos Archipelago".[441]

4.30 On its face the request seeks an Advisory Opinion on the totality of consequences, including for States. In the *Wall* advisory proceedings, the Court was asked:

> What are *the legal consequences* arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[442]

4.31 Israel objected to the question on the ground that it "fail[ed] to specify whether the Court [was] being asked to address legal consequences for 'the General

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for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 349, para. 47*; South-West Africa—Voting Procedure, Advisory Opinion, I.C.J. Reports 1955,* pp. 71-72*; Competence of Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* p. 7 ("[T]he question, as it is formulated, assumes in such a case the non-existence of a recommendation. The Court is, therefore, called about to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it").

[440] *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 423, para. 51.

[441] *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* (22 June 2017), p. 2 (emphasis added) (**Dossier No. 7**).

[442] *Construction of a Wall (Advisory Opinion)*, p. 139, para. 1 (emphasis added).

Assembly or some other organ of the 'United Nations', 'Member States of the United Nations', 'Israel', 'Palestine' or 'some combination of the above, or some different entity'."[443]

4.32 Other States took a different view, observing that the General Assembly had requested an Advisory Opinion on all "the legal consequences" arising from the wall's construction. Jordan, for instance, observed:

> In exercising its jurisdiction in the present proceedings the Court will wish to note in particular certain elements which are expressed in, or flow from, the terms of the question put to the court for an advisory opinion:
>
> > [T]he request seeks an advisory opinion on 'the legal consequences arising from' the construction of the wall, and thus covers legal consequences without any limitation as to the States, entities, organisations, or persons for which those consequences arise.[444]

[443] *Ibid.*, p. 152, para. 36.

[444] *Request for an Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Written Statement Submitted by the Hashemite Kingdom of Jordan* (30 Jan. 2004), p. 45, para. 5.36. *See also Public sitting held on Monday 23 February 2004, at 3 p.m., at the Peace Palace, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion submitted by the General Assembly of the United Nations), Verbatim Record (2004)*, p. 22, paras. 35-36 ("[T]he point has been raised that, unlike the question put before the Court in the Namibia case which enquired as to the legal consequences *for States*, no such specification has been made in the present case. This, I submit, is not unusual. Both Article 96, para. 1, of the Charter and Article 65, para. 1, of the Statute of the Court define legal questions to be put to the Court *unconditionally* and in the widest possible terms. Prescriptions on the term 'any legal question' referred to the Court are nowhere to be found and will serve only to undermine the competency bestowed on the Court by the Charter and its own Statute. This approach lacks any legal basis and will only serve to make the Court a hostage of terminology, denying it the opportunity to play its proper role and, as the Court itself has determined in the *Corfu Channel* case, its role is 'to ensure respect for international law'") (emphasis in original) (citing *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 35).

4.33 The Court followed this approach, and addressed the legal consequences for all relevant entities, including individual States.[445]

4.34 The General Assembly's intention to obtain though Resolution 71/292 an opinion that addresses the totality of legal consequences is made plain by its use of the definite article in the phrase "*the* consequences under international law," a construction that, as the Court has repeatedly ruled, indicates comprehensiveness. For instance, in *Constitution of the Maritime Safety Committee*, the Court was called upon to interpret Article 28(a) of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization, which provides:

> The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be *the largest ship-owning nations*.[446]

4.35 At the hearing, Judge Spender asked:

> What significance, if any, is to be attached to the definite article '*the* largest ship-owning nations'?[447]

[445] *See, e.g.*, *Construction of a Wall (Advisory Opinion)*, p. 200, para. 159.

[446] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960* (hereinafter "*Maritime Safety Committee (Advisory Opinion*)"), p. 154 (emphasis added).

[447] *Public Hearings held at the Peace Palace, The Hague, from 26 April to 4 May and on 8 June 1960, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Request for Advisory Opinion), Oral Statements (1960)*, p. 419 (emphasis in original).

4.36 The response of the United States explained that the definite article meant that *all* eight of the largest ship-owning States had to be included in the Committee, rather than an unspecified subset of those eight:

> [T]he significance to be attached to the definite article 'the' in the clause 'eight shall be *the* largest ship-owning nations' is that *the use of the definite article makes the class definite, and excludes flexibility or vagueness*.[448]

4.37 Similarly, Panama observed:

> The significance to be attached to the definite article 'the' in the phrase '*the* largest ship-owning nations', *is the significance normally attached to the definite article 'the', which is that of referring to something definite and not to something indefinite*.[449]

4.38 The Court adopted that approach:

> [T]he use in the original English text of the definite article 'the', which is maintained throughout each draft and finds expression in Article 28 (*a*), has a significance which cannot be ignored. It was inserted with evident deliberation.… The determination to retain the predominance of the largest ship-owning nations finds expression in Article 28 (*a*), the terms of which exclude the possibility of an interpretation which would authorize the Assembly to refuse membership on the Committee to any one or more of the eight largest ship owning nations.[450]

4.39 This understanding of the definite article's function reflects the longstanding approach of the Court and its predecessor. In *Polish War Vessels*, the PCIJ was asked to determine "whether '*the* relevant decisions' of the Council of the League of Nations and the High Commissioner confer[red] upon Poland [certain] rights and attributions as regards access and anchorage for [its naval]

[448] *Ibid.*, p. 438 (underlining added; italics in original).

[449] *Ibid.*, p. 437 (underlining added; italics in original).

[450] *Maritime Safety Committee (Advisory Opinion)*, pp. 161, 164-65.

vessels."[451] The Court held that the phrase could not be "restricted to decisions taken either by the Council or the High Commissioner in pursuance of the powers conferred by Article 103, paragraph 2, of the Treaty of Versailles, and by Article 39 of the Convention of Paris."[452] Rather, the Court was obliged to "assume[] that the phrase was intended to cover *all decisions* at which the Council might arrive which would be binding upon the Parties affected by that decision."[453]

4.40 Similarly, in the *Territorial Dispute* case between Libya and Chad, the Court interpreted Article 3 of the Treaty of Friendship and Good Neighbourliness between the French Republic and the United Kingdom of Libya. That Article provides:

> The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. I).[454]

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[451] *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, Advisory Opinion, 1931, P.C.I.J. Series A/B, No. 50*, pp. 145-146 (emphasis added).

[452] *Ibid.*

[453] *Ibid.*, p. 146 (emphasis added). *See also, e.g., Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion, 1926, P.C.I.J. Series B, No. 13*, p. 12 ("[T]he question submitted to the Court is general, and does not relate to any particular branch of industry"); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J. Series A/B, No. 50*, pp. 373, 375; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J. Series A/B, No. 44*, p. 40 ("The duty of the Court is to interpret the text as it stands, taking into consideration all the materials at the Court's disposal.")

[454] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994* (hereinafter "*Territorial Dispute (Judgment)*"), pp. 20-21, para. 39 (translation of the Registry of the Court) (emphasis added).

4.41 Libya argued that not all of its frontiers with the States concerned had been settled. The Court, however, rejected the argument, on the basis that the definite article indicates comprehensiveness:

> The Court considers that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them. … In the expression "the frontiers between the territories . . .", *the use of the definite article is to be explained by the intention to refer to all the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible*.[455]

4.42 Consistent with this practice on interpretation and application of the definite article, the construction "the legal consequences" is best understood as expressive of the General Assembly's intention to refer to *all* legal consequences. In contrast, when the Court's opinion has been sought for less than the totality of the legal consequences, the phrase is modified by words that expressly place limits on it. Thus, in *South West Africa*, the Security Council's request for an Advisory Opinion was, by its terms, limited to "'the legal consequences *for States*.'"[456] The Court's response was, accordingly, narrowly tailored to the legal consequences for States alone; it did not address the consequences for the United Nations or any other entity or actor.[457] Resolution 71/292 contains no such modifying language that limits the requested opinion to the legal consequences for the General Assembly alone.

[455] *Territorial Dispute (Judgment)*, p. 24, para. 48 (emphasis added).

[456] *South West Africa (Advisory Opinion)*, p. 17, para. 1 (emphasis added).

[457] *Ibid.*, p. 58, para. 133. *See also, e.g., Certain Expenses (Advisory Opinion)*, p. 159 (rejecting proposed interpretation of "the budget" as being limited to the "administrative budget" because if that had been intended "the word 'administrative' would have been inserted").

B. THE TEXT AND CONTEXT OF RESOLUTION 71/292 INDICATE THAT IT WAS INTENDED TO OBTAIN THE COURT'S OPINION ON THE LEGAL CONSEQUENCES FOR STATES

4.43 References to the legal obligations of States appear throughout Resolution 71/292. For instance, the preamble recalls Resolution 1514 (XV), paragraph 6 of which provides that any attempt by a colonial State that is "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."[458]

4.44 Paragraph 7 of Resolution 1514 (XV) requires that:

> All *States* shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.[459]

4.45 The centrality of the legal obligations of States to the requested advisory opinion – including those relating to the administering power – is also reflected in the preamble's reference to Resolution 2066 (XX). It provides that:

> any step taken *by the [United Kingdom]* to detach certain islands from the Territory of Mauritius for the purpose of establishing a

[458] *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* (22 June 2017), p. 1 (**Dossier No. 7**).

[459] U.N. General Assembly, 15th Session, *Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/RES/1514(XV) (14 Dec. 1960), para. 7 (emphasis added) (**Dossier No. 55**). *See also, e.g.*, U.N. General Assembly, 65th Session, *Fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/65/118 (10 Dec. 2010), paras. 7-8; U.N. General Assembly, 71st Session, *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/RES/71/122 (6 Dec. 2016).

> military base would be in contravention of [General Assembly Resolution 1514 (XV)]... .[460]

Similarly, Resolution 2232 (XXI), which is also referred to in the preamble, expresses deep concern:

> at the information contained in the report of the Special Committee on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories and at the creation *by the administering Powers* of military bases and installations in contravention of the relevant resolutions of the General Assembly.[461]

Another resolution referred to in the preamble, Resolution 2357 (XXII), calls upon "*the administering Powers* to implement without delay the relevant resolutions of the General Assembly," including Resolutions 1514 (XV), 2066 (XX) and 2232 (XXI).[462]

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[460] *Question of Mauritius* (16 Dec. 1965) (emphasis added) (**Dossier No. 146**).

[461] U.N. General Assembly, 21st Session, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, U.N. Doc. A/RES/2232(XXI) (20 Dec. 1966) (emphasis added) (**Dossier No. 171**).

[462] U.N. General Assembly, 22nd Session, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Swaziland, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, U.N. Doc. A/RES/2357(XXII) (19 Dec. 1967), para. 3 (emphasis added) (**Dossier No. 198**). Resolution 71/292's preamble also notes the many resolutions concerning the Chagos Archipelago that have been adopted by the Organization of African Unity and the African Union, and by the Movement of Non-Aligned Countries. Those resolutions emphasize the legal obligations of States, including both the administering power and the members of the international community generally, in connection with the administering power's continued administration of the Archipelago. *See, e.g.*, Organization of African Unity, Assembly of Heads of State and Government, 17th Ordinary Session, *Resolution on Diego Garcia*, AHG/Res.99(XVII) (1-4 July 1980) ("DEMAND[ING] that Diego Garcia be unconditionally returned to Mauritius") (**Annex 118**); Organization of African Unity, Council of Ministers, 74th Ordinary Session, *Decision on the Chagos Archipelago Including*

4.46 The General Assembly resolutions referred to above inform the content of the requested Advisory Opinion; each is mentioned in the questions that the General Assembly requested the Court to address. The first question asks whether the decolonisation of Mauritius was "lawfully completed… 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".[463] The second question is linked to the first, and asks: "What are the consequences under international law, *including obligations reflected in the above mentioned resolutions*, arising from the continued administration" of the Chagos Archipelago by the administering power.[464]

4.47 Although the text of Resolution 71/292 is dispositive,[465] the drafting history confirms the General Assembly's intention to obtain the Court's opinion on all legal consequences, including for States.[466] The explanatory memorandum which

Diego Garcia, CM/Dec.26(LXXIV) (5-8 July 2001), para. 1 ("CALL[ING] upon the United Kingdom to put an end to its continued unlawful occupation of the Chagos Archipelago and to return it to Mauritius thereby completing the process of decolonization") (**Annex 144**); Non-Aligned Movement, *Extracts from Selected Non-Aligned Movement Declarations* (1964-2012), p. 14 ("The Heads of State or Government reaffirmed that Chagos Archipelago, including Diego Garcia, is an integral part of the sovereign territory of the Republic of Mauritius. In this regard, they called on once again the former colonial power to pursue constructive dialogue expeditiously with Mauritius with a view to enable Mauritius to exercise its sovereignty over the Chagos Archipelago.") (**Annex 21**).

[463] *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* (22 June 2017), p. 2 (**Dossier No. 7**).

[464] *Ibid.*, (emphasis added).

[465] *See, e.g., Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J. Series B*, p. 39 ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.") *See also Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 417, para. 33; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, p. 237, para. 16; *Agreement between the WHO and Egypt (Advisory Opinion)*, p. 87, para. 33.

[466] As Germany concedes, "the underlying intention of the sponsor of a draft resolution aiming to submit a request for an advisory opinion to the Court" is of "particular relevance in determining the

Mauritius provided to the United Nations Secretary-General on 14 July 2016, and which was circulated to all Member States, explained that the request concerns the administering power's continued maintenance of an unlawful colonial administration, contrary to its international legal obligations:

> In its 1965 resolution 2066 (XX), a resolution dealing specifically with Mauritius, the General Assembly drew attention to the duty of the administering Power to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and invited "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity". Further relevant resolutions were adopted in 1966 and 1967.[467]

4.48 In regard to the "benefits of an advisory opinion," the memorandum noted how the opinion would assist the General Assembly and its Member States in addressing the administering power's continued unlawful administration:

> In 2010, on the fiftieth anniversary of the adoption of resolution 1514 (XV), the General Assembly noted with deep concern that fifty years after the adoption of the Declaration, colonialism had not yet been totally eradicated. It further declared "that the continuation of colonialism in all its forms and manifestations is incompatible with the Charter of the United Nations, the Declaration and the principles of international law", and considered "it incumbent upon the United Nations to continue to play an active role in the process of decolonization and to intensify its efforts for the widest possible dissemination of information on decolonization, with a view to the further mobilization of international public opinion in support of complete decolonization".
>
> In furtherance of its active role in the process of decolonization, the General Assembly has a continuing responsibility to complete the

content, meaning and scope of such request." Written Statement of Germany, para. 8 (citing with approval, *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 424, para. 53).

[467] U.N. General Assembly, *Request for the inclusion of an item in the provisional agenda of the seventy-first session*, U.N. Doc. A/71/142 (14 July 2016), para. 4 (**Dossier No. 1**).

> process of the decolonization of Mauritius. The best means is for the General Assembly *to engage with relevant States* directly concerned with the Chagos Archipelago, through consultations, negotiations and other measures, all towards a peaceful and orderly resolution of this matter. To fulfil that function, the General Assembly would benefit from an advisory opinion of the International Court of Justice on the legal consequences of the purported excision of the Chagos Archipelago from Mauritius in 1965 during the period of decolonization.
>
> *Members of the United Nations would also benefit from the guidance of the principal judicial organ of the United Nations*. And by having recourse to the International Court of Justice the General Assembly would also underscore its resolve to give effect to the mission entrusted to it by the Members of the United Nations, namely to complete the process of decolonization.[468]

4.49 Statements made in support of Resolution 71/292 further confirm the intention to obtain an Advisory Opinion on the legal consequences for States. Brazil highlighted how an advisory opinion that addresses the legal consequences for States would assist the international community:

> Decolonization constitutes one of the unfinished tasks of the United Nations and is therefore an issue of interest to the international community as a whole. The General Assembly has a crucial role to play in advancing the process of decolonization. One of the tools at its disposal, as set out in the Charter of the United Nations, is to request that the International Court of Justice provide clarification on legal issues through its advisory jurisdiction. A vote in favour of this resolution does not mean a commitment to any particular interpretation of the underlying issue. It means a request for the principal legal body of the United Nations to provide, through a non-binding opinion, *legal elements that may guide all parties to definitively settle this question*.[469]

[468] *Ibid.*, paras. 6-8 (emphasis added).

[469] *Ibid.*, (emphasis added).

4.50 Angola made the same point, emphasising in its statement in support of Resolution 71/292 how an Advisory Opinion would have consequences for States and, in that connection, recalling efforts by the African Union to "bring about the completion of the decolonization of Mauritius and enable the exercise of effective control *by that State* over the Chagos archipelago."[470]

4.51 The General Assembly's intention to obtain an opinion that addresses the legal consequences for States is also confirmed by the Written Statements of States that introduced and supported Resolution 71/292.

4.52 Of particular relevance is the African Union, nearly all of whose 55 Member States are members of the U.N.'s African Group that introduced Resolution 71/292. The African Union observes that:

> the Court is invited to address the legal consequences of the continued administration of the Chagos Archipelago by the United Kingdom, in terms of *international responsibility arising out of the wrongdoing State* and that of *other States* and the United Nations.[471]

4.53 That understanding of the intention of the second question is shared by a great many of the Written Statements that call upon the Court to explain the legal consequences for States. For example:

4.54 **Argentina** considers that "[t]he administering Power has the obligation to put an immediate end to the illegal situation created by the separation of the Chagos

[470] *Ibid.*, p. 10 (emphasis added).

[471] Written Statement of the African Union, para. 211 (emphasis added).

Archipelago from Mauritius" and that "[a]ll States are under the obligation not to recognize th[at] illegal situation".[472]

4.55 **Belize** considers that "[t]he consequences arising under international law from the continued administration by the United Kingdom of the Chagos Archipelago would therefore be that the United Kingdom would be under an obligation to cease forthwith its administration of the Chagos Archipelago and return it to Mauritius."[473]

4.56 **Brazil** considers that "the administering power has an obligation to immediately put an end to the continuing wrongful acts generated by the excision of the Chagos Archipelago from Mauritius, including the depopulation of the islands".[474]

4.57 **Djibouti** considers that the United Kingdom "is 'under obligation to withdraw' its administration from the Chagos Archipelago 'immediately'" and that "third States… are obligated not to assist or support the United Kingdom in its administration of the Chagos Archipelago", but rather are "obligated to *affirmatively promote* the decolonization process by facilitating the transfer of administration to Mauritius."[475]

4.58 **Namibia** considers that "[t]he decolonisation process shall be promptly completed" and that "States have an obligation to (a) refrain from assisting the

[472] Written Statement of the Argentine Republic, para. 68(c).

[473] Statement of Belize, para. 4.5.

[474] Written Statement of Brazil, para. 28(f).

[475] Written Submission of Djibouti, para. 50 (emphasis in original).

unlawful conduct, through inter alia not recognizing, benefiting, or rendering assistance to the illegal situation; and (b) assist the UN to bring the unlawful conduct to an immediate end."[476]

4.59 **Nicaragua** considers that, "[f]or the United Kingdom to comply with its international obligation it must bring the unlawful situation to an end and provide the means to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin."[477]

4.60 **Serbia** considers that "it seems necessary for the Court to give an opinion on the questions posed by the General Assembly and thus provide legal guidelines not only to the General Assembly but to the other UN organs and Member States."[478]

4.61 **South Africa** considers that "the first consequence of the non-completion of the decolonization of Mauritius is the obligation on the administrating authority to complete the decolonization of Mauritius."[479]

C. AN ADVISORY OPINION THAT ADDRESSES THE LEGAL CONSEQUENCES FOR STATES WOULD ASSIST THE GENERAL ASSEMBLY

4.62 Germany has suggested that an Advisory Opinion that explains the legal consequences for States might not contribute to the work of the General Assembly. Yet the vast majority of States that have submitted Written Statements have

[476] Written Statement of Namibia, p. 4.

[477] Written Statement of Nicaragua, para. 14.

[478] Written Statement by Serbia, para. 4.

[479] Written Statement of South Africa, para. 92.

expressed a different view. In the first place, there is nothing unusual about the General Assembly's decision to seek an Advisory Opinion that addresses the legal consequences for States. Previous requests have sought opinions on such legal obligations, and the Court has answered them.[480] The reason is straightforward: understanding the legal obligations of States can assist the General Assembly in discharging its responsibilities in practical terms, by clarifying the measures that need to be taken, including with respect to matters of timing. Indeed, the Court "has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions."[481]

4.63 Here, obtaining an Advisory Opinion on the legal consequences for States would assist the General Assembly in fulfilling its responsibilities. The U.N. Charter confers "upon the General Assembly a competence relating to 'any questions or any matters' within the scope of the Charter."[482] As detailed in Mauritius' Written Statement, matters relating to self-determination – and especially decolonisation – are squarely within the scope of the Charter and, hence,

[480] *See, e.g., Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion, 1925, P.C.I.J. Series B, No. 12*, pp. 6-7, 19, 31-33 (advising the Council of the League of Nations on whether Turkey and the United Kingdom had the right to vote in the Council on the determination of the frontier between Turkey and Iraq); *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina), Advisory Opinion, 1923, P.C.I.J. Series B, No. 8*, p. 57 (advising the Council that "the question of the delimitation of the frontier between Poland and Czechoslovakia ha[d] been settled").

[481] *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 417, para. 34. *See also, e.g., Construction of a Wall (Advisory Opinion)*, p. 163, para. 62; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, p. 237, para. 16. For example, in *Interpretation of Peace Treaties*, the General Assembly presented a question "to obtain guidance for its future action." In response, the Court advised that Bulgaria, Hungary and Romania were "obligated to carry out the provisions" of certain articles relating to the "settlement of disputes." *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 77.

[482] *Construction of a Wall (Advisory Opinion)*, p. 145, para. 17 (citing U.N. Charter (1945), Art. 10).

of the General Assembly's competence.[483] The Court's opinion would provide guidance to the General Assembly in exercising that competence, for example, with respect to how the Colonial Declaration is implemented in relation to completing the decolonisation of Mauritius.

4.64 In the *Wall* case, where the requested opinion addressed, among a range of matters, the right of self-determination and its application, the Court's opinion addressed "the legal consequences" for States.[484] The Court did so even though its opinion was "given to the General Assembly, and not to a specific State or entity."[485] As the Court explained in *South West Africa*, a case in which the requested opinion concerned the legal consequences for States exclusively: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions."[486] The same applies *mutatis mutandis* to the General Assembly resolutions concerning decolonisation that are referred to in Resolution 71/292.

4.65 Indeed, it would be curious for the Court not to set out the legal consequences for States should it determine that the decolonisation of Mauritius has not been lawfully completed. As the Court explained in *South West Africa*, "the

[483] Written Statement of Mauritius, paras. 4.40-4.41, 5.2-5.17, 6.8-6.39. *See also East Timor, Judgment*, p. 102, para. 29 ("The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court…; it is one of the essential principles of contemporary international law.") Indeed, Article 1 of the Charter establishes that one of the "[p]urposes of the United Nations" is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination." U.N. Charter (1945), Art. 1. *See also, e.g.*, U.N. Charter (1945), Art. 55. The General Assembly would be hamstrung in advancing this purpose if were debarred from obtaining the Court's opinion on what the principle may require of "nations."

[484] *See, e.g., Construction of a Wall (Advisory Opinion)*, p. 197, para.148; *ibid.*, pp. 199-200, paras. 154, 159.

[485] *Ibid.*, p. 164, para. 64.

[486] *South West Africa (Advisory Opinion)*, p. 24, para. 32.

qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end."[487] Accordingly, the Court emphasised, "[i]t would be an untenable interpretation to maintain" that once a declaration of illegality had been made, States "would be free to act in disregard of such illegality or even to recognize violations of law resulting from it."[488] Rather, "[w]hen confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf."[489]

4.66 In light of these considerations, the Court emphasised that refraining from setting out the legal consequences for States would undermine its judicial functions:

> Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: "This decision entails a legal consequence, namely that of putting an end to an illegal situation."[490]

4.67 Precisely the same reasoning applies here. If decolonisation has not been lawfully completed, then an obligation (or obligations) must ensue to bring that situation of unlawfulness to an end, and such obligation(s) will inevitably fall upon

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[487] *Ibid.*, p. 52, para. 111.

[488] *Ibid.*, p. 52, para. 112.

[489] *Ibid.*

[490] *Ibid.*, p. 54, para. 117 (quoting *I.C.J. Reports 1951*, p. 82). There is no basis on which to conclude that the General Assembly intended to prevent the Court from performing its role as the United Nations' principal judicial organ. As the Court has repeatedly stressed: "It is not to be assumed that the General Assembly would … seek to fetter or hamper the Court in the discharge of its judicial functions". *Certain Expenses (Advisory Opinion)*, p. 157; *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 425, para. 54.

the State (or States) which are best placed to bring the unlawful situation to an end. Concomitant obligations also fall on other States not to aid or abet its continuance. The termination of the unlawful situation cannot take place in a vacuum, but only when practical and actual measures are taken by the State or States responsible for its continuation. To divorce the consequences of an incomplete decolonisation from the States that are best placed to bring the situation to an end, and confine them only to the General Assembly, would be artificial. It would not prescribe the most obvious means to bring an end to the unlawful situation, and it would not answer the questions actually presented by the General Assembly.

4.68 This is especially the case given the *erga omnes* and fundamental character of the legal rights, including self-determination, that are raised by the General Assembly's questions. The Netherlands, in contrast to Germany, calls upon the Court to answer the second question in a complete manner, one that addresses the consequences for individual States. It states that this is because, "given the peremptory character of the right of self-determination, a serious breach of the right of self-determination obliges all States not to recognize the situation created as a result of that breach and not to render aid or assistance in maintaining the situation created as a result of the serious breach of that right."[491] Mauritius agrees.

D. THE COURT SHOULD NOT REFORMULATE THE SECOND QUESTION

4.69 For these reasons, the Court should not rephrase the second question so as to avoid giving an opinion on the legal consequences for States. There is no reason for it to do so.

[491] Written Statement of the Netherlands, para. 4.10.

4.70 The Court is under a duty to answer questions as the General Assembly has chosen to frame them. As one commentator has explained:

> The formulation of the question is a matter for the requesting organ. It is that organ which has the political and legal responsibility for it. The Court, as a judicial body, must not, through the exercise of powers based on judgments as to what is convenient and appropriate, and which in that sense are political ones, give the impression of "manipulations" that would be difficult to reconcile with the judicial function and the Court's judicial integrity. The Court cannot seise itself of an advisory opinion case. That being so, neither ought it to select the question which seems, *to the Court* the most appropriate one. To do so is to encroach upon the political organ's jurisdiction, fringes on self-seisin, and exposes the Court to criticism of its political judgments.[492]

4.71 The Court has consistently applied this approach. For example, in *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, Malaysia argued that the Court's Advisory Opinion should be narrower than the question that had been referred to the Court by the Economic and Social Council.[493] The Secretary-General, however, argued that: "It is not for the United Nations nor for any of the States participating in these proceedings to redefine or narrow the scope of [a] legal question."[494] The Court agreed. It held: "[I]t is for the Council – and not for a member State nor for the Secretary-General – to formulate the terms of a question that the Council wishes to ask."[495] Accordingly, the Court refused to

[492] Robert Kolb, *The International Court of Justice* (2013), p. 1080 (emphasis in original).

[493] *Public sitting held on Thursday 10 December 1998, at 10 a.m., at the Peace Palace, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Request for Advisory Opinion), Verbatim Record (1998)*, p. 48.

[494] *Ibid.*, p. 17.

[495] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 81, para. 36.

restrict the scope of its Opinion, and "answer[ed] the question as formulated by the Council."[496]

4.72 Germany wishes to have the Court issue an opinion that responds to the second question (as well as the first), but in a manner that avoids giving rise to a "way in which the current proceedings might be understood, namely as having as their object the hearing and adjudication of a bilateral dispute."[497] Mauritius is sensitive to Germany's concerns in this regard, as it is to similar concerns expressed in certain other Written Statements, including those of the Russian Federation and China. The simple answer is that the matter referred to the Court by the General Assembly is not a bilateral dispute. Mauritius reiterates that, like each of those States, it is fully committed to the principle of consent as the basis for adjudication of any bilateral disputes, and stands opposed to the use of the Court's advisory jurisdiction to circumvent that solemn principle. But, at the same time, it is clear that in fully answering both questions put to it by the General Assembly, the Court would in no way derogate from the principle, or open the door to any such derogation in the future.

4.73 As fully explained in Chapter 2 above, the questions presented by the General Assembly concern decolonisation, a subject which indisputably falls within its mandate and with which it has been deeply and directly concerned for more than half a century. Moreover, in these proceedings, unlike a dispute about legal or historical title to territory, the answer to the questions posed by the General Assembly is dispositive of all other matters. The Court's answer to the first question, and its determination of whether decolonisation has been lawfully

[496] *Ibid.*, p. 81, para. 37.

[497] Written Statement of Germany, para. 30.

completed, in and of itself determines whether the administering power or Mauritius is lawfully entitled to act as the sovereign over the Chagos Archipelago, and to exercise sovereignty.

4.74 For these reasons, the Court's exercise of its discretion to answer the questions that have been placed before it by Resolution 71/292 – in the form in which they have been asked – cannot cause any harm to the principle of consent. The Court has not hesitated to render its opinion in other advisory proceedings that had a territorial dimension, or even where its opinion impacted the sovereignty claims of particular States, as in *Western Sahara*. These opinions did not derogate from the principle that consent is necessary for jurisdiction to attach in territorial matters that are unconnected to the issue of decolonisation, which might be characterised as bilateral territorial disputes. Nor would its opinion on whether the decolonisation of Mauritius has been lawfully completed, or on what legal consequences flow from that determination for States as well as the General Assembly, derogate from that principle.

4.75 Although the Court may rephrase questions which have substantial defects, such as those that are vague[498] or inadequately formulated,[499] or where reformulation is otherwise necessary to give effect to the "true legal question" that the requesting organ had clearly intended to present,[500] the cases in which the Court

[498] *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 423, para. 50 ("Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion.") *See also Application for Review of Judgment No. 273*, p. 348 (finding the question was, "on the face of it, at once infelicitously expressed and vague").

[499] *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 423, para. 50 ("The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated").

[500] *Agreement between the WHO and Egypt (Advisory Opinion)*, p. 88, para. 35. *See also, e.g., Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 425, para. 50; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion*

has done so are rare and present circumstances that are not in issue in relation to this request.

4.76 In *Interpretation of the Greco-Turkish Agreement*, for example, the PCIJ was constrained to formulate a question (rather than *re*-formulate one) because the letter which transmitted the request for an Advisory Opinion "d[id] not exactly state the question upon which [the Court's] opinion [wa]s sought".[501] The Court therefore had to "determine what th[e] question [was] and formulate an exact statement of it, in order more particularly to avoid dealing with points of law upon which it was not the intention of the Council or the Commission to obtain its opinion."[502]

4.77 In *South-West Africa—Voting Procedure*, the Court detected a "slight difference between the wording of the English and the French texts" and decided to give preference to the "French version" because it "seem[ed] to express more precisely the intention of the General Assembly in submitting the matter to the Court."[503]

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of June 1st, 1956, I.C.J. Reports 1956, p. 25 (finding that "the expression 'grant oral hearings to petitioners' relate[d] to persons who have submitted written petitions to the Committee on South West Africa in conformity with its Rules of Procedure" because that was its "understand[ing]" of the requesting organ's intent); *Application for Review of Judgment No. 273 (Advisory Opinion)*, p. 348, para. 46 (finding that "records and report of the [requesting organ] cast doubt on whether the question as framed really correspond[ed] to the intentions of the Committee in seising the Court," causing the Court to seek "to bring out what it conceive[d] to be the real meaning" of the request).

[501] *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, Advisory Opinion, 1926, P.C.I.J. Series B, No. 16, p. 14.

[502] *Ibid.*

[503] *South-West Africa—Voting Procedure, Advisory Opinion, I.C.J. Reports 1955*, p. 72.

4.78 In *Kosovo*, the Court simply confirmed that the General Assembly's question could not pre-determine the Court's answer.[504] In particular, the question made reference to the "Provisional Institutions of Self-Government of Kosovo," notwithstanding the fact that "[w]hether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings."[505] Since the "identity of the authors of the declaration of independence" was "capable of affecting the answer to the question whether that declaration was in accordance with international law", the Court held that it "would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly."[506]

4.79 The Court's decision in *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* provides no more support for reformulating the second question. The basis for that Advisory Opinion was Article 11 of the Statute of the Administrative Tribunal, which allows the Court to give an Advisory Opinion on four possible grounds of objection in relation to a decision by the tribunal.[507] The discussions of the Committee that requested the Advisory Opinion made clear its intention to seek the Court's opinion on just two of those grounds: error in law and excess of jurisdiction.[508] Although the question did not specifically refer to those two grounds, the Court understood that this had been the

[504] *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, p. 424, para. 52.

[505] *Ibid.*

[506] *Ibid.*

[507] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 349, para. 47.

[508] *Ibid.*, pp. 348-350, paras. 46-48.

Committee's intention. Its opinion therefore addressed those grounds exclusively.[509]

4.80 The Court's decision in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* also offers no support for reformulation. In that case, the questions referred to the Court were "formulated in terms only of Section 37" of the relevant agreement.[510] Providing the requested opinion, however, required the Court to engage with a broader set of "legal principles and rules" that had to be considered for the Court to "remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction."[511]

4.81 The Court explained that:

> [A] reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization. For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.[512]

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[509] *Ibid.*, pp. 349-350, para. 48. In *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, the Court noted that, although an application had been made to the Committee on all four permissible grounds set out in Article 11, the Committee "decided that there was no substantial basis for the Application on the ground either that the Tribunal had exceeded its jurisdiction, or that it had committed a fundamental error in procedure which had occasioned a failure of justice". The Court accordingly concluded that "it is not open to it to enter into these grounds, by reformulating the question put to it or otherwise, because it cannot be said that it was the intention or wish of the Committee to have an opinion of the Court on these points." *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 43, para. 44.

[510] *Agreement between the WHO and Egypt (Advisory Opinion)*, p. 88, para. 35.

[511] *Ibid.*

[512] *Ibid.*

4.82 In the present case, in contrast, the Court's answer to the second question would only be "incomplete" if it refrains from explaining the consequences for States.[513]

4.83 Moreover, the Court does *not* reframe a question so as to circumvent the General Assembly's clear intent. That is why the Court's *Wall* Advisory Opinion fully answered the question that the General Assembly had put to it, including by providing a response that addressed the legal consequences for States.

4.84 The present request for an Advisory Opinion, in which the General Assembly has employed a substantively identical formulation, is no different. The question's "objective is clear",[514] and is reflected in the way the General Assembly has framed the question: to determine the legal consequences of the administering power's continued administration of the Chagos Archipelago for all relevant entities, including States.

4.85 None of the reasons offered for distinguishing the *Wall* Advisory Opinion is persuasive.

4.86 *First*, there is the suggestion that the reference to another legal instrument (the Fourth Geneva Convention) in the General Assembly's request "implied that the General Assembly had thereby also wanted to make specific reference to obligations of third States arising under Art. 1… to which the Court accordingly then also alluded in its advisory opinion."[515] However, this could not have been the

[513] *See* paras. 4.65-4.68 above.

[514] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, p. 238, para. 20.

[515] Written Statement of Germany, para. 111.

reason for the Court's decision to address the legal consequences for States, because the Advisory Opinion was *not* limited to explaining the legal consequences for States under Article 1. Rather, the Court addressed the full range of legal consequences for States, including, most pertinently for the present case, the legal consequences for States in regard to self-determination. Moreover, as described above, the present Advisory Opinion request also contains express references to multiple international legal authorities – General Assembly Resolutions 1514 (XV), 2066 (XX), 2232 (XXI) and 2357 (XXII) – that set out legal obligations which apply to States.

4.87 *Second*, there is the argument that the Court's decision to address the legal consequences for States may be explained by the fact that "the occupied Palestinian territory… constitutes a question of direct and specific relevance to the United Nations, falling within the scope of its responsibility, almost since the organization's inception."[516] However, the same may be said about matters connected to the decolonisation of Mauritius, which has been the subject of attention by the United Nations since at least 1947.[517] Moreover, the General Assembly's engagement with the administering power's detachment of the Chagos Archipelago dates to 1965, as the lengthy Dossier submitted by the United Nations Secretariat makes clear.[518] The United Nations' longstanding and extensive engagement with the issue is set out at length in Chapter 6 of Mauritius' Written Statement.

[516] *Ibid.*, para. 113.

[517] U.N. Secretary-General, *Transmission of Information by Members under Article 73(e) of the Charter: Summary of Information Transmitted by the United Kingdom Government (First Part) – Mauritius*, U.N. Doc. A/319 (16 July 1947), p. 3.

[518] Written Statement of Mauritius, para. 1.13.

4.88 In summary, the General Assembly has made clear its intention to obtain an Advisory Opinion that addresses all the legal consequences that arise from the administering power's continued administration of the Chagos Archipelago, including the legal consequences for States. That intention is clear from the text of Resolution 71/292, its drafting history, and the Written Statements of its sponsors and supporters. It is difficult to see any basis, having regard to the Court's prior practice, to refashion the second question so as to exclude the legal consequences for States from the Court's answer. To do so would serve only to give the General Assembly an incomplete response to the questions it posed. This would serve no practical purpose, and would be inconsistent with the Court's judicial functions.

III. The specific legal consequences of the administering power's continued administration of the Chagos Archipelago

A. THE ADMINISTRATION OF THE CHAGOS ARCHIPELAGO IS A CONTINUING WRONGFUL ACT THAT MUST CEASE IMMEDIATELY

4.89 Mauritius explained in its Written Statement that the administering power's failure to complete its decolonisation is a continuing wrongful act that persists to this day, and that, as a consequence, full legality must be restored by the immediate completion of Mauritius' decolonisation. That process will only be concluded when the colonial administration has been fully withdrawn, Mauritius is able to exercise full rights of sovereignty, and the administering power recognises Mauritius' sovereignty over the Archipelago.[519]

4.90 Mauritius observes that *none* of the Written Statements disagrees with the general principle that where decolonisation has not been lawfully completed, the

[519] *See* Written Statement of Mauritius, para. 7.3(1).

necessary legal consequence is that decolonisation must be brought to completion. Numerous Written Statements expressly affirm the principle. For example:

4.91 The **African Union** considers that "[t]he United Kingdom is obliged under general international law to… complete the process of decolonization of Mauritius".[520]

4.92 **Argentina** considers that "[t]he administering Power has the obligation to pursue negotiations in good faith and without conditions with Mauritius in order to render effective the termination of the illegal situation".[521]

4.93 **Belize** considers that if the excision of the Chagos Archipelago prevented the Mauritian people from freely exercising their right to self-determination, then the United Kingdom "would have an obligation to cease forthwith administration of the Chagos Archipelago and return it to Mauritius."[522]

4.94 **Brazil** considers that "the administering power shall pursue negotiations in good faith to conclude the decolonization process of Mauritius, taking into account the determinations made by the General Assembly in the realm of decolonization."[523]

4.95 **China** observes that the Declaration on Friendly Relations "stipulates that, 'every State has the duty to promote … realization of the principle of equal rights

[520] Written Statement of the African Union, para. 258(e).

[521] Written Statement of the Argentine Republic, para. 68(b).

[522] Statement of Belize, para. 1.5.

[523] Written Statement of Brazil, para. 28(g).

and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order … to bring a speedy end to colonialism'".[524]

4.96 **Djibouti** considers that "[t]he United Kingdom's continued administration of the Chagos Archipelago constitutes a continuing wrongful act that must be brought to an immediate end."[525]

4.97 **Guatemala** "expects the Court to find that the continued administration of the Chagos Archipelago by the United Kingdom constitutes a continued wrongful act" and submits that "it must be brought to an end in order to attain a complete decolonization of Mauritius".[526]

4.98 **India** observes that the General Assembly "solemnly proclaimed the necessity of a speedy and unconditional end of colonialism in all its forms and manifestations".[527]

4.99 **Madagascar** endorses "[l]es points n°2 et n°3 de la Résolution Assembly/AU/Res.1 (XXVIII) adoptée par la Conférence de l'Union à l'issue de sa 28ÈME session ordinaire qui s'est tenue à Addis-Abeba les 30 et 31 janvier 2017," and submits that "le point n° 3 réaffirme que 'l'archipel des Chagos y compris Diego Garcia fait partie intégrante du territoire de la République de Maurice et que

[524] Written Statement of China, para. 8.

[525] Written Submission of Djibouti, para. 54.

[526] Written Statement of Guatemala, para. 36.

[527] Written Statement of India, para. 61.

la décolonisation de la République de Maurice ne sera complète tant qu'elle n'aura pas exercé sa pleine souveraineté sur l'archipel des Chagos'".[528]

4.100 **Namibia** considers that "[t]he decolonisation process shall be promptly completed, under the supervision of the UN."[529]

4.101 **Nicaragua** considers that "[f]or the United Kingdom to comply with its international obligation it must bring the unlawful situation to an end".[530]

4.102 **Serbia** considers that the "[c]ontinuing violation of Mauritius' sovereignty, territorial integrity and self-determination must be brought to an end."[531]

4.103 **South Africa** considers that "there is an obligation on the United Kingdom to complete the decolonization of Mauritius".[532]

4.104 It is notable that the U.K.'s Written Statement does not dispute the proposition that a decolonisation that has not been lawfully completed must be completed expeditiously. Rather, the United Kingdom simply contends that

[528] Written Submission of Madagascar, p. 2.

[529] Written Statement of Namibia, p. 4.

[530] Written Statement of Nicaragua, para. 14.

[531] Written Statement by Serbia, para. 45.

[532] Written Statement of South Africa, para. 85.

Mauritius' decolonisation was lawfully completed,[533] a conclusion that is incorrect, for the reasons set out in Chapter 3 above.[534]

4.105 The consensus is not surprising. International law is clear that: (i) a "breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation";[535] (ii) unlawfully maintaining a colonial administration is a "continuing wrongful act";[536] (iii) a State which is responsible for such an internationally wrongful act is required to "cease that act, if it is continuing";[537] and (iv) where an unlawful colonial administration is being maintained, it must be "withdraw[n]… immediately".[538]

4.106 For that reason, the Court's *South West Africa* Advisory Opinion held, without ambiguity, that: "South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia."[539] The Advisory

[533] *See* Written Statement of the United Kingdom, paras. 9.4-9.21 (addressing Question (b) under the assumption that the 1965 "Agreement" was lawful, but not stating that no action would be required if decolonisation was not lawfully concluded).

[534] *See* paras. 3.68-3.115 above.

[535] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentarie*s (2001), Art. 14(2).

[536] *Ibid.*, Commentary to Art. 14, para. 3 (referring to the "maintenance by force of colonial domination" as a "continuing wrongful act").

[537] *Ibid.*, Art. 30(a).

[538] *See, e.g., South West Africa (Advisory Opinion)*, p. 58, para. 133.

[539] *Ibid.*, p. 54, para. 118.

Opinion further made clear that South Africa was obligated to withdraw its administration "immediately."[540]

4.107 Mauritius demonstrated in its Written Statement that there is no impediment to the immediate completion of its decolonisation, and that decolonisation has often been completed in less than one year, including in circumstances where the process was more complex than is the case with the Chagos Archipelago.[541] There is almost no administration to be transferred. This is due to the administering power's restrictions on entrance to the Archipelago; the complete lack of any commercial, industrial, or agricultural activities; and the administering power's minimal administrative presence in the Archipelago: it largely governs remotely from London, with a total annual budget of £446,000 having been earmarked for "Administration" during the last financial year for which information is available.[542]

4.108 Moreover, Mauritius has also shown that any legal changes necessary to facilitate decolonisation can be achieved quickly: the administering power's "Commissioner" has plenary legal authority to enact, amend and enforce laws and regulations, and any constitutional changes can be accomplished through a simple Order in Council made under the Royal prerogative.[543] There is very little legislation in place that would have to be changed, and virtually no personnel to relocate. Nothing in the United Kingdom's Written Statement calls into question whether decolonisation can be completed in less than a year. To the contrary, the

[540] *Ibid.*, p. 58, para. 133.

[541] *See* Written Statement of Mauritius, Chapter 7, Section III, Part B.

[542] *See* United Kingdom, "*British Indian Ocean Territory Ordinance No. 1 of 2016: An ordinance to make provision for the expenditure of public funds between 1 April 2016 and 31 March 2017*" (30 June 2016), p. 1 (**Annex 180**). *See also* Written Statement of Mauritius, paras. 7.17-7.21.

[543] Written Statement of Mauritius, paras. 7.17-7.21.

United Kingdom accepts that its administration is "unusually confined in nature",[544] and consists of no more than a handful of officials, none resident in the Chagos Archipelago, who are supported by a small local staff.[545]

4.109 Further, the United Kingdom's Written Statement confirms that the presence of a military base on Diego Garcia is no impediment to the immediate completion of decolonisation. The United Kingdom accepts that Mauritius has issued a "clear statement" providing "assurances that it intends to maintain the US military base on Diego Garcia" and that the existing "'[s]ecurity arrangements will remain in place'."[546]

4.110 In short, nothing in the Written Statements casts doubt on the position set out by Mauritius in its Written Statement, namely that the administering power's continued administration of the Chagos Archipelago is a continuing wrongful act that must cease. This requires the immediate withdrawal of the existing colonial administration, a process that can and should be achieved without delay.

IV. The legal consequences while decolonisation is being completed

4.111 Mauritius explained in its initial submission that, during the short period between the issuance of the Court's Advisory Opinion and the immediate completion of decolonisation, the administering power is obligated "to give effect to the 'principle that the interests of' the 'inhabitants [of Mauritius] are…

[544] Written Statement of the United Kingdom, para. 9.4.

[545] *Ibid*., para. 2.36. In particular, the United Kingdom identifies the administration as being comprised of a Commissioner, Deputy Commissioner, Administrator (who is also the Director of Fisheries), Deputy and Assistant Administrators, General Counsel and Principal Legal Adviser, Environment Officer, and Chief Science Adviser. *Ibid*.

[546] *Ibid.*, para. 9.8.

paramount' and to 'accept as a sacred trust the obligation to promote to the utmost' their 'well-being'."[547]

A. RESETTLEMENT OF MAURITIANS OF CHAGOSSIAN ORIGIN

4.112 This issue is a matter of the utmost international importance. It requires the administering power, prior to the immediate completion of decolonisation, not to obstruct efforts by Mauritius to advance a programme for the resettlement of Mauritians of Chagossian origin who were unlawfully removed by the administering power, and to ensure access of other Mauritian citizens to the Chagos Archipelago in accordance with Mauritian law.[548]

4.113 Mauritius has previously set out the facts in relation to the administering power's forcible expulsion of the entire Mauritian population of the Chagos Archipelago.[549] Mauritius has also described the United Kingdom's attempts to conceal the unlawful nature of the expulsion, as well as its belated and inadequate expressions of "regret" for the circumstances in which the inhabitants were removed.[550]

4.114 The experiences of five Chagossians are set out immediately below. All, together with family members, were forcibly removed by the administering

[547] Written Statement of Mauritius, para. 7.43 (citing U.N. Charter (24 Oct. 1945), Art. 73).

[548] *See* Written Statement of Mauritius, paras. 7.42-7.61.

[549] *See ibid.*, paras. 3.100-3.107. On the reaction to the forcible removal of the Chagossians, *see also ibid.*, paras. 4.49-4.61.

[550] *See*, *e.g.*, Mauritius Written Statement, paras. 1.8, 7.48-7.49; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Hearing on Jurisdiction and the Merits, UNCLOS Annex VII Tribunal, Transcript (Day 1) (22 Apr. 2014), p. 43:21-23 (**Annex 169**).

power from the islands of the Archipelago where they resided. All have always been, and remain, desirous of returning, but have been prevented from doing so.

Rosemond Samynaden

"I was born on 29 August 1936 in Bodham Salomon and spent my childhood in the Chagos Archipelago, until I went to Mauritius at the age of 16. When I returned to the Chagos Archipelago in 1967 at the age of 31, life was exactly the same. It was peaceful and beautiful. Then my family and I were deported to Mauritius. Mr. Todd and Mr. Moulinie announced to people living in Peros Banhos that we would have to leave. We were told that we would have to leave as all the islands were closing down. We would not be allowed to bring our luggage. We could only bring a mattress and a box in which we kept our clothes. It is my misfortune that I am alive at the age of 81 almost 82, my eyes are still open but I am unable to go back. If I have the opportunity to return to Chagos, I will go back without the slightest hesitation. I shall start preparing my things immediately. Even if I can no longer work as I used to, I have sufficient knowledge and experience that I could share with others. I can still go fishing and I can cook food. I know the islands inside out. My wife will follow me. My children as well have said that they would like to live in Chagos. We need to preserve our culture and tradition. I want to die peacefully in Chagos one day."

Marie Liseby Elysé

"I was born on 24 July 1953 in Peros Banhos. I had a very happy childhood there. One day we were suddenly told we had to attend an assembly. We were told that we would no longer be able to stay there because the United Kingdom had taken Chagos. People were not happy. Lots of people were angry on that day. We felt helpless. The ship from Mauritius which used to deliver goods stopped coming. For approximately 6 months or more, we no longer had rice, flour, oil, milk *etc*. Children started falling sick, many were feeling nauseous, and there was a shortage of medicine. I boarded the last ship which came to Peros Banhos in 1973. We could not even take our pets. It felt that we were all attending a funeral and at the same time we were dying. People were screaming in despair. Many were crying. Everyone was sad and extremely frightened. There we were on a crowded ship in the dark, had to leave everything behind and not knowing what the future had in store for us. It took us 4 days to reach Mauritius. We were simply dumped there. Being 4 months pregnant at the time, the trip was unbearable for me. When I delivered my baby 5 months later, it died after 15-20 minutes. I still feel guilty for having lost my baby as I fear I was unable to look after it properly

given the trauma I underwent throughout my pregnancy. Before life was so peaceful, calm and we did not have to worry about anything. If someone tells me I will be able to return, I shall immediately take my belonging and go back to Chagos. My children will also not hesitate to go to Chagos. They said they would accompany me."

Marie Janine Sadrien

"I was born on 30 August 1956 in Ile Bodham Salomon. My mother had 13 children. They were all born in Chagos. We were living happily in paradise. In 1966 my aunt had heart problems and I accompanied her to Mauritius for treatment. We left the bulk of our personal belongings at home because in our minds we would be returning soon. As soon as my aunt recovered and was feeling better, she decided that we should go back to Salomon. However, in 1968 she was told that the islands were closing down and we would not be able to return. We were so sad as we really wanted to go back. We missed our old life. It came as a shock. It was extremely difficult to digest the fact that we would not be seeing our home again. If today, I am told that there is a ship at the harbour ready to take us to Chagos for us to live there forever, I will not hesitate. I will pick up my belongings and leave immediately. At times when I sleep and I think of my happy life back then, I cry. I wanted to bring up my children there and teach them the meaning of a simple and beautiful life. Mauritius is beautiful but Salomon is where my heart belongs. Had I not been prevented from going back, I would still have been in Chagos. I spent the happiest days of my life in Salomon. Memories of Salomon is what still keep me alive."

Marie Mimose Furcy

"I was born on 7 June 1955 in Peros Banhos, Ile Du Coin. My life was beautiful. We were 6 children in all. We were not poor. We had enough to live a really nice life. In 1967, my sister got hurt and for 6 months she had to come to Mauritius for treatment. My father told us there was no need to take our belongings as we would be returning shortly. I still remember him closing the door and locking it and putting our house key in his pocket. We did not know that we would never be able to use the key again. My father died without ever being able to open the door again. My sister died a few months after we came to Mauritius. My mother went to meet the person in charge of the list so that we could put our names down for the next trip to Chagos. He said that we could not as the place is closing down there. My mother cried. My life changed overnight."

Rosemonde Berthin

"I was born in Salomon, Ile Bodham on 19 October 1954. We were a family of 10 children. I had 6 brothers and 3 sisters. They were all born in Salomon except for my youngest sister who was born in Peros Banhos. My family can be traced generations back, as my great great grandparents on both my parents' sides were born in Chagos. I came back to Mauritius in 1972 as Salomon closed down that year. The last child who was born in Salomon was my son. He was born in May 1972. What's the point of the United Kingdom allowing us to visit only? We reach there early morning and we have to leave in the afternoon at 3 pm. Meanwhile others are enjoying there. When I went in 2006, I saw many tents erected and I am surprised that others are able to enjoy unlimitedly and I am not even allowed to stay at my place. I do not want to visit. I am not a visitor. It is my home and I have every right to stay there forever. I want to hold my grandchildren's hands and bring them to my home. I have 14 grandchildren and they are all excited to go to Chagos to stay. If today someone tells me that we are being allowed to go back, I will not hesitate even once."

4.115 No Written Statement challenges these facts in any way, or seeks to justify the administering power's treatment of the Chagossians. Indeed, the United Kingdom concedes their mistreatment: "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."[551] However, notwithstanding this expression of regret, the administering power continues to refuse to allow Mauritians of Chagossian origin to return to the Archipelago. Nearly all of the Written Statements that address the second question agree with Mauritius that the legal consequences include removal of the obstacles to the Chagossians' resettlement. For example:

4.116 The **African Union** submits that "[t]he continued administration by the United Kingdom 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, constitutes

[551] Written Statement of United Kingdom, para. 1.5.

an internationally wrongful act with several consequences under international law".[552]

4.117 **Argentina** considers that "the decisions and facts leading to the separation of the Chagos Archipelago from Mauritius, while deporting its inhabitants and preventing their return, also amounts to a breach of fundamental human rights of Mauritian nationals."[553]

4.118 **Brazil** submits that "Article 13(2) of the Universal Declaration of Human Rights determines that 'everyone has the right to leave any country, including his own, and to return to his country'"[554] and that "[t]he fact that the administering power has been preventing the resettlement of Chagossians in the archipelago constitutes a violation of that right."[555]

4.119 **Cuba** emphasises the "right to return to the Archipelago of the Mauritian citizens forcibly displaced by the United Kingdom of Great Britain and Northern Ireland."[556]

4.120 **Namibia** considers that Mauritius should "be able to implement a programme for the resettlement in the Chagos Archipelago of [Mauritius'] nationals, in particular those of Chagossian origin."[557]

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[552] Written Statement of the African Union, para. 258(c).

[553] Written Statement of the Argentine Republic, para. 60.

[554] Written Statement of Brazil, para. 27.

[555] *Ibid.*

[556] Written Statement of Cuba, pp. 1-2.

[557] Written Statement of Namibia, p. 4.

4.121 **Nicaragua** submits that "[f]or the United Kingdom to comply with its international obligation it must bring the unlawful situation to an end and provide the means to implement a programme for the resettlement on the Chagos Archipelago of [Mauritius'] nationals, in particular those of Chagossian origin."[558]

4.122 **Serbia** considers that "[a]ny internationally wrongful act involves legal consequences", and that "[i]n the concrete case… there is an urgent need to be allowed for those who were expelled from Chagos Archipelago to return."[559]

4.123 **South Africa** submits that "the continuing denial of the right of return to their homes of Chagossians constitutes an international wrongful act for which responsibility and liability exists, which must be reversed, and for which reparations may be required."[560]

4.124 Only two Written Statements have raised contrary views. However, as shown below, the arguments they invoke, to encourage the Court not to address legal obligations pertaining to the resettlement of Mauritian nationals of Chagossian origin, are unpersuasive and without merit.

4.125 Germany argues that the Court should not provide an answer "to the question of which remedies, if any, would follow from any possible violations of international law, especially with regard to the question of the possible resettlement of the Chagossians."[561] But Germany also recognises that "the underlying intention

[558] Written Statement of Nicaragua, para. 14.

[559] Written Statement by Serbia, para. 45.

[560] Written Statement of South Africa, para. 98(b).

[561] Written Statement of Germany, para. 155(iii)(b).

of the sponsor of a draft resolution"[562] is of "particular relevance in determining the content, meaning and scope of such [a] request."[563] Given that the General Assembly expressly requested the Court to address the legal consequences "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",[564] it is difficult to see on what basis the Court could refrain from addressing the issue.

4.126 That the General Assembly specifically requested the Court's opinion on the resettlement of the Chagossians is hardly surprising. The General Assembly has been addressing the mistreatment of the Chagosians for decades, including in the context of its work on decolonisation. This is made abundantly clear by the Dossier submitted by the Secretariat of the United Nations.

4.127 For example, in 1983, the forced displacement of the Chagossians was discussed during the 38th session of the General Assembly as part of the 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.[565] Further discussions of the plight of the Chagossians occurred in 1987 and 1988.[566]

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[562] *Ibid.*, para. 8.

[563] *Ibid.* (citing, with approval, *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, para. 53).

[564] U.N. General Assembly, 71st Session, *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*, U.N. Doc. A/RES/71/292 (22 June 2017), p. 2 (**Dossier No. 7**).

[565] U.N. General Assembly, 38th Session, 85th Plenary Meeting, *Agenda Item 18: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/38/PV.85 (6 Dec. 1983), para. 146 (**Dossier No. 279**). *See also Letter* from the Permanent Representative of Mauritius to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/38/711 (5 Dec. 1983), p. 1 (**Dossier No. 280**).

[566] U.N. General Assembly, 42nd Session, Provisional Verbatim Record of the 32th Meeting, *General Debate 9*, U.N. Doc. A/42/PV.32 (9 Oct. 1987), pp. 48-50 (**Dossier No. 282**); U.N. General

Since the 1980s, the Chagossians have been a frequent item on the General Assembly's agenda.[567] Their mistreatment has also been regularly addressed by other U.N. bodies, including the Human Rights Council and the Committee on the Elimination of Racial Discrimination.[568] As such, the General Assembly's request

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Assembly, 43rd Session, Provisional Verbatim Record of the 28th Meeting, *General Debate 9*, U.N. Doc. A/43/PV.28 (12 Oct. 1988), pp. 39-40 (**Dossier No. 283**).

[567] *See, e.g.*, U.N. General Assembly, 52nd Session, 17th Plenary Meeting, *Address by Mr Emomali Rahmonov, President of the Republic of Tajikistan*, U.N. Doc. A/52/PV.17 (30 Sept. 1997), p. 14 (addressing the need for assistance regarding the forced expulsion of Chagossians) (**Dossier No. 289**); U.N. General Assembly, 53rd Session, 11th Plenary Meeting, *Hurricane in the Dominican Republic*, U.N. Doc. A/53/PV.11 (23 Sept. 1998), p. 10 (noting the desire of the Chagossians to return) (**Dossier No. 290**); U.N. General Assembly, 54th Session, 18th Plenary Meeting, *Agenda Item 9: General Debate*, U.N. Doc. A/54/PV.18 (30 Sept. 1999), p. 12 (same) (**Dossier No. 291**); U.N. General Assembly, 55th Session, 28th Plenary Meeting, *Agenda Item 9: General debate*, U.N. Doc. A/55/PV.28 (22 Sept. 2000), p. 16 (same) (**Dossier No. 293**); U.N. General Assembly, 56th Session, 46th Plenary Meeting, *Address by Mr Glafcos Clerides, President of the Republic of Cyprus*, U.N. Doc. A/56/PV.46 (11 Nov. 2001), p. 15 (noting the violation of fundamental rights of Chagossians) (**Dossier No. 294**); U.N. General Assembly, 57th Session, 4th Plenary Meeting, *Agenda Item 119: Scale of assessments for the apportionment of the expenses of the United Nations*, U.N. Doc. A/57/PV.4 (13 Sept. 2002), p. 21 (expressing support for Chagossians seeking redress) (**Dossier No. 296**); U.N. General Assembly, 58th Session, 10th Plenary Meeting, *Address by Mr Domitien Ndayizeye, President of the Republic of Burundi*, U.N. Doc. A/58/PV.10 (24 Sept. 2003), p. 27 (same) (**Dossier No. 298**); U.N. General Assembly, 59th Session, 14th Plenary Meeting, *Address by Mr Anote Tong, President of the Republic of Kiribati*, U.N. Doc. A/59/PV.14 (28 Sept. 2004), p. 19 (same) (**Dossier No. 300**); U.N. General Assembly, 60th Session, 13th Plenary Meeting, *Address by Mr Pierre Nkurunziza, President of the Republic of Burundi*, U.N. Doc. A/60/PV.13 (19 Sept. 2005), p. 11 (same) (**Dossier No. 302**); U.N. General Assembly, 61st Session, 16th Plenary Meeting, *Address by Mr Mikheil Saakashvili, President of Georgia*, U.N. Doc. A/61/PV.16 (22 Sept. 2006), p. 13 (same) (**Dossier No. 304**); U.N. General Assembly, 63rd Session, 16th Plenary Meeting, *Agenda Item 8: General debate*, U.N. Doc. A/63/PV.16 (29 Sept. 2008), p. 38 (same) (**Dossier No. 308**); U.N. General Assembly, 64th Session, *Letter dated 28 September 2009 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the General Assembly*, U.N. Doc. A/64/480 (28 Sept. 2009), p. 2 (same) (**Dossier No. 311**); U.N. General Assembly, 65th Session, 21st Plenary Meeting, *Agenda Item 8: General debate*, U.N. Doc. A/65/PV.21 (28 Sept. 2010), p. 31 (referring to impediments to Chagossian resettlement) (**Dossier No. 312**); U.N. General Assembly, 70th Session, 25th Plenary Meeting, *Agenda Item 8: General Debate*, U.N. Doc. A/70/PV.25 (2 Oct. 2015), pp. 15-16 (referring to the unlawful removal of Chagossians) (**Dossier No. 318**); U.N. General Assembly, 71st Session, 17th Plenary Meeting, *Address by Mr Bujar Nishani, President of the Republic of Albania*, U.N. Doc. A/71/PV.17 (23 Sept. 2016), p. 38 (same) (**Dossier No. 320**); U.N. General Assembly, 71st Session, 88th Plenary Meeting, *Agenda item 87: 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*, U.N. Doc. A/71/PV.88 (22 June 2017) (**Dossier No. 6**).

[568] *See, e.g.*, U.N. General Assembly, 28th Session, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial*

for an Advisory Opinion on resettlement of the Chagossians is manifestly within its mandate and area of concern. No Written Statement has argued otherwise.

4.128 The Written Statement of the United Kingdom is mistaken to suggest that "[i]n 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".[569]

Countries and Peoples, Vol. IV, U.N. Doc. A/9023/Rev.1 (1975), p. 6(b)(5) (condemning the eviction of Chagossians) (**Dossier No. 329**); U.N. General Assembly, Human Rights Council, 8th Session, *Report of the Working Group on the Universal Periodic Review, United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. A/HRC/8/25 (23 May 2008), p. 14, para. 47 (question from the Republic of Korea regarding the rights of the Chagossians) (**Dossier No. 338**); U.N. General Assembly, Human Rights Council, 25th Session, *Report of the Working Group on the Universal Periodic Review, Mauritius*, U.N. Doc. A/HRC/25/8 (23 Dec. 2013), para. 66 (recommending return of Chagossians) (**Dossier No. 343**); Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, 23rd Meeting, *Summary Record*, U.N. Doc. E/CN.4/Sub.2/2000/SR.23 (30 May 2001), paras. 7, 9, 16, 19 (commenting on the forced removal) (**Dossier No. 348**); Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53rd Session, *Summary Record of the 17th Meeting*, U.N. Doc. E/CN.4/Sub.2/2001/SR.17 (18 Feb. 2002), para. 55 (same) (**Dossier No. 349**); Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 56th Session *Summary Record of the 7th Meeting*, U.N. Doc. E/CN.4/Sub.2/2004/SR.7 (6 July 2005), para. 29 (NGO commenting on the forced removal) (**Dossier No. 356**); Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 51st Session *Human Rights of Indigenous Peoples: Report of the Working Group on Indigenous Populations on its seventeenth session*, U.N. Doc. E/CN.4/Sub.2/1999/19 (12 Aug. 1999), para. 63 (referencing the desire of Chagossians to be returned) (**Dossier No. 360**); United Nations General Assembly, 66th Session, *Report of the Committee on the Elimination of Racial Discrimination relating to the 78th and 79th sessions*, U.N. Doc. A/66/18 (2011), p. 115(12) (expressing concern on the prohibition of Chagossians from returning) (**Dossier No. 374**); Committee on the Elimination of Racial Discrimination, *Reports submitted by States parties under article 9 of the Convention – 15th-19th periodic reports of States parties due in 2009: Mauritius*, U.N. Doc. CERD/C/MUS/15-19 (16 May 2012), para. 16 (same) (**Dossier No. 377**); U.N. Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant – Fifth periodic reports of States parties due in 2010: Mauritius*, U.N. Doc. CCPR/C/MUS/5 (23 May 2016), paras. 8, 10 (same) (**Dossier No. 402**); U.N. Committee against Torture, 46th Session, 998th Meeting, *Consideration of reports submitted by States parties under Article 19 of the Convention: Third periodic report of Mauritius*, U.N. Doc. CAT/C/SR.998 (19 May 2011), para. 4 (reference to the Chagossians' right of return and compensation) (**Dossier No. 403**).

[569] Written Statement of the United Kingdom, para. 9.9.

4.129 No such information is necessary for the Court to give its opinion. The second question makes clear that the requested Advisory Opinion seeks the Court's advice on legal consequences relating to the "inability of *Mauritius* to implement" a programme of resettlement, because decolonisation is not complete, and not for any other reason. In due course, with the assistance of the General Assembly, given its experience in such matters, it will be for Mauritius to determine the details of any plan to implement a resettlement programme. Regardless, matters of expense and feasibility in relation to resettlement are not relevant to the Court's consideration of the question of the legal rights or principles to be applied. They certainly present no bar to the fulfilment of the administering power's obligation, during the interval before the completion of decolonisation, not to obstruct Mauritius' resettlement efforts.

4.130 In any event, it is wrong to suggest that resettlement would not be feasible. As long ago as 1980, the U.K. Foreign Office acknowledged that resettlement of the Chagossians would be possible upon return of the Chagos Archipelago to Mauritius: "[O]nce the Chagos Archipelago is no longer required for defence purposes, it will be ceded to Mauritius, leaving the former islanders free to return if they so wish".[570] Moreover, the most recent resettlement study commissioned by the administering power, carried out by KPMG, concluded that there is no fundamental legal obstacle preventing resettlement and that potential environmental impacts can be mitigated. The report acknowledges that there are income opportunities in the Chagos Archipelago in artisanal fishing and the

[570] *Note* from C. C. D. Haswell of the U.K. Foreign and Commonwealth Office East African Department to Mr Wallace and Mr Robson (30 June 1980), p. 2 (**Annex 219**).

development of coconut plots, as well as the potential to develop high-end and eco-tourism.[571]

4.131 The United Kingdom has suggested that a settlement agreement concluded in 1982 waived the right of Chagossians to resettle in the Chagos Archipelago.[572] However, the settlement agreement, which concerns the private rights of individuals, has no bearing on the right of *Mauritius* to develop and implement a resettlement programme. It cannot relieve the administering power, in accordance with its obligations under Article 73, from its obligation to take no action that would obstruct such resettlement efforts. Indeed, construing the private settlement agreement as an obstacle to resettlement would be inconsistent with Article 103 of the U.N. Charter, which provides that, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[573]

4.132 In any event, insofar as the private settlement agreement may be understood as a waiver of rights, the waiver would only apply to (i) the class of individuals covered by the agreement; and (ii) the specific individuals who signed it. The

[571] The United Kingdom grossly overstates the potential costs of resettlement. The KPMG study estimates that total capital costs would be between £65.4 million (phased over three years) and £423.3 million (over six years) to implement a resettlement scheme for between 50 and 1,500 Chagossians. *See* Written Statement of the United Kingdom, Annex 55, pp. 8, 94. In deciding against resettlement, largely on grounds of cost, the United Kingdom rejected these figures and estimated that resettling 50 Chagossians for 10 years would cost £202.1 million (equating to £4.04 million per head). This includes the sum of £92 million for unspecified "security-related costs", including "security clearances". Written Statement of the United Kingdom, Annex 59, pp. 7-9.

[572] Written Statement of the United Kingdom, para. 9.10.

[573] U.N. Charter (1945), Art. 103.

United Kingdom concedes that there are Chagossians who are not signatories, and who are thus not bound by its terms.[574]

B. THE OBLIGATION TO ADMINISTER THE CHAGOS ARCHIPELAGO IN THE BEST INTERESTS OF MAURITIUS AND ITS PEOPLE DURING THE COMPLETION OF DECOLONISATION

4.133 Mauritius previously showed that, during the period before decolonisation is completed, the administering power must consult and cooperate with Mauritius so as to ensure *inter alia* that, with immediate effect from the Advisory Opinion being handed down: "(a) the Chagos Archipelago is administered in a manner which promotes the economic well-being of the Mauritian people; (b) Mauritius is afforded access to its natural resources; (c) the environment of the Chagos Archipelago is fully protected; (d) Mauritius participates in the authorisation, oversight and regulation of scientific research in and around the Archipelago; (e) Mauritius is allowed to make submissions to the U.N. Commission on the Limits of the Continental Shelf in regard to the Archipelago; and (f) Mauritius is able to proceed to a delimitation of the Archipelago's maritime boundaries with the Maldives".[575]

[574] Mauritius observes that the settlement agreement refers only to Chagossians in Mauritius. *See* Written Statement of the United Kingdom, Annex 50, Art. 4. It is unclear whether the 12 Chagossian non-signatories cited by the United Kingdom refer to all Chagossians who had refused to sign renunciations, or just those who "went to the Social Security Office to collect [the] final sum." *See* Written Statement of the United Kingdom, para. 9.10; *Chagos Islanders v. The Attorney General* [2003] EWHC 2222 (QB) (9 Oct. 2003), para. 80. The actual number therefore may be higher.

[575] Written Statement of Mauritius, para. 1.42(vi). *See also ibid*., paras. 7.42-7.61.

4.134 Mauritius observes that no Written Statement submitted to the Court challenges that these legal consequences apply during the period prior to the immediate completion of decolonisation.

C. THE OBLIGATION NOT TO AID OR ABET THE CONTINUANCE OF THE UNLAWFUL SITUATION

4.135 In its initial submission, Mauritius showed that the administering power's continued administration of the Chagos Archipelago entails legal consequences for third States and international organisations, including the United Nations. These consequences flow from the *erga omnes* character of the right of self-determination. They require that third States and international organisations (i) neither aid nor assist in maintaining the denial of the right of self-determination;[576] and (ii) contribute in a positive fashion in bringing decolonisation to an immediate end.[577]

4.136 Mauritius observes that *no* Written Statement challenges these general principles of international law. To the contrary, many affirm that they apply here. For example:

4.137 The **African Union** considers that "the Court should follow its consistent practice, and, thus, indicate that all States have the obligation: a. not to recognise the illegal situation created by the separation of the Chagos Archipelago from Mauritius and the continued British administration of the former; b. not to render

[576] *Ibid.*, para. 7.64.

[577] *Ibid.*, para. 7.66.

aid or assistance in maintaining that situation; and c. to cooperate through lawful means in order to bring that illegality to an end."[578]

4.138 **Argentina** considers that "[a]ll States are under the obligation not to recognize the illegal situation resulting from the separation of the Chagos Archipelago from Mauritius and not to render aid or assistance".[579]

4.139 **Djibouti** considers that "third States and international organizations are obligated not to assist or support the United Kingdom in its administration of the Chagos Archipelago," and that "[t]hey are further obligated to *affirmatively promote* the decolonization process by facilitating the transfer of administration to Mauritius".[580]

4.140 **Namibia** considers that "States have an obligation to (a) refrain from assisting the unlawful conduct, through inter alia not recognizing, benefiting, or rendering assistance to the illegal situation; and (b) assist the UN to bring the unlawful conduct to an immediate end."[581]

4.141 **South Africa** considers that "[t]he United Nations General Assembly has a continuing obligation to complete the process of decolonization of Mauritius, and to fulfil this function, it would benefit from an advisory opinion from the Court."[582] It further considers that "[t]he Court will, by giving the opinion and notwithstanding the outcome, also contribute to the legal understanding of a very

[578] Written Statement of the African Union, para. 250.

[579] Written Statement of the Argentine Republic, para. 68(c).

[580] Written Submission of Djibouti, para. 50 (emphasis in original).

[581] Written Statement of Namibia, p. 4.

[582] Written Statement of South Africa, para. 96.

important international law issue that the international community is obliged to advance, and contribute to the eradication of tragic consequences of colonialism and advancement of human rights."[583]

4.142 These unchallenged views are plainly correct. As the Court held in its *South West Africa* Advisory Opinion, Member States of the United Nations are "under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia".[584]

4.143 The Court's *Wall* Advisory Opinion recalled that: "'[e]very State has the duty to promote, through joint and separate action, realization of the principle of… self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle…'."[585] As a result, the Court emphasised, "[i]t is… for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."[586]

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[583] *Ibid.*

[584] *South West Africa (Advisory Opinion)*, p. 54, para. 119. The Court made clear that the obligation of "non-recognition of South Africa's administration" of Namibia "should not result in depriving the people of Namibia of any advantages derived from international co-operation." *Ibid*., p. 56, para. 125.

[585] *Construction of a Wall (Advisory Opinion)*, p. 199, para. 156.

[586] *Ibid.*, p. 200, para. 159.

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4.144 In conclusion, the second question requires the Court to give its opinion on all the consequences under international law that arise from the administering power's continued administration of the Chagos Archipelago, including the legal consequences for States.

4.145 Nothing in any of the Written Statements undermines the fact that:

(1) The administering power's continued administration of the Chagos Archipelago is a continuing wrongful act that must, and can, be brought to an immediate end.

(2) During any brief period prior to the immediate completion of the decolonisation process, the administering power shall take no actions that would obstruct Mauritius' efforts to resettle, as a matter of urgency, its nationals of Chagossian origin in the Chagos Archipelago.

(3) The administering power is under an obligation to consult and cooperate with Mauritius *inter alia* to: (a) advance the economic well-being of the Mauritian people; (b) give Mauritius access to the Chagos Archipelago's natural resources; (c) ensure that its environment is fully protected; (d) allow Mauritius to participate in the authorisation, oversight and regulation of scientific research in and around the Archipelago; (e) permit Mauritius to make submissions to the U.N. Commission on the Limits of the Continental Shelf; and (f) allow Mauritius to proceed to a delimitation of its maritime boundaries with the Maldives.

(4) Third States and international organisations are under an obligation not to recognise the existing unlawful situation, or assist the administering power in maintaining it. Rather, they are affirmatively required to aid in bringing Mauritius' decolonisation to full and final completion.

Conclusions

For the reasons set out in its Written Statement of 1 March 2018, and further developed in these Written Comments, Mauritius submits as follows:

(1) The Court has jurisdiction to give the Advisory Opinion requested, and there are no grounds for declining to exercise such jurisdiction;

(2) The process of decolonisation of Mauritius was not lawfully completed in accordance with international law when Mauritius was granted independence in 1968, and has not been lawfully completed to this day, as a result of the separation of the Chagos Archipelago from Mauritius; and

(3) As regards the consequences, international law requires that:

(a) The process of decolonisation of Mauritius be completed immediately, including by the termination of the administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, so that Mauritius is able to exercise sovereignty over the totality of its territory;

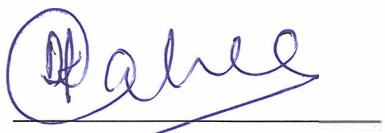
(b) Mauritius be able to implement with immediate effect a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin;

(c) No State may render aid or assistance that will prevent the process of decolonisation from being completed; and

(d) The United Nations, and especially the General Assembly, shall take all actions necessary to enable the process of decolonisation to be completed without further delay.

(4) In addition, the Court is invited to offer an Opinion on such other relief or measures as may be required by the totality of the circumstances.

15 May 2018



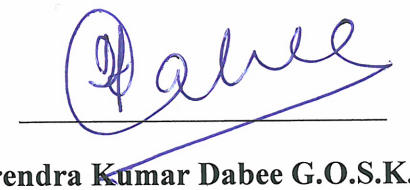
Dheerendra Kumar Dabee G.O.S.K., S.C.

Solicitor-General of Mauritius

Certification

I certify that the copies of documents annexed to these Written Comments are true copies of the original documents referred to.

15 May 2018



Dheerendra Kumar Dabee G.O.S.K., S.C.

Solicitor-General of Mauritius

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Annex 234	John Tasioulas, "Custom, jus cogens, and human rights", forthcoming in Custom's Future: International Law in a Changing World (20 Mar. 2015)
Annex 235	N. Wenban-Smith & M. Carter, *Chagos: A History - Exploration, Exploitation, Expulsion* (2016)