Australian Government

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965 (REQUEST FOR ADVISORY OPINION)

WRITTEN STATEMENT

OF THE GOVERNMENT OF AUSTRALIA

27 FEBRUARY 2018

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WRITTEN STATEMENT OF THE GOVERNMENT OF AUSTRALIA

1. By Resolution 71/292 adopted on 22 June 2017, the United Nations General Assembly (**General Assembly**) requested an advisory opinion of the International Court of Justice (**ICJ** or the **Court**) on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, specifically:

   (a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?";

   (b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?".

2. The following observations are submitted by the Government of Australia in line with the Orders of the Court of 14 July 2017 and 17 January 2018 fixing the time-limits within which written statements relating to these questions may be submitted to the Court by the United Nations, its Member States, and the African Union.

SUMMARY

3. For the reasons outlined in this Statement, the Court should not give the advisory opinion requested by the General Assembly.

4. First, the request from the General Assembly does not contain an exact statement of the legal questions upon which the opinion of the Court is actually sought but, rather, a proxy for those questions. The questions referred therefore do not comply with the requirements of Article 65 of the Statute of the Court (**ICJ Statute**) and thus lie outside the jurisdiction of the Court.

5. Secondly, even if the Court has jurisdiction, it should exercise its discretion to decline to give the requested advisory opinion for a number of reasons. The request from the General Assembly in reality seeks to have the Court adjudicate upon a pre-existing bilateral dispute between the United Kingdom and Mauritius concerning sovereignty over the Chagos Archipelago and related matters. The giving of an advisory opinion involving such a dispute would be inconsistent with the fundamental principle which requires the consent of both the United Kingdom and Mauritius to be present before any court or tribunal, including this Court, may adjudicate upon a bilateral dispute between them.

Further, the Court should not provide the opinion sought as it will not assist the General Assembly in the performance of its functions, because the General Assembly is not performing any substantive functions with respect to the Chagos Archipelago. Finally, the Court cannot be confident that it has sufficient factual material to found a proper examination of the matters before the Court.

6. Given Australia's position that the Court should decline to give the requested advisory opinion, this Statement does not address the substance of the questions put to the Court.

BACKGROUND

7. The Chagos Archipelago, which is situated in the northern Indian Ocean, was formally ceded to the United Kingdom under the 1814 *Treaty of Paris* and from that time was administered by the United Kingdom as a dependency of Mauritius.

8. In 1965, the United Kingdom and the Mauritian Council of Ministers negotiated the *Lancaster House Undertakings*, which set out the elements of Mauritius' independence. As part of that process, the Chagos Archipelago was detached from Mauritius[1] on 8 November 1965, with the prior agreement of the Mauritian Council of Ministers, on the understanding that a series of conditions would be met by the United Kingdom. From this time the Archipelago was administered by the United Kingdom as part of the British Indian Ocean Territory.

9. In 1966, the United Kingdom agreed with the United States that Diego Garcia, the largest island in the Chagos Archipelago, could be used by the United States for defence purposes for an initial period of 50 years. The United Kingdom has undertaken to cede Diego Garcia to Mauritius once it is no longer required for such defence purposes.

10. Mauritius gained formal independence from the United Kingdom in 1968 and was then removed from the United Nations list of Non-Self-Governing Territories. Between 1968 and 1973, all residents of the Chagos Archipelago were relocated to Mauritius and the United Kingdom, with a number of payments being made by the United Kingdom to Mauritius to assist in this process.

11. In 2016, the 1996 agreement between the United Kingdom and the United States in respect of Diego Garcia was extended for a further 20 years.

12. In the period between 1968 and 1980, Mauritius "did not raise the question of the Chagos Archipelago in public fora and diplomatic communications".[2] However, beginning in 1980, Mauritius commenced asserting its sovereignty over the Archipelago. This has resulted in a legal dispute between the United Kingdom and Mauritius concerning sovereignty over the Chagos Archipelago and the circumstances of its detachment from

[1] British Indian Ocean Territory Order 1965 (S.I. 1965 No. 1920), amended by the British Indian Ocean Territory (Amendment) Order 1968 (S.I. 1968 No. 111), at Annex 1.
[2] *Chagos Marine Protected Area Arbitration (The Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland) (Award)* (18 March 2015) <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>, para. 100 (UN Dossier No. 409).

Mauritius, including the interpretation and application of the *Lancaster House Undertakings*.[3]

13. This bilateral dispute between the United Kingdom and Mauritius, which has been ongoing for decades, has manifested itself in a range of legal cases before both international and domestic courts and tribunals. Most pertinently, it included proceedings before an Arbitral Tribunal constituted under Annex VII of the 1982 *United Nations Convention on the Law of the Sea*[4] (**Chagos Arbitration**). A majority of the Tribunal declined to consider three of the four submissions of Mauritius on the basis that they involved issues of sovereignty over the Chagos Archipelago, being issues over which the Tribunal lacked jurisdiction.[5]

14. Both the United Kingdom and Mauritius, in their respective declarations lodged under Article 36, paragraph 2, of the ICJ Statute, exclude all legal disputes between them from the contentious jurisdiction of the Court. It is therefore plain that this Court cannot resolve the above dispute in the exercise of its contentious jurisdiction.

15. The General Assembly, acting at the request of Mauritius, now seeks to bypass the required consent of the parties by requesting an advisory opinion from the Court.

16. Australia, in voting against General Assembly Resolution 71/292 requesting the opinion of the Court, noted its long-standing position that it is not appropriate to use the Court's advisory opinion jurisdiction to determine the rights and interests of States arising from a specific context – in this case, a bilateral dispute over sovereignty.[6] That view is widely shared.[7]

THE COURT'S JURISDICTION

17. Article 65, paragraph 1, of the ICJ Statute establishes the power of the Court to give an advisory opinion. It provides that the Court "may give an advisory opinion on any legal question" at the request of a body authorised by the Charter of the United Nations (**UN Charter**) to request it. Article 96 of the UN Charter complements that provision, by authorising the General Assembly to request an advisory opinion of the Court "on any legal question". The fact that only certain public international organisations can request an advisory opinion emphasises that the jurisdiction to give such an opinion exists to

[3] Ibid, para. 209-10.
[4] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entry into force 16 November 1994).
[5] *Chagos Marine Protected Area Arbitration (The Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland) (Award)* (18 March 2015) <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf> (UN Dossier No. 409).
[6] For example, in the *Wall* case, Australia stated that "[t]o allow the advisory opinion procedure to be used in this way to overcome this rule [concerning consent] has profound implications for States' participation in treaties and is clearly contrary to judicial propriety: 'Written Statement of the Government of Australia', *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* 29 January 2004, p. 8, para. 15.
[7] UN Doc. A/71/PV.88 (22 June 2017), p. 18 (UN Dossier No. 6). A total of 15 States joined Australia in voting against the resolution. A further 65 States abstained from the vote, many for reasons which echo those of Australia and which particularly emphasise the importance of resolving such disputes at the bilateral level.

enable the Court to provide guidance to those organisations, who would otherwise not have access to the Court.[8]

18. The reference to "legal questions" in Article 65, paragraph 1, confines the advisory jurisdiction of the Court. The Court has held that "[i]f the question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested."[9] The formulation adopted in Article 65, paragraph 1, of the ICJ Statute is narrower than that contained in Article 14 of the Covenant of the League of Nations, which accorded the Permanent Court of International Justice (**PCIJ**) a power to "give an advisory opinion upon *any dispute or question* referred to it" (emphasis added). It is narrower not just because the advisory jurisdiction of the ICJ does not extend to an opinion on "any dispute", but also because it is confined to "legal questions" rather than "questions".[10] As a result, purely factual disputes fall outside the advisory jurisdiction of the Court.[11]

19. Article 65, paragraph 2, of the ICJ Statute assists in identifying the kind of "legal question" that falls within the advisory jurisdiction, as it requires the Court to be provided with a "written request containing an *exact statement of the question* upon which the opinion is required" (emphasis added). That reveals that the "legal questions" that may properly form the subject of a request for an advisory opinion are questions of a kind that are capable of "exact statement".

20. It may be accepted that the reference to "legal questions" has not been interpreted restrictively. A question "directed to the legal consequences arising from a given factual situation considering the rules and principles of international law", being a question "framed in terms of law" and "susceptible of a reply based on law" has been held to be a "legal question" for the purpose of Article 65 of the ICJ Statute.[12] Further, the Court has accepted that "a mixed question of law and fact is none the less a legal question" for the purposes of Article 65 of the ICJ Statute and Article 96 of the UN Charter.[13]

21. However, the Court has pointed out that "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request."[14] The barrier to the exercise of jurisdiction in this case is that the "legal questions" that have been referred

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[8] "Since States alone have capacity to appear before the Court, public (governmental) international organizations cannot as such be parties to any case before it. A special procedure, the advisory procedure, is, however, available to such organizations and to them alone": International Court of Justice, *Advisory Jurisdiction* <http://www.icj-cij.org/en/advisory-jurisdiction>.

[9] *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, p. 155.

[10] See Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff, 2006), Vol I, p. 285 and 288; Simma et al, *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2013), Vol II, p. 1978-79; Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed, 2012), p. 1673.

[11] See Kolb, *The International Court of Justice*, (Hart, 2013), p. 1068.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 153, para. 37; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15.

[13] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 19, para. 17.

[14] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para. 35.

to this 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. While the referred questions ostensibly concern decolonisation, their true purpose and effect is to seek the Court's adjudication over a question of sovereignty. That question is the subject of the long running dispute between the United Kingdom and Mauritius. The conclusion that the request is, in substance, an attempt to bring that dispute before the Court, notwithstanding that the questions are framed as "legal questions" concerning decolonisation, is apparent from the following facts (which are not exhaustive):

a. Mauritius' Aide Memoire to the General Assembly in May 2017, which stated that the request is directed towards "enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago".[15]

b. A press release issued by the Government of Mauritius dated 31 October 2017 concerning a meeting in Port Louis between the Prime Minister of Mauritius and the Chairman and Leader of the Chagos Refugees Group, Mr Louis Olivier Bancoult, which refers to the meeting being "focused on joint efforts being undertaken at the International Court of Justice for Mauritius to effectively exercise its sovereignty over the Chagos Archipelago".[16]

c. When introducing Resolution 71/292, the representative of Congo, speaking on behalf of the African States Members of the United Nations, stated that the action had been initiated by the African States "to allow a State member of both the African Union and the United Nations *to exercise its full sovereignty over the Chagos Archipelago*".[17]

22. A request for an advisory opinion that contains questions that ostensibly relate to one topic, but that in fact relate to a different topic, falls outside the advisory jurisdiction of the Court. In such a case, there is no "exact statement" – or, indeed, any statement at all – of the real "legal question" upon which the opinion of the Court is sought.

23. Unlike other cases where the Court has been able to interpret or "even reformulate" questions that have been expressed infelicitously or vaguely,[18] that course is not available in this case, because any reformulation of questions about decolonisation could never encompass the substantive issue on which the Court is asked to give its opinion.[19]

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[15] Government of the Republic of Mauritius, Aide Memoire dated May 2017 in relation to Item 87 of the Agenda of the 71st Session of the UN General Assembly, para. 1-2, at Annex 2.
[16] Government of the Republic of Mauritius, *Prime Minister Meets Chagos Refugees Group Leader on Advisory Opinion Request* (31 October 2017) <http://www.govmu.org/English/News/Pages/Prime-Minister-meets-Chagos-Refugees-Group-Leader-on-advisory-opinion-request-procedure.aspx>, at Annex 3.
[17] UN Doc. A/71/PV.88 (22 June 2017), p. 5 (UN Dossier No. 6) (emphasis added).
[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 154, para. 38.
[19] In *Interpretation of the Greco-Turkish Agreement of December 1st, 1926, Advisory Opinion, 1928 P.C.I.J. (ser. B) No.16* at p. 14, the Court recognised that it may not always be possible to reformulate the question where no exact question was referred to it.

24. This point is jurisdictional, because the Court's advisory jurisdiction depends on the terms of the questions that are referred to it. In a case where a request for an advisory opinion does not contain a statement of the legal questions upon which the opinion of the Court is actually sought (but, rather, a proxy for those questions), the Court's jurisdiction is not engaged. The Court cannot properly reformulate the questions because it cannot rule out the possibility that the General Assembly would not have requested the opinion if the real legal issues had been identified. Indeed, a reluctance to expressly identify the "true legal question"[20] may be the very reason that the questions referred in this case were framed as questions about decolonisation rather than sovereignty.

25. In those circumstances, the questions referred do not comply with Article 65 of the ICJ Statute, with the necessary consequence that the Court lacks jurisdiction.

THE COURT'S DISCRETION TO GIVE AN ADVISORY OPINION

26. If the Court concludes that it has jurisdiction, a question arises as to whether it should exercise its discretion to decline to render the advisory opinion sought in this case.

27. Under Article 65, paragraph 1, of the ICJ Statute, the Court "*may* give an advisory opinion" (emphasis added). The text plainly conveys that the jurisdiction to give an advisory opinion is discretionary. Consistently with that text, the Court has acknowledged many times that it may be appropriate for the Court to "decline to answer" a request for an advisory opinion,[21] and that the Court "possesses a large amount of discretion in the matter".[22]

28. The Court has not comprehensively defined the factors that govern the exercise of this discretion, beyond stating that it will only decline to give an advisory opinion where there are "compelling reasons" to do so.[23] That formulation does not assist in identifying the factors that – alone or in combination – will constitute "compelling reasons". As Judge Bennouna said in the *Kosovo* case, the Court has applied the "compelling reasons"

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[20] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88-89, para. 35-36.

[21] See, e.g., *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21, para. 23; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p.416, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 156, para. 44. Given the settled existence of the discretion, the statement in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 235, para. 14 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 156, para. 44 that the Court "should not, in principle, refuse to give an advisory opinion" clearly must be understood as meaning that the Court should not decline to give such an opinion unless there is a proper basis on which to do so.

[22] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[23] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the UNESCO, I.C.J. Reports 1956,* p. 86. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 41; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 416, para. 30.

formulation "without making clear what it means".[24] In the same case, Judge Keith remarked that "[t]he exercise of the discretion… should not… be unduly hampered by a label such as 'compelling reasons'."[25]

29. In the *Namibia* case, Judge Fitzmaurice said that the Court has an admitted right to "refuse entirely to comply with a request for an advisory opinion if it thinks that, for sufficient reasons, it would be improper or inadvisable for it to do so".[26] While usefully recognising the width of the discretion, that formulation again provides little guidance as to the factors that inform the discretion.

30. The clearest guidance appears in the *Wall* case, where the Court, having referred to the "compelling reasons" formulation, nevertheless recognised that it has a "duty to satisfy itself, each time it is seised of a request for an opinion, as to the *propriety of the exercise* of its judicial function".[27] As Judge Owada explained in the same case:

> "… the issue of jurisdiction and especially the issue of judicial propriety is a matter that the Court should examine, *proprio motu* if necessary, in order to ensure that it is not only right as a matter of law but also proper as a matter of judicial policy for the Court as a judicial body to exercise jurisdiction in the concrete context of the case."[28]

31. Why might "judicial propriety" require the Court to decline to give an advisory opinion, whether as a matter of law or judicial policy? Without being comprehensive, Australia submits that judicial propriety would require such a course if:

    a. to answer the request would be inconsistent with the fundamental requirement of State consent underpinning the judicial settlement of disputes under international law, that being the foundation upon which the Court's authority is based;

    b. the request for an advisory opinion is made by an organ of the United Nations in circumstances where that opinion, if given, will not assist it in the performance of its functions; or

    c. the Court cannot be confident that it has access to sufficient factual information to allow the issue to be properly examined, as to attempt an answer in those

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[24] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Dissenting Opinion of Judge Bennouna, I.C.J. Reports 2010*, p. 501, para. 5.
[25] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Separate Opinion of Judge Keith, I.C.J. Reports 2010*, p. 483, para. 5.
[26] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Dissenting Opinion of Judge Fitzmaurice, I.C.J. Reports 1971*, p. 303, para. 12.
[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 157, para. 45 (emphasis added). See also *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p.416, para. 29, where the Court stated that the discretion exists in order to "protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations"; *Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Oda, I.C.J. Reports 1996,* p. 332, para. 1 (referring to reasons of "judicial propriety and economy").
[28] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Owada, I.C.J. Reports 2004*, p. 260-1, para. 2.

circumstances may be unfair to the parties and would be incompatible with the Court's judicial character.

Those considerations are examined in turn below.

(a) Absence of Consent

The fundamental requirement of consent

32. The key principle underpinning international dispute resolution is that a State cannot be compelled to any form of dispute resolution – including before this Court – without its consent (**fundamental requirement of consent**).[29]

33. In *Status of the Eastern Carelia*, the PCIJ relied on the fundamental requirement of consent in refusing to exercise its discretion to render an advisory opinion over what was a bilateral dispute.[30] It did so notwithstanding that the advisory jurisdiction of the PCIJ under Article 14 of the Covenant of the League of Nations expressly extended not just to "legal questions", but also to "disputes".[31] *Eastern Carelia* has subsequently been distinguished on the basis of Russia's non-membership of the League of Nations at the time.[32] However, while Russia's non-membership of the League explains *why* Russian consent was absent, it was the absence of consent *per se* which underpinned the Court's decision to decline an advisory opinion, rather than the *reason* for that lack of consent.[33] *Eastern Carelia* should therefore be understood as establishing that the Court should decline to exercise its advisory jurisdiction if that would be inconsistent with the fundamental requirement of consent. As the PCIJ observed:

> "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement… The submission, therefore, of a dispute between [Russia] and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of [its] consent. Such consent, however, has never been given

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[29] *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5*, p. 27; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, para. 25, 32-33, referring to *Interpretation of Peace Treaties, Advisory Opinion, First Phase, I.C.J. Reports 1950*, p. 65, para. 71. See also Aust, *Handbook of International* Law (Cambridge University Press, 2nd ed, 2010), p. 396; Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012), p. 718; Shaw, *International Law* (Cambridge University Press, 7th ed, 2014), p.733.

[30] Importantly, the PCIJ affirmed the "well-established" principle that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement": see *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5*, p. 27.

[31] See Simma et al, *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2013), Vol II, p. 1978 (Oellers-Frahm).

[32] *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*, p. 23, para. 31; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 23-24, para. 30; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 235-6, para. 14.

[33] *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5*, p. 27-28. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Owada, I.C.J. Reports 2004*, p. 262-3, para. 6-7.

> by Russia… The Court therefore finds it impossible to give its opinion on a dispute of this kind." [34]

34. The PCIJ went on to say:

> "The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by investigation into the facts underlying the case. *Answering the question would be substantially equivalent to deciding the dispute between the parties*. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." [35]

35. The Court strongly affirmed the relevance of the fundamental requirement of consent to its discretion whether to render an advisory opinion in *Western Sahara*. It stated:

> "[l]ack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion… In certain circumstances, therefore, *the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction." [36]

36. That statement unequivocally recognises that, if the provision of an advisory opinion "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent", the Court must decline to provide the opinion. To do otherwise would be incompatible with the Court's judicial character.

37. This principle has been cited in subsequent decisions of the Court.[37] It remains critical today, particularly in the face of increasingly familiar attempts by claimant States to recharacterise disputes in a way that avoids limits on jurisdiction that respondent States have put in place. The fundamental requirement of consent has particular force when it comes to territorial disputes. As Spain put to the Court in *Western Sahara*, "the consent of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary".[38] The Court implicitly accepted this, but noted that "[t]he questions in the request do not however relate to a territorial dispute, in the proper sense of the term,

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[34] *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5*, p. 27-28.
[35] Ibid p. 28-29 (emphasis added).
[36] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 32-33 (emphasis added).
[37] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989*, p. 191, para. 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 158, para. 47.
[38] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27-28, para. 43.

between the interested States" and found that "the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory".[39]

38. That is apposite here, because Question (b) cannot be answered without the Court adjudicating upon a territorial dispute between the United Kingdom and Mauritius as to which State has territorial sovereignty over the Chagos Archipelago.

39. Finally, some aspects of the dispute between the United Kingdom and Mauritius have been determined by the Arbitral Tribunal in the *Chagos Arbitration*. It appears that the arguments that Mauritius will advance in seeking particular answers to the referred questions will be inconsistent with binding determinations already made in the Arbitration.[40] That raises particularly acute questions of judicial propriety, as this Court is being asked to utilise its advisory jurisdiction not just contrary to the fundamental requirement of consent, but also in a way that would circumvent a determination binding on the United Kingdom and Mauritius that has already been made.

Circumventing the contentious jurisdiction of the Court

40. A closely related point is that, as a matter of both law and judicial policy, the Court should not allow its advisory jurisdiction to be used to circumvent the optional nature of its contentious jurisdiction.

41. The respective declarations of the United Kingdom and Mauritius made under Article 36, paragraph 2, of the ICJ Statute do not accord the Court jurisdiction over legal disputes which may arise between those two States. The declaration of acceptance of the United Kingdom under Article 36, paragraph 2, deposited on 22 February 2017 and updating and replacing earlier declarations, accepts the jurisdiction of the Court "over all disputes arising after 1 January 1987" but excludes from that acceptance "any dispute with the government of any other country which is or has been a Member of the Commonwealth".[41] Similarly, the declaration of Mauritius under Article 36, paragraph 2, deposited on 23 September 1968, excludes from its acceptance of the jurisdiction of the Court "[d]isputes with the Government of any other country which is a Member of the

[39] Ibid.

[40] By way of example, the Arbitral Tribunal in the *Chagos Arbitration* considered the legal effect of the 1965 Agreement between the United Kingdom and Mauritius concerning the detachment of the Chagos Archipelago in exchange for compensation and a series of detailed undertakings. It found that "upon Mauritian Independence, the 1965 Agreement became a matter of international law between the Parties" and that any concerns about defects in Mauritius' consent in this respect were resolved (*Chagos Arbitration (Award)* (18 March 2015), para .428. See also paras. 424-7). The statement made by the Mauritian Representative (Mr Jugnauth) immediately prior to the adoption of UNGA Resolution 71/92 on 22 June 2017 is indicative of the intention of Mauritius to revisit the binding determination of the Arbitral Tribunal that the 1965 Agreement forms part of international law in the current proceedings. In so doing Mr Jugnauth suggested grounds of invalidity including duress, lack of legal competence and breaches of peremptory norms of international law (A/71/PV.88, p. 6-9) (UN Dossier No. 6).

[41] United Kingdom of Great Britain and Northern Ireland, *Declaration under Article 36(2) of the Statute*, deposited 22 February 2017.

British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree."[42]

42. By virtue of these declarations, the ongoing dispute between two Commonwealth members, the United Kingdom and Mauritius, concerning sovereignty over the Chagos Archipelago is not subject to the contentious jurisdiction of the Court. The absence of the Court's contentious jurisdiction cannot be overcome through the General Assembly seeking an advisory opinion. As Judge de Castro said in *Western Sahara*:

> "[It] seems evident that there is a compelling reason for refusal when the request for an advisory opinion implies that the advisory function of the Court is being used to get round the difficulty represented by the optional nature of the contentious jurisdiction."[43]

43. While closely connected to the absence of consent principle addressed above, the fact that the giving of an advisory opinion in these proceedings would result in circumventing the optional nature of the Court's contentious jurisdiction is an additional reason why the Court should not give an advisory opinion. That reason is particularly powerful where the disputing States have expressly excluded a particular category of disputes from their general acceptance of the contentious jurisdiction of the Court. In such a case, the issue goes beyond the *absence* of consent to jurisdiction (which is itself fundamental), for to give the advisory opinion sought would negate the *express refusal* of both parties to the Court determining disputes between them.

44. Furthermore, the giving of an advisory opinion in the current proceedings will only serve to encourage the reference of other bilateral disputes to the Court through the medium of a request for an advisory opinion by the General Assembly. For reasons of judicial economy, and to protect its judicial function, the Court should not give such encouragement. As Judge Bennouna said in the *Kosovo* case, by declining a request for its advisory opinion, the Court could have put a stop to any further "requests which political organs might be tempted to submit to it in future, and indeed thereby protected the integrity of its judicial function."[44]

Other authorities

45. Notwithstanding the fundamental principle of consent, there are cases where the Court has rendered an advisory opinion despite the existence of a related legal controversy between States. However, for the reasons addressed below, those cases do not deny the importance of the fundamental requirement of consent to the proper exercise of the discretion whether to give an advisory opinion. On the contrary, they affirm that fundamental requirement, but then turn upon particular features – being features that are not present in this case – that explain why an advisory opinion could properly be given without infringing upon that fundamental requirement.

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[42] Mauritius, *Declaration under Article 36(2) of the Statute*, deposited 23 September 1968.
[43] *Western Sahara, Separate Opinion of Judge de Castro, I.C.J. Reports 1975*, p. 143.
[44] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Dissenting Opinion of Judge Bennouna, I.C.J. Reports 2010*, p. 500, para. 3.

46. The cases discussed below are therefore consistent with Australia's submission that judicial propriety requires the Court to decline to exercise its advisory jurisdiction in the circumstances of this case, because to do otherwise would be inconsistent with the consensual foundations of the Court's authority, and would require it to depart from the fundamental requirement of consent governing judicial involvement in the settlement of disputes under international law.

47. In several cases, the Court has decided it was proper to give an advisory opinion despite an underlying bilateral dispute because the "legal position of the parties to [the] disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it."[45] The Court has indicated that may be so for several different reasons:

    a. *The opinion concerned the procedure for settling the dispute, and not its merits*

    In the *Peace Treaties* case, the advisory opinion that the Court was asked to give related to the appointment of representatives to the Treaty Commissions responsible for the settlement of disputes arising under the respective Treaties of Peace between Bulgaria, Hungary and Romania and the Allied States. The Court considered that to give an opinion on that question related only to the *procedure* for the settlement of the disputes. It "in no way touches the *merits* of those disputes" which may later come before the Treaty Commissions.[46] In substance, therefore, the advisory opinion was sought on a specific matter that was incidentally related to, but not in fact the subject of, an existing dispute.

    b. *The opinion concerned the applicability of the Convention generally, rather than its application to any particular dispute*

    In the *Convention on the Privileges and Immunities of the United Nations* case, the Court noted that "the nature and purpose of the present proceedings are… that of a request for advice on the *applicability* of a part of the General Convention, and not the bringing of a dispute before the Court for determination."[47] In giving its opinion, the Court was concerned with an abstract legal question, and it steered well clear of the actual dispute "between the United Nations and Romania with respect to the *application* of the General Convention".[48]

    c. *The opinion did not concern the present-day rights of the non-consenting party*

    In *Western Sahara*, the Court observed that the issue before it concerned the rights of Morocco over the Western Sahara *at the time of its colonisation*. It did not

[45] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 72.
[46] Ibid (emphasis added).
[47] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989*, p. 190, para. 35 (emphasis added).
[48] Ibid, p. 191, para.38.

concern the rights of the administering power (Spain) *at the time of the hearing*.[49] For that reason, the Court concluded that "[t]he settlement of this issue will not affect the rights of Spain today as the administering Power".[50] Therefore, the fact that Spain had not consented to the resolution of such a dispute was no impediment to the provision of an advisory opinion, because that opinion had no ramifications for Spain's rights.

d. The underlying legal issue had already been determined

In the *Namibia* case, the Security Council, by resolution, had already declared the continued presence of South Africa in Namibia to be illegal, and had called upon States to act accordingly. In those circumstances, the advisory opinion was sought to guide the Security Council's future actions in respect of Namibia (see paragraph 52 below). It did not "[relate] to a legal dispute *actually pending* between two or more States",[51] as that dispute had already been resolved by the Security Council.

e. The request was located in a broader frame of reference than any individual bilateral dispute

In the *Wall* case, the Court noted that the question on which its opinion had been requested was "one which is located in a much broader frame of reference than a bilateral dispute".[52] It was for that reason that the Court concluded that to give the opinion would not "have the effect of circumventing the principle of consent to judicial settlement", and therefore that it could not on that basis exercise its discretion to decline to give an opinion.[53] As is apparent, that conclusion acknowledges the significance of consent in the exercise of the Court's discretion whether to provide an advisory opinion.

48. Unlike the cases summarised above, the advisory opinion that is sought in this case would compromise the legal positions of the United Kingdom and Mauritius in their dispute concerning sovereignty over the Chagos Archipelago. In particular, in responding to Question (b), the Court will have to confront directly the substantive legal issue in dispute between the United Kingdom and Mauritius (cf *Peace Treaties; Convention on the Privileges and Immunities of the United Nations*), that being a dispute that concerns the present day rights of the parties[54] (cf *Western Sahara*), that has not already been decided (cf *Namibia*), and that specifically relates only to the existing bilateral dispute (cf *Wall*).

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[49] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 42.
[50] Ibid.
[51] *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*, p. 24, para. 32 (emphasis added).
[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 159, para. 50.
[53] Ibid.
[54] Question (b) refers to the "*continued* administration by the United Kingdom... of the Chagos Archipelago" (emphasis added).

49. The circumstances identified in each of the authorities cited in paragraph 47 do not apply in the present case. There is therefore no reason to qualify or depart from the long-standing authorities that establish that judicial propriety requires the Court to decline to give the advisory opinion that has been sought, in order to respect the fundamental requirement of State consent that underpins the judicial settlement of disputes under international law.

(b) The General Assembly lacks a sufficient interest in the subject of the opinion

50. In the overwhelming number of cases in which requests have been made by the General Assembly for an advisory opinion, its interest has been manifest and did not need to be expressly stated in the request. That is why the Court was able to state, in the *Wall* opinion, that:

> "As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requested organ the *elements of law necessary for them in their action*." [55]

51. It is the fact that an advisory opinion is sought in order "to guide the United Nations in respect of its own action"[56] that has underpinned the Court's statements that "compelling reasons" are needed before it will refuse to provide an advisory opinion, for the exercise of the advisory jurisdiction represents the Court's participation in the activities of the organisation.[57]

52. The premium that the Court places on the performance of this role has caused the Court to exercise its discretion to provide such an opinion even if the subject matter has some relationship to an existing dispute.[58] However, that has occurred only in cases where the opinion is sought, not to obtain an adjudication of the dispute, but to guide the United Nations in the performance of its own functions. For example:

    a. In the *Reservations to the Genocide Convention* case, the Court dismissed an objection to its competence to give an advisory opinion on the basis that "[t]he object of this request for an Opinion is to guide the United Nations in respect of its own action".[59]

    b. In the *Western Sahara* case, the Court held that "[t]here is in this case a legal controversy, but one which arose during the proceedings of the General Assembly

[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 162-163, para. 60 (emphasis added).
[56] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 19.
[57] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 71.
[58] This is a factor additional to those outlined in paragraph 47 where the Court will provide an opinion notwithstanding the existence of a bilateral dispute.
[59] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 19.

and in relation to matters with which it was dealing. It did not arise independently in bilateral relations."[60]

c. In the *Namibia* case, the Court again cited this reason, emphasising the express wording of the preamble to the Security Council resolution requesting the opinion, which stated "that an advisory opinion from the International Court of Justice *would be useful for the Security Council* in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking".[61]

d. Finally, in the *Wall* case, the Court stated that "[t]he 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 located in a much broader frame of reference than a bilateral dispute."[62] That "acute concern" manifested itself through "the adoption of many Security Council and General Assembly resolutions" on the subject matter.[63]

53. Unlike the cases summarised above, the advisory opinion sought in this case would not assist the United Nations in respect of its own actions (that usually being the basis upon which the Court finds that a request for an opinion is "not devoid of object or purpose"[64]). Thus, the interest of the General Assembly is not manifest. Also, there is no suggestion in the wording of Resolution 71/292 that the opinion of the Court is required to guide the General Assembly in discharging its responsibilities in relation to decolonisation, or in matters relating to the Chagos Archipelago (cf *Namibia*).[65] While the questions referred to the Court have been framed through a lens of decolonisation, as Judge Higgins observed in the *Wall* case, "[t]he request is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of our Opinion, to exercise powers over the dispute or controversy."[66]

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[60] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 34; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 158, para. 47.

[61] *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*, p.24, para.32 (emphasis added).

[62] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 159, para. 50.

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

[64] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 20, para. 20 and p. 37, para. 73.

[65] The letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations requesting an item on the Agenda of the General Assembly concerning a request for an advisory opinion relating to the Chagos Archipelago (UN Doc. A/71/142) (UN Dossier No. 1) suggested that the General Assembly would benefit from an advisory opinion from the Court in carrying out the functions attributed to it by Mauritius. However, that benefit asserted by Mauritius is not reflected in the wording of Resolution 71/292 (UN Dossier No. 7).

[66] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Higgins, I.C.J. Reports 2004*, p. 210, para. 12. The Court in *Western Sahara* referred to the same

54. Here, neither the Security Council nor the General Assembly have been actively considering matters relating to the Chagos Archipelago (whether in the context of decolonisation or otherwise) (cf *Namibia; Wall*). On the contrary, notwithstanding the fact that the bilateral dispute between the United Kingdom and Mauritius concerning sovereignty over the Chagos Archipelago began in the early 1980s, it has never been considered actively in the General Assembly through any form of resolution.[67] In those circumstances, the General Assembly does not have a sufficient interest in the subject matter of the request to warrant an exercise of the Court's discretion to answer the request (particularly where it would cut across a pre-existing bilateral dispute and infringe the fundamental principle of consent). As Judge Keith put it in the *Kosovo* opinion:

> "In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to co-operate does not exist and what is sometimes referred to as its duty to answer disappears."[68]

(c) Procedural and evidential effects

55. A final reason why "judicial propriety" requires the Court to exercise its discretion to decline to give an advisory opinion is that, where the requested opinion in substance relates to a dispute between States, the procedural and evidentiary aspects of advisory proceedings are ill-adapted to the determination of the question, and the Court may lack sufficient information to allow the issue to be properly examined.

56. The Court has long recognised that the question of whether it has sufficient evidence available to give an advisory opinion must be decided in each particular instance, the question being:[69]

> "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character".

57. If the Court lacks sufficient information, it should decline to provide an advisory opinion.[70] In the *Wall* case, for example, Judge Buergenthal and Judge Owada expressed concerns about the inadequacy of the factual foundation relied on by the Court to support

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circumstances but said that they did not apply in that case. See *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26-7, para. 39.

[67] Rather, it has only been raised by Mauritius in the annual general debate.

[68] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Separate Opinion of Judge Keith, I.C.J. Reports 2010*, p. 489, para. 16.

[69] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28-29, para. 46, quoted with approval in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 161, para. 56.

[70] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 161, para. 56, suggesting that *Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5*, p. 28 is an example of this occurring (which is true, although this was a secondary reason for the Court's conclusion, as it was introduced as another "other cogent reason" for declining to answer).

its conclusions, which may have resulted in unfairness to the parties to the underlying bilateral dispute.[71]

58. Even if there is sufficient evidence to enable an opinion to be provided, judicial propriety may nevertheless require the Court to decline to exercise its advisory jurisdiction if to exercise that jurisdiction would be unfair to a particular State, or if to proceed would be "incompatible with the Court's judicial character".[72] In particular:

    a. In contentious proceedings, each party is afforded the opportunity in the oral phase of the proceedings to put forward detailed arguments in support of their case, as well as to respond to the arguments made by the other party. This provides an important means of identifying matters fundamental to resolving the dispute and of narrowing the issues between the parties, which is unlikely to be available in advisory proceedings. In part for that reason, judicial propriety would require the Court, in the exercise of its advisory jurisdiction, to refrain from departing from findings made by the Arbitral Tribunal in the *Chagos Arbitration*, being contentious proceedings that are binding on the United Kingdom and Mauritius.

    b. In advisory proceedings, if the Court does not have sufficient information to resolve a particular issue of fact, it cannot fall back on considerations of burden of proof that are available in contentious proceedings.[73] That is a real risk in this matter, in circumstances where the dispute between the United Kingdom and Mauritius includes a dispute as to bilateral dealings between the United Kingdom and the Mauritian Council of Ministers in the mid-1960s and thereafter.

(d) Summary on Court's discretion

59. In summary:

- The bilateral legal dispute that arose between the United Kingdom and Mauritius in the early 1980s concerning territorial sovereignty over the Chagos Archipelago and associated matters lies at the heart of the questions posed by the General Assembly. The United Kingdom and Mauritius have not consented to this Court resolving that dispute. In those circumstances, to render the advisory opinion requested in the current proceedings would be contrary to the fundamental principle recognised in the *Western Sahara* case (and earlier by the PCIJ in the *Status of the Eastern Carelia*) that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent, and thus would be inconsistent with the judicial character of the Court. Indeed, if that principle is not applied to preclude the giving of an advisory

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Declaration of Judge Buergenthal, I.C.J. Reports 2004*, p. 240-246; *Separate Opinion of Judge Owada, I.C.J. Reports 2004*, p. 267-231, para. 20-30.
[72] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.
[73] Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice' in Gaja and Stoutenburg (eds), *Enhancing the Rule of Law Through the International Court of Justice* (Brill Nijhoff, 2014), p. 68-69.

opinion in the present case, it is difficult to comprehend the circumstances in which it would be so applied.

- The General Assembly lacks a sufficient interest in the subject matter of the opinion sought as it will not assist in the performance of any of its functions.

- The matters that have previously been identified by the Court as weighing in favour of the exercise of discretion to provide an advisory opinion, notwithstanding some overlap between the subject matter of that opinion and a pre-existing dispute between States who have not consented to the adjudication of their dispute by the Court, are not present.

CONCLUSIONS

For the reasons outlined in this Statement, Australia respectfully requests the Court to decline to give the advisory opinion sought by the General Assembly in its Resolution 71/292 adopted on 22 June 2017.

W. M. Campbell QC

Representative of Australia

27 February 2018

CERTIFICATION

I certify that the annexes attached to this Statement are true copies of the documents reproduced therein.

W. M. Campbell QC

Representative of Australia

27 February 2018

LIST OF ANNEXES

STATUTORY INSTRUMENTS

1976 No. 893

OVERSEAS TERRITORIES

The British Indian Ocean Territory Order 1976

Made - - - -	*9th June* 1976
Coming into Operation	*28th June* 1976

At the Court at Buckingham Palace, the 9th day of June 1976

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, by virtue and in exercise of the powers in that behalf by the Colonial Boundaries Act 1895(**a**) or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows :—

Citation and Commencement

1. This Order may be cited as the British Indian Ocean Territory Order 1976 and shall come into operation on the appointed day.

Interpretation

2.—(1) In this Order unless the context otherwise requires—

" the Territory " means the British Indian Ocean Territory specified in the Schedule hereto ;

" the appointed day " means the 28th day of June 1976 ;

" the Commissioner " means the Commissioner for the Territory and includes any person for the time being lawfully performing the functions of the office of Commissioner.

(2) The Interpretation Act 1889(**b**) shall apply, with the necessary modifications, for the purpose of interpreting this Order and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to Acts of Parliament of the United Kingdom.

Revocations

3.—(1) The British Indian Ocean Territory Order 1965(**c**) and the British Indian Ocean Territory (Amendment) Order 1968(**d**) are revoked.

(2) The revocation of those Orders shall be without prejudice to the continued operation of any laws made and laws having effect thereunder and having effect as part of the law of the Territory immediately before the appointed day ; and any such laws shall have effect on and after the

(**a**) 1895 c. 34. (**b**) 1889 c. 63.
(**c**) S.I. 1965/1920 (1965 III, p. 5767).
(**d**) S.I. 1968/111 (1968 I, p. 304).

appointed day as if they had been made under this Order and (without prejudice to their amendment or repeal by any law made under this Order) shall be construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring them into conformity with this Order.

Establishment of office of Commissioner

4.—(1) There shall be a Commissioner for the Territory who shall be appointed by Her Majesty by Commission under Her Majesty's Sign Manual and Signet and shall hold office during her Majesty's pleasure.

(2) During any period when the office of Commissioner is vacant or the holder thereof is for any reason unable to perform the functions of his office those functions shall, during Her Majesty's pleasure, be assumed and performed by such person as Her Majesty may designate in that behalf by instructions given through a Secretary of State.

Powers and duties of Commissioner

5. The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other functions as Her Majesty may from time to time be pleased to assign to him and, subject to the provisions of this Order and of any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him.

Official Stamp

6. There shall be an Official Stamp for the Territory which the Commissioner shall keep and use for stamping all such documents as may be by any law required to be stamped therewith.

Constitution of offices

7. The Commissioner, in the name and on behalf of Her Majesty, may constitute such offices for the Territory as may lawfully be constituted by Her Majesty and, subject to the provisions of any law for the time being in force in the Territory and to such instructions as may from time to time be given to him by Her Majesty through a Secretary of State, the Commissioner may likewise—

(*a*) make appointments, to be held during Her Majesty's pleasure, to any office so constituted ; and

(*b*) dismiss any person so appointed or take such other disciplinary action in relation to him as the Commissioner may think fit.

Concurrent appointments

8. Whenever the substantive holder of any office constituted by or under this Order is on leave of absence pending relinquishment of his office—

(*a*) another person may be appointed substantively to that office ;

(*b*) that person shall, for the purpose of any functions attaching to that office, be deemed to be the sole holder of that office.

Power to make laws

9.—(1) The Commissioner may make laws for the peace, order and good government of the Territory.

(2) All laws made by the Commissioner in exercise of the powers conferred by this Order shall be published in such manner and at such place or places in the Official Gazette for the Territory as the Commissioner may from time to time direct.

(3) Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (2) of this section unless it is provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it shall come into operation on that date.

Disallowance of laws

10.—(1) Any law made by the Commissioner in exercise of the powers conferred by this Order may be disallowed by Her Majesty through a Secretary of State.

(2) Whenever any law has been disallowed by Her Majesty, the Commissioner shall cause notice of such disallowance to be published in such manner and in such place or places in the Official Gazette for the Territory as the Commissioner may from time to time direct.

(3) Every law so disallowed shall cease to have effect as soon as notice of disallowance has been published as aforesaid ; and thereupon any enactment repealed or amended by, or in pursuance of, the law so disallowed shall have effect as if such law had not been made, and, subject thereto, the provisions of section 38(2) of the Interpretation Act 1889 shall apply to such disallowance as they apply to the repeal of an Act of Parliament.

Commissioner's powers of pardon, etc.

11. The Commissioner may, in Her Majesty's name and on Her Majesty's behalf—

(*a*) grant to any person concerned in or convicted of any offence against the laws of the Territory a pardon, either free or subject to lawful conditions ; or

(*b*) grant to any person a respite, either indefinite or for a specified period, of the execution of any sentence imposed on that person for any such offence ; or

(*c*) substitute a less severe form of punishment for any punishment imposed by any such sentence ; or

(*d*) remit the whole or any part of any such sentence or of any penalty or foreiture otherwise due to Her Majesty on account of any offence.

Judicial proceedings

12.—(1) All proceedings that, immediately before the commencement of this Order, are pending before any court established by or under the existing Order may be continued and concluded after the commencement of this Order before the corresponding court established under the provisions of this Order.

(2) Any decision given before the commencement of this Order by any such court as aforesaid shall for the purpose of its enforcement or for the purpose of any appeal therefrom, have effect after the commencement of this Order as if it were a decision of the corresponding court established by or under this Order.

Disposal of land

13. Subject to any law for the time being in force in the Territory and to any Instructions from time to time given to the Commissioner by Her Majesty under Her Sign Manual and Signet or through a Secretary of State, the Commissioner, in Her Majesty's name and on Her Majesty's behalf, may make and execute grants and dispositions of any lands or other immovable property within the Territory that may be lawfully granted or disposed of by Her Majesty.

Amendment of Seychelles (Constitution) Order 1975

14. The First Schedule to the Seychelles (Constitution) Order 1975(**a**) is amended as follows:—

(*a*) the word "Desroches" is added to the list of islands under the heading "*Poivre Islands*";

(*b*) the words

"*Aldabra Group, consisting of:*

West Island
Middle Island
South Island
Cocoanut Island
Polymnie Island
Euphratis and other small islets"

are added immediately below the list of islands under the heading "*Cosmoledo Group*";

(*c*) the words "*Farquhar Islands*" are added immediately below the list of Islands under the heading "*Aldabra Group*".

Power reserved to Her Majesty

15. There is reserved to Her Majesty full power to make laws from time to time for the peace, order and good government of the British Indian Ocean Territory (including, without prejudice to the generality of the foregoing, laws amending or revoking this Order).

N. E. Leigh

THE SCHEDULE

Section 2(1)

Diégo Garcia
Egmont or Six Islands
Péros Banhos
Salomon Islands
Three Brothers Islands
Nelson or Legour Island
Eagle Islands
Danger Island.

EXPLANATORY NOTE

(*This Note is not part of the Order.*)

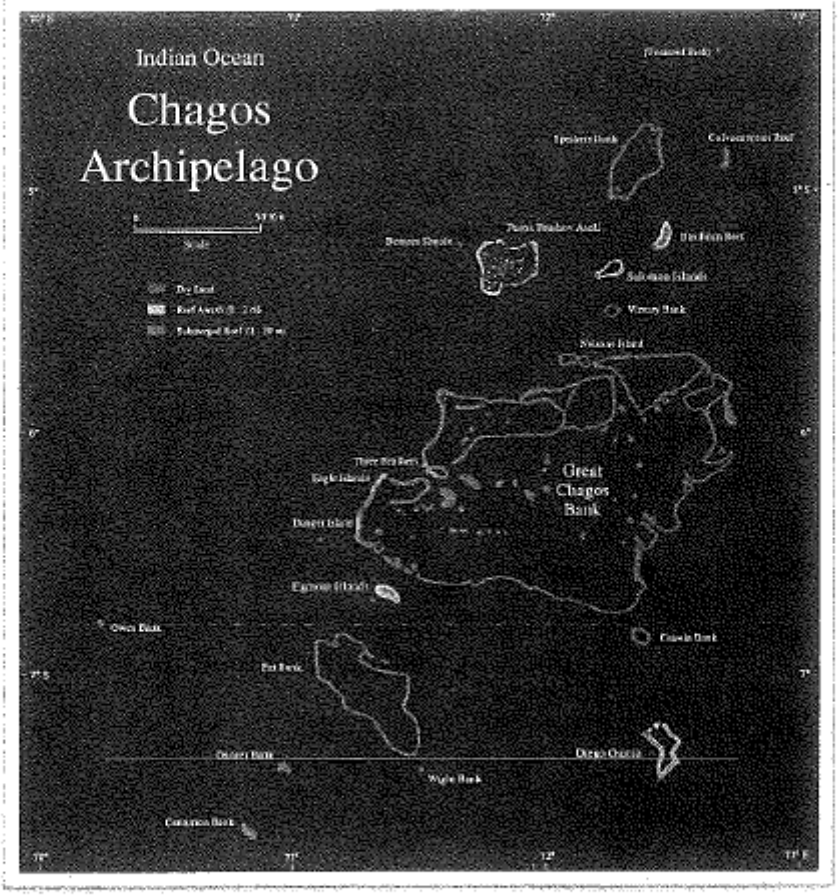
This Order makes new provision for the administration of the British Indian Ocean Territory and for the return to Seychelles of the Aldabra Group of islands, Desroches and Farquhar Islands from the Territory.

(**a**) 1975 III, p. 8585.

Annex 2

REPUBLIC OF MAURITIUS

Aide Memoire



ITEM 87 OF THE AGENDA OF THE 71ST SESSION OF THE UN GENERAL ASSEMBLY

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

MAY 2017

1. On 16 September 2016, the UN General Assembly (UNGA) decided to include an item entitled "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" on the agenda of its current session, on the understanding that it would not be considered before June 2017 and that thereafter it may be considered upon notification by a Member State.

2. The period between September 2016 and June 2017 was intended to allow time for Members to ascertain whether progress could be made on the issues raised by the item, which relates to the completion of the process of decolonization of Mauritius, thereby enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago. Unfortunately, no progress has been possible. Accordingly, action should now be taken by the UNGA.

Background

3. The Chagos Archipelago is a group of islands in the Indian Ocean. They have been part of Mauritius since at least the eighteenth century, when Mauritius was under French colonial rule. All of the islands forming part of the French colonial territory of Île de France (as Mauritius was then known) were ceded to Britain in 1810, after which Mauritius, including the Chagos Archipelago, was under British colonial rule.

4. Prior to granting independence to Mauritius on 12 March 1968, the United Kingdom of Great Britain and Northern Ireland ("United Kingdom" or "UK") unlawfully dismembered Mauritius in 1965 by excising the Chagos Archipelago from its territory to create the so-called "British Indian Ocean Territory."

5. This excision was carried out in violation of international law and UNGA Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965. Resolution 2066 (XX),

dealing specifically with Mauritius, required 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."

6. Dismemberment occurred, and its effects continue to this day. Subsequent efforts to seek the return of the Chagos Archipelago to the effective sovereign control of Mauritius have been unsuccessful. The United Kingdom claims that it exercises sovereignty lawfully over the Chagos Archipelago, yet it also tacitly admits the impropriety of its actions, stating that it will return the Chagos Archipelago to Mauritius once it is no longer required for defence purposes without providing any clarity on the date of return, while the criteria to determine when defence needs will cease to exist keep on changing.

7. In 2015, an Arbitral Tribunal acting under Part XV of the UN Convention on the Law of the Sea (UNCLOS) unanimously found that this commitment to return the Chagos Archipelago to Mauritius is binding under international law,[1] acknowledging that Mauritius has inalienable legal rights with respect to the Chagos Archipelago and that the process of decolonization remains incomplete. Two members of the Tribunal found, *inter alia*, that the excision of the Chagos Archipelago from Mauritius in 1965 showed 'a complete disregard for the territorial integrity of Mauritius by the United Kingdom',[2] in violation of the right to self-determination. No contrary view was put forward by any other members of the Tribunal.

[1] In the Matter of the Chagos Marine Protected Area (Mauritius v. United Kingdom), Annex VII Arbitral Tribunal Award (18 March 2015), para. 448.
[2] *Ibid*, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, para. 91. The other three members of the Tribunal considered that the Tribunal lacked jurisdiction over the issue, and therefore expressed no view on that part of the case.

Actions taken by the United Kingdom in violation of international law

8. Following the illegal excision of the Chagos Archipelago, the United Kingdom has purported to take a number of actions in respect of the Chagos Archipelago which give rise to serious violations of international law, including human rights and international environmental law. These actions, which are inconsistent with the commitment to decolonization, include, but are not limited to:

   i. Conclusion in December 1966 of a fifty-year agreement between the United Kingdom and the United States of America ("United States" or "US") concerning the availability for defence purposes of the Chagos Archipelago. While a limited naval communications facility was initially intended to be set up by the United States in Diego Garcia, which forms part of the Chagos Archipelago, it was subsequently developed into a support facility of the US Navy and later on into a full-fledged military base. The United Kingdom initially contended that the Chagos Archipelago was required for the defence of the West. Now that the Cold War is over and the threat from the Soviet Union no longer exists, the United Kingdom argues that the Chagos Archipelago is needed for the fight against terrorism and piracy.

   ii. Forcible eviction of the former inhabitants of the Chagos Archipelago ("Chagossians") in total disregard of their fundamental human rights.

   iii. Continued and systematic denial of the right of Mauritians, particularly those of Chagossian origin, to settle in the Chagos Archipelago, including through the creation of a 'marine protected area' around the Chagos Archipelago. Mr. Colin Roberts of the United Kingdom Foreign and Commonwealth Office is reported to have told a Political Counsellor at the US Embassy in London on 12 May 2009 that "establishing a marine reserve would, in effect, put paid to resettlement claims of the archipelago's former residents"[3].

[3] Cable from US Embassy, London, on UK Government's proposal for a marine reserve covering the Chagos Archipelago, May 2009, published on "WikiLeaks" website in December 2010.

iv. Use of Diego Garcia – which, according to the United Kingdom, hosts a joint UK-US military base – as a transit point after September 2001 for rendition of persons to countries where they risked being subjected to torture or ill-treatment.

v. Unilateral creation of a 'marine protected area' ("MPA") around the Chagos Archipelago on 1 April 2010. The Arbitral Tribunal constituted in the case brought by Mauritius against the United Kingdom to challenge the legality of the 'MPA' ruled that the United Kingdom had breached its obligations under Articles 2(3), 56(2) and 194(4) of UNCLOS.

vi. Pollution of the waters of the Chagos Archipelago with sewage and human waste by vessels acting under the authority or consent of the United Kingdom, including the *Pacific Marlin*, a patrol vessel used by the United Kingdom.

vii. Hydro blasting of ships in the lagoon adjoining Diego Garcia.

9. The following further unilateral actions have purportedly been taken by the United Kingdom without the prior involvement and consent of Mauritius since the ruling of the Arbitral Tribunal in the case of *Mauritius v United Kingdom*, which concluded at para. 298 of its Award that "the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius gives Mauritius an interest in significant decisions that bear upon the possible future uses of the Archipelago. Mauritius' interest is not simply in the eventual return of the Chagos Archipelago, but also in the condition in which the Archipelago will be returned." These include:

    i. the conduct by the UK Government of a public consultation exercise on resettlement in the Chagos Archipelago from 4 August to 27 October 2015;

    ii. the UK Government's decision in November 2016 against resettlement of the former inhabitants of the Chagos Archipelago and the automatic roll over of the purported UK-US agreement in respect of the Chagos Archipelago for a further period of 20 years until 30 December 2036. These purported decisions were announced barely a week after the first round of talks held between Mauritius and the United Kingdom following the understanding reached in New York last

September to defer, at the United Kingdom's request, consideration of item 87 of the UNGA agenda; and

(iii) the organization of a significantly expanded programme of visits for Mauritians of Chagossian origin to the Chagos Archipelago as part of a purported £40 million package announced by the UK Government in November 2016, which is said to be intended to support improvements to the livelihoods of Chagossians. This purported initiative was also taken barely three weeks after the third round of talks held between Mauritius and the United Kingdom following the above-mentioned understanding reached in New York last September.

Talks between Mauritius and the United Kingdom

10. Three meetings have been held between Mauritius and the United Kingdom following the understanding reached in New York last September, during which the United Kingdom made the following two proposals:

    (a) joint environmental stewardship of the outer islands of the Chagos Archipelago, excluding the island of Diego Garcia (environmental protection, conservation and promotion of marine and land biodiversity; development of sustainable management of fishery stocks in the waters of the Chagos Archipelago; and observation of natural phenomena in the region); and

    (b) bilateral defence engagement between Mauritius and the United Kingdom (training and defence cooperation, covering areas including maritime and aviation security, port security, and governance).

    Mauritius has made clear to the United Kingdom that neither of these proposals is acceptable as they do not address the very objective of the talks, namely the completion of the decolonization process of Mauritius and the exercise of full sovereignty by Mauritius over the Chagos Archipelago. The UK's proposal of joint stewardship does not include the island of Diego Garcia and its surrounding maritime zones and is limited to environmental

management only. Mauritius has nevertheless conveyed to the United Kingdom that it is prepared to consider the two proposals in the context of an agreed time bound framework for the return of the Chagos Archipelago to the effective sovereign control of Mauritius.

11. In addition, Mauritius has addressed the security and defence needs invoked by the United Kingdom by reaffirming that it has no objection to the continued use of Diego Garcia for defence purposes in the context of an agreed time bound framework for the return of the Chagos Archipelago to the effective sovereign control of Mauritius. Following the stand recently taken by the United Kingdom that the military base in Diego Garcia is a joint US-UK base, Mauritius has responded that it would be willing, within the framework of the completion of the decolonization process, to guarantee to the United Kingdom and the United States in a binding agreement their continued use of Diego Garcia for defence purposes. Mauritius will stand by this commitment.

The rationale for an advisory opinion

12. The General Assembly has a direct institutional interest in this matter. It has played a historic and central role in addressing decolonization, especially through the exercise of its powers and functions in relation to Chapters XI to XIII of the Charter of the United Nations. Under its 1960 Resolution 1514 (XV)[4] on the granting of independence to colonial countries and peoples, the General Assembly declared that a denial of fundamental human rights is contrary to the Charter; that the integrity of the national territory of dependent peoples shall be respected; and that any attempt at the disruption of the territorial integrity of a colonial country is incompatible with the purposes and principles of the Charter.[5]

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[4]General Assembly Resolution 1514 (XV) (14 December 1960), paras.1, 4, & 6.
[5]General Assembly Resolution 2066 (XX) (16 December 1965), para. 3.

13. In 2010, on the fiftieth anniversary of the adoption of UNGA Resolution 1514 (XV), the General Assembly noted with deep concern that "fifty years after the adoption of the Declaration, colonialism has 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."[6]

14. In furtherance of its active role in the process of decolonization, the General Assembly has a continuing responsibility to complete the process of the decolonization of Mauritius. 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.

15. 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.

16. The Government of Mauritius will be submitting a draft resolution pertaining to the request from the General Assembly for an advisory opinion from the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.

17. The Government of Mauritius would be grateful for the support of all Member States in its endeavour.

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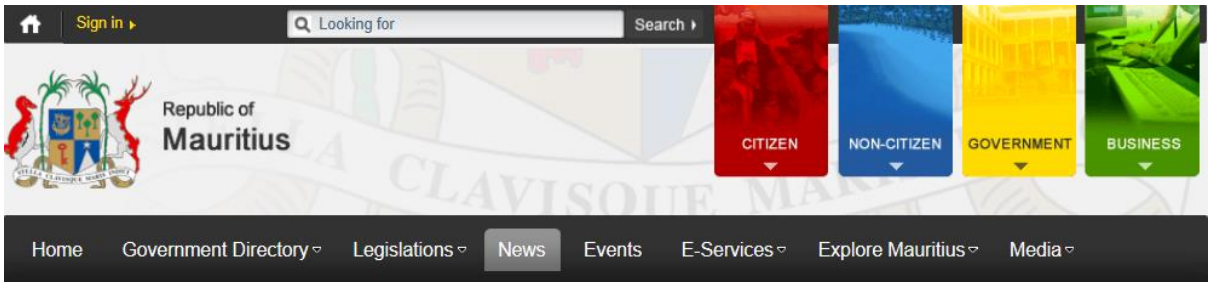
[6] General Assembly Resolution 65/118 (20 January 2011), pmbl.,paras. 2 & 9.

http://www.govmu.org/English/News/Pages/Prime-Minister-meets-Chagos-Refugees-Group-Leader-on-advisory-opinion-request-procedure.aspx



News

Prime Minister meets Chagos Refugees Group Leader on advisory opinion request procedure

Date: October 31, 2017
Domain: Judiciary; International Relations; Foreign Affairs
Persona: Business; Citizen; Government; Non-Citizen

GIS – 31 October, 2017: The Prime Minister, Minister of Home Affairs, External Communications and National Development Unit, and Minister of Finance and Economic Development, Mr. Pravind Kumar Jugnauth, had a working session yesterday with the Chairman and Leader of the Chagos Refugees Group, Mr Louis Olivier Bancoult, at the New Treasury Building in Port Louis.

The meeting focused on joint efforts being undertaken at the International Court of Justice for Mauritius to effectively exercise its sovereignty over the Chagos Archipelago and for the right of Mauritian citizens, including those of Chagossian origin, to return to and resettle in the Chagos Archipelago.

In a statement following the meeting, Mr Bancoult said the meeting was very positive and cordial. Recalling the historic adoption on 22 June 2017 by the United Nations General Assembly of the resolution seeking International Court's advisory opinion on pre-independence separation of Chagos Archipelago from Mauritius, Mr Bancoult pointed out that the working session reviewed the status regarding the presentations of written statements and comments to the International Court of Justice. The time-limit within which statements on the question may be presented to the Court has been set for 30 January 2018.

According to Mr Bancoult, members of the Chagossian community are finalising their arguments on the violations of rights and sufferings endured in their deportation, and their statements will be ready by next week. He added that all submissions will be made in consultation with the Government.

The Leader of the Chagos Refugees Group stated that the coordinated efforts of everyone, both the Government and the Chagossian community, are required for a positive outcome.

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