INTERNATIONAL COURT OF JUSTICE

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

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

WRITTEN COMMENTS

of

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

14 MAY 2018

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PART THREE: THE LEGAL ISSUES ARISING FROM THE QUESTIONS

CHAPTER I

INTRODUCTION

1.1. In accordance with the Court's Orders of 14 July 2017 and 17 January 2018[1], the United Kingdom of Great Britain and Northern Ireland (United Kingdom) submits these Written Comments on the Written Statements submitted by other States.

1.2. It is recalled that, in resolution 71/292, the General Assembly requested the Court to render an advisory opinion on the following two Questions:

> (a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?
>
> (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?[2]

1.3. In these Written Comments, the United Kingdom focuses on the Written Statement of the Republic of Mauritius (Mauritius). This is unsurprising. It is with Mauritius that the United Kingdom has the longstanding bilateral dispute over the Chagos Archipelago, in particular as to sovereignty, which is the central issue behind the Request for an

[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for an Advisory Opinion), Order of 14 July 2017*, paras 1 and 2; *Order of 17 January 2018*.

[2] In French, the questions read:

a) « *Le processus de décolonisation a-t-il été validement mené à bien lorsque Maurice a obtenu son indépendance en 1968, à la suite de la séparation de l'archipel des Chagos de son territoire et au regard du droit international, notamment des obligations évoquées dans les résolutions de l'Assemblée Générale 1514 (XV) du 14 décembre 1960, 2066 (XX) du 16 décembre 1965, 2232 (XXI) du 20 décembre 1966 et 2357 (XXII) du 19 décembre 1967 ? » ;*

b) « Quelles sont les conséquences en droit international, y compris au regard des obligations évoquées dans les résolutions susmentionnées, du maintien de l'archipel des Chagos sous l'administration du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, notamment en ce qui concerne l'impossibilité dans laquelle se trouve Maurice d'y mener un programme de réinstallation pour ses nationaux, en particulier ceux d'origine chagossienne ? ».

advisory opinion[3]. It is Mauritius that, in its Written Statement, has put in issue before this Court key legal and factual issues concerning the bilateral relations between it and the United Kingdom, including as to whether Mauritius consented to the detachment of the Chagos Archipelago[4]. It is Mauritius that, in its Written Statement, has re-stated the arguments on consent and on self-determination that it recently made in the arbitral proceedings against the United Kingdom under the United Nations Convention on the Law of the Sea (hereafter, the *Chagos Arbitration*)[5].

1.4. The United Kingdom's position is as follows: it does not appear possible (or intended, at least by Mauritius) for the Court to engage with the Request of 22 June 2017 without making determinations on or directly concerning the longstanding bilateral dispute; and, unless that is somehow incorrect, the Court should exercise its discretion so as to decline to answer the Request for reasons of judicial propriety. It is noted that the United Kingdom's position is consistent with the position expressed by many States before the General Assembly[6], as well as in the Written Statements that have now been submitted by Australia, Chile, France, Israel and the United States of America (United States). It is also noted that other States have expressed serious concern as to the exercise of the advisory opinion jurisdiction where a bilateral dispute is in effect being put before the Court: see the Written Statements of China[7], Germany[8], the Republic of Korea[9] and the Russian Federation[10].

1.5. The United Kingdom makes six introductory points.

1.6. First, there is a common acceptance in the Written Statements, whether these are in favour of the position of the United Kingdom or of Mauritius or located somewhere in between, that the Court's discretion under Article 65(1) of the Statute should be

[3] See Written Statement of the United Kingdom, Chapter V, and para. 7.13; see further **Chapter III** below.
[4] It is only Mauritius and the United Kingdom that go into matters of fact, which is a reflection of the bilateral nature of the issues now being put before the Court.
[5] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (hereafter '*Chagos Arbitration'*). See further **Chapter III** below, in particular as to the Award dated 18 March 2015. **UN Dossier No. 409.**
[6] See Written Statement of the United Kingdom, para. 1.15.
[7] Written Statement of China, para. 18.
[8] Written Statement of Germany, with specific regard to the correct interpretation of the Questions put to the Court. See e.g. at paras. 151-154
[9] Written Statement of the Republic of Korea, para. 16 et seq.
[10] Written Statement of the Russian Federation, paras. 29-32.

exercised so as not to answer a request if "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"[11].

1.7. Second, the United Kingdom's position that the longstanding bilateral dispute with Mauritius is being put before the Court finds strong support from a reading of the case put forward in Mauritius' Written Statement. Not only does this echo the case previously put forward by Mauritius in contentious proceedings (in the *Chagos Arbitration*[12]), but also it has now become clear that Mauritius is seeking from the Court what is in effect a *dispositif* amounting to a determination as to Mauritius' sovereignty over the Chagos Archipelago[13].

a. Of course, Mauritius now seeks to portray the bilateral dispute as an issue of decolonization, and at the same times it emphasises the central role played by the General Assembly in the process of decolonization[14]. However, this is to bypass the fact that the dispute only arose in the bilateral relations between the United Kingdom and Mauritius years after independence[15]; and, further, while the General Assembly has indeed played a very important role in decolonization as a general matter, it has not been engaged in any decolonization or other issue with respect to the Chagos Archipelago for many decades.

b. As noted in the United Kingdom's Written Statement[16], it is only through Mauritius asserting in these proceedings, as it asserted in the recent *Chagos Arbitration*[17], that the 1965 Agreement was not based on its valid consent that there can be any debate as to the Questions raised in the Request.

c. There is an underlying reality that it is only following various attempts by Mauritius to secure contentious jurisdiction over the longstanding bilateral

[11] *Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.
[12] See Written Statement of the United Kingdom, Chapter VI, in particular at para. 6.5 (referring to Mauritius Memorial, p. 155 and paras. 6.8-6.30).
[13] Written Statement of Mauritius, p. 285, para. 3(a).
[14] See e.g. Written Statement of Mauritius, para. 1.2.
[15] See Written Statement of the United Kingdom, Chapter V, and para. 7.13; see further **Chapter II** below.
[16] See Written Statement of the United Kingdom, paras. 1.18 and 7.15.
[17] See further under **Chapter II** below.

dispute that it has sought to achieve the same objectives through the means of an advisory opinion from the Court. Moreover, in doing do, it pays no regard to the fact that it has already argued for, and has obtained, a ruling in the *Chagos Arbitration* that the United Kingdom has made a legally binding undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes[18].

d. The "Conclusions" submitted by Mauritius at the end of its Written Statement do not fit within any established scheme of action of the General Assembly's work on decolonization and, by contrast, are formulated in the language of a series of orders that leave no meaningful role to the General Assembly at all[19].

1.8. Third, the facts as to the circumstances of detachment are critical to the case as put forward by Mauritius, but these facts are and have long since been in dispute[20]. For example, it is said by Mauritius in the Introduction to its Written Statement that the detachment was "carried out without regard to the will of the people of Mauritius"[21]; that the decision to allow use of Diego Garcia as a military base "was taken in secret"[22]; and that the consent of the Mauritian Ministers to detachment in September 1965 was procured "in a situation of duress" as they were being threatened by means of a stark choice between giving their consent to detachment or losing out on independence[23]. Yet these allegations have no sound factual basis:

a. No decision was taken in secret. Mauritius' Council of Ministers was informed of the plan to allow use by the United States of an island for a military base long before any final decision was taken, and the Council of Ministers was not in principle opposed to this plan[24].

[18] *Chagos Arbitration*, Award, para. 547(B).
[19] Written Statement of Mauritius, p. 285.
[20] See e.g. in the *Chagos Arbitration*: Memorial of Mauritius, Chapter 3; Reply of Mauritius, Chapter 2(III).
[21] See Written Statement of Mauritius, para. 1.7.
[22] *Ibid.*
[23] See Written Statement of Mauritius, paras. 1.10-1.11, and 3.111-3.112.
[24] See Written Statement of the United Kingdom, paras. 3.10-3.16, and see further, paras. 2.21 and 2.29 below.

b. There was no duress, and no decision on detachment was even taken by the Mauritian Council of Ministers in September 1965. Instead, the actual facts are that:

i. The United Kingdom's's decision on independence was announced on 24 September 1965, as follows:

> The Secretary of State accordingly announced at a Plenary meeting of the Conference on Friday, 24th September, his view that it was right that Mauritius should be independent and take her place among the sovereign nations of the world. When the electoral Commission had reported, a date would be fixed for a general election under the new system, and a new Government would be formed. In consultation with this Government, Her Majesty's Government would be prepared to fix a date and take the necessary steps to declare Mauritius independent, after a period of six months full internal self-government if a resolution asking for this was passed by a simple majority of the new Assembly.[25]

ii. The decision on detachment was not taken by the Mauritius Council of Ministers until many weeks following this announcement, i.e. on 5 November 1965, following a debate in Port Louis, which had in turn followed upon a negotiated improvement in the terms on which detachment might be agreed[26].

c. Contrary to the portrayal in Mauritius' Written Statement, it was not the United Kingdom, but rather one of the political parties in Mauritius (the *Parti Mauricien Social Démocrate* (PMSD)), that was in 1965 against independence, and was seeking a free association agreement with the United Kingdom[27].

d. Independence followed a general election in Mauritius in 1967, with the Mauritian electorate voting at a time when the detachment had long since been public knowledge, with the political parties able to make an issue of the detachment as they saw fit[28].

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[25] Command Paper, Mauritius Constitutional Conference 1965, para. 20 (**Annex 22**).
[26] See Written Statement of the United Kingdom, paras. 3.17-3.32, and see further, paras. 2.17, 2.31-2.32, and 2.72-2.76 below.
[27] See further, paras. 2.43-2.46 below.
[28] See Written Statement of the United Kingdom, paras. 3.33-3.37, and see further, paras. 2.84-2.85 below.

1.9. The allegations that Mauritius makes in its Written Statement are very serious indeed. The intent is plainly to portray the United Kingdom in the worst possible light. Such allegations might be suitable to be tested in contentious proceedings, although it is noted that the key witnesses – Mauritian Premier Sir Seewoosagur Ramgoolam and United Kingdom Prime Minister, Harold Wilson – have long since died and would not be available to speak to the meeting of 23 September 1965, which is portrayed by Mauritius as the meeting of central importance[29]. The allegations are not, however, suitable to be determined in advisory proceedings – without a complete factual record, and without a full exchange of pleadings and a full oral hearing in which the United Kingdom would have the right to reply to the case as finally put by Mauritius.

1.10. Fourth, and related to the above, all the United Kingdom documents that Mauritius relies on were long since made public or disclosed by the United Kingdom Government in domestic proceedings[30]. Thus the documents as to detachment and as to the very regrettable treatment of the Chagossians have long since been in the public domain. By contrast, there has been no equivalent disclosure on Mauritius' part. The United Kingdom has no access to, for example, internal Mauritian documents relevant to Mauritius' reaffirmation of the 1965 Agreement post-1968 (and one would expect such documents to exist). Yet, the Court is nonetheless being asked to come to conclusions on this and other equally important issues of fact.

1.11. Fifth, Mauritius has approached the issue of the Court's discretion as if it had not already put the same factual and legal issues in dispute in the *Chagos Arbitration*, and it has likewise elected to ignore the consideration by the Arbitral Tribunal of the 1965 Agreement. Although the Arbitral Tribunal did not have jurisdiction to decide Mauritius' case on invalidity[31], it did find as follows:

> In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. *When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, the Parties fulfilled the conditions necessary to give effect*

[29] See Written Statement of Mauritius, e.g. paras. 1.10-1.11, paras. 3.72-3.73.
[30] As to which, see Written Statement of the United Kingdom, Chapter IV.
[31] See Written Statement of the United Kingdom, para. 6.8, quoting *Chagos Arbitration*, Award, paras. 418-420.

to the 1965 Agreement and, by their conduct, reaffirmed its application between them.[32]

1.12. Mauritius has not challenged – and could not challenge – this finding as to reaffirmation. It is for Mauritius to establish that the 1965 Agreement was invalid in 1965 and invalid from 1968 when it was reaffirmed and became governed by international law[33]. Yet Mauritius has not even sought to engage with the international law rules on duress[34]. It has sought to put forward the dissenting views of Judges Kateka and Wolfrum in the *Chagos Arbitration* as if these somehow represented an un-contradicted position[35], whereas the majority simply did not enter into the sovereignty issues because of their finding on jurisdiction, and the reasoning of the majority provides a further demonstration of the truly bilateral nature of the dispute[36].

1.13. Finally, the United Kingdom reiterates that, as stated in its Written Statement[37], it fully accepts that the Chagossians were treated very badly at and around the time of their removal, and it deeply regrets that fact. The United Kingdom has sought to put a balanced account of the treatment of the Chagossians in Chapter IV of its Written Statement – by reference to the in-depth (and very critical) consideration of this issue in the English courts.

1.14. Mauritius has focused on the expulsion of the Chagossians, but it is noted that it has said very little about the subsequent settlement reached through and following the 1982 Agreement between the United Kingdom and Mauritius[38], and likewise the detailed consideration that the United Kingdom has since given to resettlement (currently being tested in the English courts) and the November 2016 Ministerial announcement in favour of a package of approximately £40 million to support improvements in the livelihoods of Chagossians in the communities where they live (whether in the United Kingdom, Mauritius or Seychelles)[39]. Yet the existence of the 1982 Agreement, like

[32] *Chagos Arbitration*, Award, para. 425, emphasis added.
[33] *Ibid*, para. 428.
[34] Cf. Written Statement of the United Kingdom, paras. 8.16-8.18.
[35] See Mauritius Aide Memoire, May 2017, para. 7, and Written Statement of Mauritius, e.g. para. 1.14.
[36] Written Statement of the United Kingdom, para. 6.17, referring to the Dissenting and Opinion of Judges Kateka and Wolfrum, paras. 74-80 (**UN Dossier No. 409**).
[37] Written Statement of the United Kingdom, para. 1.5.
[38] Written Statement of the United Kingdom, paras. 4.8-4.20.
[39] Written Statement of the United Kingdom, paras. 4.31-4.39.

the 1965 Agreement and the subsequent reaffirmation of this in the post-1968 period[40], identify the matters raised in the Request as truly part of a longstanding bilateral dispute that could not be addressed without having 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[41].

* * *

1.15. These Written Comments are divided into three Parts as follows.

1.16. **Part One** is focused on issues of fact. It comprises one Chapter, **Chapter II**, which contains the comments of the United Kingdom of the factual contentions that have been made in the Written Statements, i.e. the factual contentions made by Mauritius (no other State having addressed issues of fact).

1.17. **Part Two** which also comprises one Chapter, **Chapter III**, contains comments on the issues arising with respect to the Court's discretion whether or not to give the opinion that has been requested.

1.18. **Part Three** contains comments with respect to the substantive issues arising under the Questions, made without prejudice to the United Kingdom's position that the Court should exercise its discretion so as not to answer the Questions. In this Part:

Chapter IV contains the United Kingdom's comments on the Written Statements submitted by other States with respect to Question (a).

Chapter V contains the United Kingdom's comments on the Written Statements submitted by other States with respect to Question (b).

[40] Written Statement of the United Kingdom, paras. 3.38-3.50, and see further **Chapter II** below.
[41] *Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.

1.19. These Written Comments end with the United Kingdom's conclusion that the Court should exercise its discretion so as to decline to give answers to the Questions posed by the General Assembly in this case.

PART ONE: THE FACTS

CHAPTER II

THE DETACHMENT OF THE CHAGOS ARCHIPELAGO AND THE INDEPENDENCE OF MAURITIUS

2.1. This Chapter addresses the facts relating to the constitutional history of Mauritius; the events surrounding the 1965 Agreement between the United Kingdom and Mauritius on the detachment of the Chagos Archipelago in return for financial and other benefits; Mauritian independence following the 1967 general election; and Mauritius' reaffirmation of the 1965 Agreement after independence. Throughout the Chapter, the United Kingdom will address and refute assertions made by Mauritius in its Written Statement on the various issues.

2.2. The United Kingdom stands by its account of the facts in its Written Statement[42]. Consistent with the bilateral nature of the dispute, aside from the United Kingdom, the only other State to address the facts at the core of the sovereignty dispute between the United Kingdom and Mauritius, is Mauritius.

2.3. This Chapter will demonstrate that Mauritius' narrative of the events is not based on a fair or accurate portrayal of the facts. Mauritius has developed a narrative of detachment under duress by selectively relying on certain documents, and ignoring others that do not suit its case. It conflates and condenses events, confusing the chronology in order to present to the Court an over-simplified and inaccurate picture. It skips over periods during which the evidence, or lack thereof, undermines its position.

2.4. The Chapter is organised as follows.

a. First, it will address the administration of the colony of Mauritius and the status of its dependencies, including the Chagos Archipelago (**Section A**).

[42] Written Statement of the United Kingdom, Chapters II and III.

b. Second, it recalls the events leading up to the 5 November 1965 consent of the Mauritius Council of Ministers to detachment of the Chagos Archipelago (**Section B**).

c. The Chapter then discusses the push by some Mauritian Ministers to hold a referendum on whether Mauritius should become independent or remain associated with the United Kingdom, and how that position was opposed by the Mauritius Premier, whose overriding concern in September 1965 was that the United Kingdom commit to independence at the Constitutional Conference (**Section C**).

d. **Section D** then focuses on the decision of the Council of Ministers of 5 November 1965, consenting to the detachment of the Archipelago in exchange for certain benefits, as had been agreed in principle at the Constitutional Conference (the 1965 Agreement).

e. Thereafter, the Chapter explains the importance of the 1967 general election and in the Legislative Assembly debate and vote prior to independence (**Section E**).

f. And then it shows that Mauritius repeatedly reaffirmed the 1965 Agreement for a significant period of time as an independent State (**Section F**).

A. British administration of the Chagos Archipelago as a lesser dependency

2.5. As the Arbitral Tribunal in the *Chagos Arbitration* found in its Award: "From the date of the cession by France until 8 November 1965, when the Chagos Archipelago was detached from the colony of Mauritius, the Archipelago was administered by the United Kingdom as a lesser dependency of Mauritius"[43]. In its Written Statement in the present proceedings, the United Kingdom briefly explained the nature of the British administration of the Chagos Archipelago as a lesser dependency from 1814 to 1965[44].

[43] *Chagos Arbitration* Award, para. 61 (**UN Dossier No. 409**).
[44] Written Statement of the United Kingdom, paras. 2.12-2.29.

But whatever the precise constitutional arrangements may have been from time to time, what matters is the reality of the connection between the Chagos Archipelago and Mauritius. It was loose and remote. The Archipelago was not treated as an integral part of Mauritius.

2.6. Before this Court, too, the United Kingdom and Mauritius are in agreement that the Chagos Archipelago, which lies approximately 1,150 nautical miles (2,150 kilometres) from the main island of Mauritius, was administered as a dependency of Mauritius[45]. Furthermore, it is not disputed that the distinction between Mauritius and its Dependencies was maintained up to and including the last Mauritius Constitution before the detachment of the Chagos Archipelago[46]. The two States differ, however, on the meaning and effects of this arrangement.

2.7. Mauritius continues to emphasise that the dependency was an "integral part of Mauritius"[47]. Mauritius also devotes several paragraphs to depicting the attitude of British officials to the relationship between Mauritius and the Archipelago. It asserts that the fact that the United Kingdom sought to have the consent of Mauritius' Ministers, and entered into an agreement with them to compensate Mauritius for the detachment demonstrates how integral the Archipelago was to Mauritius[48].

2.8. Of course, what logically follows from these statements, taken at face value, is that the United Kingdom did in fact seek the consent of Mauritius' legitimate representatives for detachment and, in return, offered substantial benefits and compensation. Indeed, on 5 November 1965 the Mauritius Council of Ministers agreed to detachment in return for certain undertakings by the United Kingdom Government (1965 Agreement).

2.9. An important factor in the background to the 1965 Agreement was the loose relationship between Mauritius and the Chagos Archipelago. As the United Kingdom explained in its Written Statement[49], in both French and British practice, the attachment of a remote and less developed island or territory to a nearby larger and more developed

[45] Written Statement of Mauritius, para. 2.15; Written Statement of the United Kingdom, para. 2.13.
[46] Mauritius (Constitution) Order 1964, 26 February 1964, Section 90 (**Annex 10**).
[47] Written Statement of Mauritius, paras. 1.32, 2.16-2.38.
[48] *Ibid*., paras. 2.34-2.38.
[49] *Ibid*., paras. 2.12-2.29.

overseas territory, which was capable of exercising effective authority over it, was an established constitutional administrative arrangement[50]. In the British context, dependencies could be, and often were, detached or attached as between one colony and another by exercise of the Royal Prerogative.

2.10. This is what occurred when Seychelles was detached from Mauritius to form a separate colony in 1903. The Seychelles, like the Chagos Archipelago, was a dependency and administered as part of the colony of Mauritius until its detachment. And this is what happened with the dependency of the Chagos Archipelago, which as a practical matter only had economic links to Mauritius as a minor supplier of coconut products.

2.11. The Chagos Islands were loosely administered - as a matter of convenience - as a dependency of Mauritius. The distance of the Archipelago from Mauritius explains why its inhabitants had limited contact with Mauritius nor were they represented in Legislative Assembly[51]. As can be seen from the Mauritius Written Statement itself, the only consistent and in any way significant economic ties with Mauritius was the import of copra from the Archipelago[52]. Officials from Mauritius only visited the Chagos Archipelago infrequently[53].

2.12. It also explains why the representatives of Mauritius were willing to agree to its detachment in exchange for certain benefits. As Sir Seewoosagur Ramgoolam himself later noted, the Chagos Archipelago "consisted of islands very remote from Mauritius and virtually unknown to most Mauritians", that these were "a portion of our territory of which very few people knew", and islands "very far from here, and which we had never visited, which we could never visit…"[54]. To claim that the Chagos Archipelago was an "integral" part of Mauritius is to ignore the reality that was recognized by the Prime Minister of Mauritius himself, explaining why he consented to detachment in exchange for benefits.

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[50] *Ibid*., para. 2.16.
[51] United Kingdom record of a conversation between the Prime Minister and the Premier of Mauritius at No.10 Downing Street, 10:00am, 23 September 1965, Written Statement of the United Kingdom, (**Annex 32**). Ramgoolam "affirmed that the inhabitants of Diego Garcia did not send elected representatives to the Mauritius Parliament".
[52] Written Statement of Mauritius, paras. 2.24-2.31.
[53] See for example, Written Statement of Mauritius, Annex 10.
[54] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 10 (**Annex 90**).

2.13. It is against this background that the Court must approach the events that took place in 1965, culminating in the consent of the Council of Ministers on 5 November 1965 to detachment in exchange for benefits. The distance – both geographically and figuratively – between Mauritius and the Chagos Archipelago further explains why the independent State of Mauritius reaffirmed this Agreement over the years.

B. Events leading to the 5 November 1965 Agreement by the Mauritius Council of Ministers to the detachment of the Chagos Archipelago in exchange for benefits

2.14. In its Written Statement, Mauritius continues to pursue the line that it first adopted in the 1980s, many years after the relevant events: it attempts to portray the detachment of the Chagos Archipelago as closely linked to the grant of independence – to the point of saying that the consent of Mauritius' elected Council of Ministers to detachment was a precondition to the grant of independence. In addition, as it first argued in the *Chagos Arbitration*, it claims that such a decision was adopted under 'duress'[55].

2.15. This portrayal of events is distorted . Mauritius seeks to defend its position by ignoring the dates of certain events; ignoring long stretches of time altogether; putting emphasis on less relevant meetings; artificially producing a narrative based on little evidence and overlooking inconvenient facts, some of them of fundamental importance, such as the benefits it received in exchange for its consent to detachment.

2.16. As the United Kingdom explained in its Written Statement, on 5 November 1965 the Mauritius Council of Ministers consented to the 1965 Agreement[56]. These matters were also discussed in detail in the *Chagos Arbitration* Award[57].

[55] Albeit without seeking to define 'duress' under international law.
[56] Written Statement of the United Kingdom, paras 3.7-3.32.
[57] *Chagos Arbitration* Award, paras. 69-80 (**UN Dossier No. 409**).

2.17. In summary,

a. The 1965 Agreement was preceded by a series of exchanges between British officials and Mauritian Ministers beginning in July 1965 and continuing in the margins of the Constitutional Conference in London in September 1965.

b. The Lancaster House meeting on 23 September 1965 and its follow-up, culminated in the agreed record of the meeting, which embodied an agreement 'in principle' of the Mauritian representatives to detachment in exchange for certain benefits.

c. This was followed by further exchanges, in Port Louis, between the Governor and the Council of Ministers in October leading to the Agreement on 5 November 1965 of the Ministers, after negotiating better terms for Mauritius.

d. Throughout this period, the Mauritian Ministers were well aware of the intentions of the United Kingdom to allow the United States to open a military base on Diego Garcia. The United Kingdom and the United States concluded this agreement on 30 December 1966 and it was deposited with the UN Secretariat and published in the UN Treaty Series thereafter.

e. Some two years later, in August 1967, the Mauritius electorate and the newly elected Legislative Assembly voted for independence, fully aware of the geographical implications of the 1965 Agreement.

2.18. Mauritius' attempt to show that the detachment was a *quid pro quo* - or "inseparable package deal"[58] - for independence does not withstand scrutiny for several reasons.

2.19. As in the *Chagos Arbitration*, Mauritius' position focuses largely on a meeting between Prime Minister Wilson and Premier Ramgoolam held at the time of the Constitutional Conference[59]. It relies on internal British documents recollecting what occurred in that

[58] Written Statement of Mauritius, para. 3.77.
[59] Written Statement of the United Kingdom, paras. 3.60-3.90, 6.99-6.104.

meeting and paints a picture where the United Kingdom was the one that initiated discussions over detachment at the margins of the Constitutional Conference, the talks on establishing a United States military base in the Archipelago was unknown to the Mauritius Ministers and presented as a 'fait accompli'.

2.20. All of these assertions are incorrect. First, contrary to Mauritius' claims[60], it was the representatives of Mauritius, and not the United Kingdom, who proposed that the issue of detachment be discussed in London during the Constitutional Conference. This was accepted, although British officials repeatedly expressed a preference to keep the matters of independence and negotiations over defence matters separate[61].

2.21. Second, Mauritius asserts that there was a 'secret plan' between the United Kingdom and the United States to reach an agreement on constructing military facilities[62]. Yet, the representatives of Mauritius knew, well ahead of time, about the intentions of the United Kingdom and the United States. Already in the initial discussions between the Governor and the Ministers in July 1965, the plan to place American military facilities on the islands was clear. Indeed, Mauritius' leaders made demands for compensation from the United States in their meeting with Governor Rennie on 30 July 1965[63].

2.22. During the Constitutional Conference of September 1965, the discussions regarding detachment and its ramifications were based on the premise that, once agreed, the United States would build military facilities in the Archipelago[64]. Had it been otherwise, there would have been no exchanges with respect to a 99-year lease to the United States or increased compensation for detachment.

[60] Written Statement of Mauritius, para. 3.38.
[61] Written Statement of the United Kingdom, para. 3.12 and **Annexes 26 and 27**.
[62] Written Statement of Mauritius, Chapter 3, Section III.
[63] Written Statement of the United Kingdom, **Annex 26**.
[64] For example, Written Statement of the United Kingdom, Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**).

2.23. In addition, the issue of detachment was widely known to the public in Mauritius at the relevant time. Before the conference:

> Potential plans for using the Chagos Archipelago had been openly discussed in the Mauritian press before the constitutional delegates left for London[65].

2.24. After agreement was reached and prior to the 1967 general election leading to independence, the details concerning detachment – mainly the compensation received for it – was put before the Mauritian public. In fact, and as will be explained below, the *Parti Mauricien Social Démocrate* (PMSD) openly raised their disagreement with the terms of detachment, albeit exclusively on the basis of the amount of compensation[66]. Thus, there was nothing secret about it. It was public knowledge from at least September 1965, prior to the Constitutional Conference. And finally, it is undisputed that the agreement between the United Kingdom and the United States was signed on 30 December 1966[67], more than a year after the Council of Ministers had consented to detachment and its benefits, so there was no fait accompli as argued by Mauritius.

2.25. Central to Mauritius' position is the meeting between Prime Minister Wilson and Premier Ramgoolam on 23 September 1965. Mauritius focuses on a short internal minute prepared for the Prime Minister ahead of the meeting[68], and also on one small part of the United Kingdom's record of the meeting[69], and it contends that

> Premier Ramgoolam understood Prime Minister Wilson's words to be in the nature of a threat. He understood that if he and his colleagues did not "agree" to the detachment of the Chagos Archipelago, Mauritius would not be granted independence[70].

2.26. Mauritius, however, does not support this assertion with any contemporaneous evidence. It tries to build a case around what occurred in a private meeting a long time ago, to which no witnesses can testify, without producing any support for its

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[65] Kevin Shillington, *Jugnauth: Prime Minister of Mauritius*, (Hong Kong: Macmillan 1991), p. 64 (hereafter *Shillington*) (**Annex 91**).
[66] Adele Smith Simmons, *Modern Mauritius: The politics of de-colonisation*, (Bloomington: Indiana University Press 1982), p. 173(hereinafter: Simmons) (**Annex 92**); *The Times*, Sunday 12 November 1965 (**Annex 93**).
[67] Written Statement of the United Kingdom, **Annex 49**.
[68] Written Statement of Mauritius, para. 3.69.
[69] *Ibid*., para. 3.72.
[70] *Ibid*., para. 3.73.

interpretation of the events from those that actually attended the meeting. It resorts to cherry picking statements made well after the fact, ignoring or misrepresenting statements made by Ramgoolam himself, that confirmed the consent given by him and his colleagues to detachment, initially during the Constitutional Conference and thereafter in Port Louis in the Council of Ministers.

2.27. Mauritius may try to interpret the summary record of the meeting as it sees fit.However, that cannot alter the simple fact that the minutes of the meeting do not record any threat made, as will be explained below.

2.28. This meeting, as well as other events referred to in these proceedings, must be looked at in their chronological order. If the events are looked at in their full context and sequencing, and if the evidence is looked at objectively, one reaches an entirely different conclusion.

2.29. Thus, going back to July 1965, when the idea of detachment was first raised with Mauritius, despite an initial negative reaction, Mauritian Ministers rather quickly warmed to the idea of detachment in exchange for certain benefits to the future State. Only a week after the matter was first presented to them, Governor Rennie reported back that:

> The Premier speaking for the Ministers as a whole, said that they were sympathetically disposed to the request and prepared to play their part in the defence of the Commonwealth and the free world[71].

2.30. At the Constitutional Conference, what followed was a negotiation where Mauritius was seeking the most favourable return for Mauritius in exchange for detachment. The United Kingdom has set out the pertinent facts in its Written Statement[72].

2.31. At the end of the meeting between the Colonial Secretary and the Mauritian Ministers on 20 September 1965, it was understood that there was no objection to detachment in principle. The sides continued to negotiate the terms, and an agreement, in principle,

[71] Written Statement of the United Kingdom, **Annex 26**.
[72] *Ibid.*, paras. 3.7-3.32.

was reached and put in writing as paragraph 22 of the final record of the meeting with the Ministers on 23 September 1965. The Mauritian Ministers provisionally agreed to detachment on the understanding that the Secretary of State would recommend the following in return:

> (i) negotiations for a defence agreement between Britain and Mauritius;
> (ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;
> (iii) compensation totalling up to £3m. should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
> (iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;
> (v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;
> (vi) the British Government would use their good offices with the U.S Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:
> (a) Navigational and Meteorological facilities;
> (b) Fishing Rights;
> (c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers.
> (vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.
> (viii) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government[73].

2.32. While still in London, Premier Ramgoolam consulted his colleagues and a few days later proposed additional conditions to the Agreement. These were agreed by the British side, and became paragraphs 22(vi) and 22(viii) in the final record of the 23 September meeting[74]. Thus, the consideration received by Mauritius in exchange for detachment was negotiated by the Ministers and agreed, in principle, by them, pending the consent from the Council of Ministers, discussed below.

[73] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**). The list includes points that were added to the record in the days following the meeting, at the request of the Premier.
[74] Written Statement of the United Kingdom, para. 3.29; Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965 (**Annex 33**).

2.33. As for the meeting between the United Kingdom Prime Minister and the Mauritian Premier, more extensive extracts from the record were included in the United Kingdom's Written Statement[75]. They record that Ramgoolam was positively inclined to reaching an agreement on detachment:

> Sir Seewoosagur reaffirmed that he and his colleagues were very ready to play their part [referring to detachment][76].

Like his fellow Ministers, he was of the view that the benefits offered and terms negotiated with the United Kingdom in exchange for the Chagos Archipelago were more valuable to Mauritius than the very remote islands.

2.34. The reality is that there is nothing in the meeting, or its summary minutes, that says that a threat was made. Nowhere is it said that Wilson threatened to withhold independence from Mauritius. Wilson expressed the obvious fact that the United Kingdom was interested in an agreement on detachment with the Premier and his colleagues. At the same time, Wilson also recognised that Ramgoolam was interested in the United Kingdom's public commitment at the conference to independence, while some of his fellow ministers were pushing for the United Kingdom's support for a close association with the United Kingdom (both legitimate forms of exercising the self-determination of the Mauritian people). Wilson noted that both leaders can come out of this conference triumphant; never was it said that independence would be withheld.

2.35. Despite the very serious allegation of duress made in Mauritius' Written Statement, the record does not indicate that any threat was in fact made, and there is a notable absence of any evidence produced by Mauritius to support its allegation. As was said in the note prepared for the Prime Minister by the Colonial Secretary, the United Kingdom was to avoid making any direct link between independence and the detachment of the Chagos Archipelago[77].

[75] Written Statement of the United Kingdom, para. 3.24.
[76] *Ibid*.
[77] Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius (22 Sept. 1965) (**Annex 31**).

2.36. Mauritius goes on to assert that as Prime Minister, Ramgoolam

> who served until June 1982, repeatedly explained that he and his fellow Mauritian Ministers had been given no choice by the administering power: they were told that independence would be granted only upon Mauritius' "acceptance" of detachment of the Chagos Archipelago, and that absent such "acceptance" there would be no independence. Prime Minister Ramgoolam also pledged that Mauritius would seek the return of the Chagos Archipelago from the U.K.[78].

2.37. But it is important to note that the references on which Mauritius relies to support this passage do not, in any way, support the assertion that a threat was made to Ramgoolam, conditioning independence on detachment[79]. For example, it refers to a statement made by Ramgoolam in the Mauritius Legislative Assembly on 26 June 1974 in a response given in a parliamentary debate over the Appropriation (1974-75) Bill. Here is what Ramgoolam actually said:

> The Government of Mauritius was nevertheless informed, after we had discussed in England, that this had taken place, *and we gave our consent to it. It was done like this, but the day it is not required it will revert to Mauritius.* But, Mauritius has reserved its mineral rights, fishing rights and landing rights, and certain other things that go to complete, in other words, some of the sovereignty which obtained before on that island. *That is the position.* Even if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper. This, in principle, was agreed even by the P.M.S.D. who was in the Opposition at the time; and we had consultations, *and this was done in the interest of the Commonwealth, not of Mauritius only. This is all I can say about Diego*[80].

2.38. Ramgoolam's statement, that the Mauritius ministers consented to detachment after weighing the interests of the future State, does not reconcile with the argument that he acted under 'duress'.

[78] Written Statement of Mauritius, para. 4.4.
[79] *Ibid*., fn. 393-394.
[80] Written Statement of Mauritius, Annex 102 (emphasis added).

2.39. Similarly, Mauritius refers to a statement made by Hon. G. Ollivry on 9 April 1974, where he names Ramgoolam for agreeing to sell the islands and being responsible for the establishment of a base on Diego Garcia:

> La politique de détente du Gouvernement ! Il aurait fallu y avoir songé en 1965 quand on a, pour des raisons de stratégic et de tactique électorales, donné Diégo Garcia pour Rs. 40m…parce que le Gouvernement sait que c'est le Premier ministre lui-même qui a été complice de la vente de Diégo Garcia[81].

2.40. The assertion that Ramgoolam, in power until 1982, vowed to retrieve the islands is also misleading. What he did in fact say is that it was his policy to negotiate with the United Kingdom on the timing of the return of the islands when they were no longer needed for defence purposes, as set out in the 1965 Agreement. On 20 November 1979, in response to a question put forward in the Legislative Assembly on when the islands will be returned, Ramgoolam stated clearly:

> The islands will be returned to Mauritius if the need for the facilities there disappeared. How soon this will be done, I cannot say…[82]

Here, in 1979, Ramgoolam cannot have been clearer on the legal position of Mauritius vis-à-vis the United Kingdom, based on the 1965 Agreement he and his colleagues consented to.

2.41. Furthermore, a very basic point that undermines Mauritius' narrative is that consent to the 1965 Agreement was given on 5 November 1965, six weeks after the meeting between Wilson and Ramgoolam. Whatever transpired in that meeting cannot amount to duress. Consent was given weeks later, not in London but in Port Louis, by a decision of Ministers who were not present in the bilateral meeting. This will be further explained in **Section D** below.

2.42. Mauritius further seeks to rely on references to the meeting made long after the event in internal documents by British officials who were not present, to the effect that independence was conditioned on detachment[83]. It even claims that, according to the

[81] *Ibid*., Annex 101.
[82] *Ibid*., Annex 116.
[83] Written Statement of Mauritius, paras. 3.74-3.80.

records, the fact that Prime Minister Wilson was present on one occasion but, according to the record, did not correct the speaker, is probative[84].

2.43. What these documents really show is not threats, but a very complex political situation reflecting the differing political goals among the Mauritian Ministers. There was disagreement between the Mauritius Labour Party (MLP) and its allies and the PMSD, on whether to push for association with the United Kingdom or independence.

2.44. For example, Mauritius quotes the following from a British colonial official, Mr Fairclough, during the 23-24 September 1965 talks between the United Kingdom and the United States:

> 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[85].

2.45. First, note that Fairclough states that the United Kingdom was trying to separate, rather than connect, the issues of independence and detachment. He goes on to say that the various political parties representing Mauritius were the ones that thought to connect the issues[86]. He continues:

> Both pro and anti independence parties regarded the defence project as a bargaining counter which they might use either to achieve or to avoid complete independence. No party leader wanted to settle the defence project before the independence issue was settled. All Mauritius Ministers had given a positive response to the defence project in that they agreed with us that it was in the interests of Mauritius. Discussion had turned on their demand for favourable trading arrangements…[87]

[84] *Ibid*., para. 3.74.
[85] *Ibid*., para. 3.79, quoting Annex 62.
[86] *Ibid*.
[87] *Ibid*.

2.46. Thus, what Fairclough was actually saying is that

a. All of the Mauritius ministers felt that detachment – for the right price – was more favourable to Mauritius' interests than keeping the Chagos Archipelago; and

b. As will be explained **Section D**, to the extent that detachment played a role in the Constitutional Conference, it was not as a condition for independence, but rather brought into the conversation by Mauritian Ministers, aiming to achieve their own political ambitions.

2.47. In any event, the words of a couple of officials, who were not present at the meeting, can hardly be evidence as to what actually transpired. To take but one example, the note in 1983 by Margaret Walawalkar, of the Foreign Office Research Department, where she says Premier Ramgoolam, "I imagine… could" have interpreted Wilson's comments as a threat. Mauritius chose to underline the word 'could' for emphasis[88]. With respect, if anything this shows that all that Mauritius can put forward is second-hand speculation. It should also be noted that minutes from such meetings are summary and do not necessarily give an accurate picture of what had taken place, as noted by Walawalkar herself in her note[89].

2.48. The fact that Mauritius relies on such flimsy 'evidence' in an effort to establish what it claims Mauritius has always argued is telling. Most likely, this is because there is no contemporaneous evidence to show that Premier Ramgoolam, his fellow Ministers, or anyone else in Mauritius understood that independence was given on condition or under threat, or that the consent given was not genuine.

2.49. In this context, Mauritius continues to rely entirely on British internal documents from the 1960s. Mauritius' own documents from the relevant period are not produced. The omission of such documents (which according to Ramgoolam exist or existed in the Mauritius archives[90], and presumably still do) from the record is very notable. One can

[88] *Ibid*., para. 3.76.
[89] Written Statement of Mauritius, para. 3.76.
[90] *Ibid.*, Annex 124.

only assume that its own contemporaneous documents do not support the narrative Mauritius is putting before the Court. Indeed, Mauritius' position is an after-the-fact construction based on guesses and assumptions.

2.50. The evidence on record from later discussions in Mauritius contradicts the argument now put forward by Mauritius years later, that its leaders acted under duress.

2.51. For example, Ramgoolam's statement on 26 June 1974, as noted above, reaffirmed his consent to detachment[91].

2.52. Sir Harold Walter, in a statement of 26 June 1980 on the reading of the Interpretation and General Clauses (Amendment) Bill (No XIX of 1980) at the Committee Stage said "Now, it was by consent that it was excised"[92]. In response to a question from the Chairman, Sir Harold also said that the BIOT "forms part of Great Britain and its overseas territories, just as France has les Dom Tom; it is part of British territory and there is no getting away from it [...]"[93].

2.53. Another illuminating exchange is from 25 November 1980, with the Prime Minister:

> Mr Boodhoo: Was the excision of these islands a precondition for the independence of this country?
> Prime Minister: Not exactly.
> Mr Bérenger: Since the Prime Minister says to-day that his agreement was not necessary for the "excision" to take place, can I ask the Prime Minister why then did he give his agreement which was reported both in Great Britain and in this then – Legislative Council in Mauritius?
> Prime Minister*: It was a matter that was negotiated, we got some advantage out of this and we agreed*[94].

2.54. Here, Prime Minister Ramgoolam, asked directly whether he was forced to give the Archipelago away in exchange for independence, maintains without any reservations, *that the 1965 Agreement was negotiated and agreed* by him and his fellow Ministers.

[91] Written Statement of Mauritius, Annex 102.
[92] Debate in Mauritius Legislative Assembly (extracts), 26 June 1980, at col. 3414 (**Annex 46**).
[93] *Ibid*., col. 3415.
[94] Written Statement of the United Kingdom, **Annex 48**.

2.55. Furthermore, it is telling that in his memoirs, published in 1982, Ramgoolam described his "triumphant" victory in the Constitutional Conference, and says nothing whatsoever about coercion, duress or blackmail[95]. He speaks only of the complete success Mauritius had achieved at the 1965 Constitutional Conference. Had he been under duress, one would assume that he would not have excluded such an important fact from his autobiography at a time when the former opposition was in power.

2.56. Mauritius also relies on the 1983 Report of the Mauritius Legislative Assembly Select Committee, set up to look into the circumstances that had led to the detachment of the Chagos Archipelago[96]. It refers to the conclusion of the Committee that 'blackmail' occurred and the words of, among others, Sir Ramgoolam, that he had to make a choice between the 'remote islands' and independence[97].

2.57. It should be kept in mind that the passages cited by Mauritius from evidence given to the Select Committee were the expressions of politicians nearly two decades after the Constitutional Conference, in the context of a highly political inquiry with a pre-determined conclusion. They carry little, if any, weight. So political and far from objective was the inquiry that Mauritius openly asserts that its whole purpose was acting "in furtherance" of a policy already decided[98].

2.58. In any event, the evidence from the Select Committee's report supports the view that the Agreement was not coerced. The report contains several telling observations by politicians either directly involved in the discussions over detachment of the Chagos, or indirectly involved as contemporaries of party political colleagues who attended the discussions. Sir Ramgoolam, the Select Committee acknowledges, "refused to describe the deal as a blackmail"[99], a fact the Committee chose to set aside. Instead he told the Committee that one of the reasons "he accepted the excision" was "he could not then assess the strategic importance of the archipelago which consisted of islands very remote from Mauritius and virtually unknown to most"[100].

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[95] Seewoosagur Ramgoolam, *Our Struggle* (1982), p. 109 (**Annex 94**).
[96] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 10 (**Annex 90**).
[97] Written Statement of Mauritius, paras. 4.12-4.14.
[98] *Ibid*., paras. 4.09-4.10.
[99] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 36 (**Annex 90**).
[100] *Ibid*., p. 10.

2.59. Mr Paturau, an independent member of the Council of Ministers who also attended the discussion at Lancaster House on 23 September 1965 said he "expressed dissent as he thought the compensation was inadequate, but the other delegates agreed"[101].

2.60. Sir Harold Walter, also of the MLP, "further stressed that no Mauritian delegate present at Lancaster House had expressed any dissent on the principle of excision"[102].

2.61. Sir Veerasamy Ringadoo, also of the MLP,

> confirmed that, at no time, was the question of the excision of the Chagos Archipelago brought on the table of the Mauritius Constitutional Conference of September 1965.... He did not object to the principle of excision as he felt that, being given the defence agreement entered into with Great Britain... - a decision which had the unanimous support of all political parties present at Lancaster House, most particularly in view of the social situation which had deteriorated in Mauritius – the United Kingdom should be given the means to honour such an agreement. It was in this context that he viewed the excision of the islands which were to be used as a communications station[103].

2.62. The Select Committee itself said that "[i]t would be wrong, however, to pretend that the excision of the Chagos Archipelago was a unilateral exercise on the part of Great Britain"[104] and concluded that

> the Select Committee is not prepared to put on the sole shoulders of the latter [Sir Seewoosagur Ramgoolam] the blame for acceding unreservedly to the United Kingdom's request. Evidence is not lacking to show that, indeed, the Premier shared with, at least, some independent participants, including Mr Paturau, D.F.C., the United Kingdom's offer of excision and the interests of the United States of America"[105].

The Select Committee recorded that the agreement of the Council of Ministers to the detachment of the Chagos Archipelago was obtained at the sitting of the Council of Ministers on 5 November 1965[106] and, later in its conclusions to the Report,

[101] *Ibid*., p. 16.
[102] *Ibid*., p. 12.
[103] *Ibid*., p. 11.
[104] *Ibid*., p. 4, para. 12.
[105] *Ibid*., p. 23, para. 37.
[106] *Ibid*., p. 26, para. 44.

"denounce[d] the then Council of Ministers which did not hesitate to agree to detachment of the islands[107].

C. Premier Ramgoolam's wish to avoid a referendum as demanded by the PMSD

2.63. The Report of the Select Committee brushes aside testimony as to what was truly at stake for Premier Ramgoolam and his colleagues at the Constitutional Conference. Sir Gaëtan Duval, of the PMSD, which was in favour of close association with the United Kingdom rather than independence,

> argued that the choice was between the excision *and a referendum* on independence. This contradiction is substantially immaterial to the Committee"[108].

2.64. It is perhaps unsurprising that this highly political Committee decided to knowingly ignore important facts, as they reveal a picture of mutual understanding and consent by Mauritius' Ministers to detachment in exchange for certain benefits.

2.65. The fact of the matter is that Premier Ramgoolam and his party were indeed seeking independence. Although the United Kingdom had already showed it was supportive of independence[109], the same was not true for all Mauritians. The PMSD, in particular, was opposed to independence:

> The Mauritius labour party and the Independent Forward Bloc advocated full independence for Mauritius, whilst the Muslim Committee of Action was also prepared to support independence, subject to electoral safeguards for the Muslim community. The Parti Mauriciene had wished to continue "Free Association with Britain" and called for a referendum to decide the matter[110].

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[107] *Ibid*., p. 35.
[108] *Ibid*., para. 52E (emphasis added).
[109] *Shillington*, p. 61 (**Annex 91**).
[110] A. Ramaoutar Mannick, *Mauritius: The development of a Plural Society*, (Nottingham: Spokesman 1979) (extract), p. 123. (**Annex 95**)

2.66. As acknowledged by Mauritius, the MLP platform was that of independence. While the MLP and its partners won 29 out of 40 seats in the Legislative Assembly in the 1959 elections, its majority and influence was waning, with only 23 seats in the 1963 elections[111].

2.67. As the United Kingdom said in its Written Statement[112], the record of the meeting between the United Kingdom's Prime Minister and the Premier of Mauritius on 23 September 1965 shows that the latter sought support for independence from the British Government to strengthen his political position against the PMSD, which did not want independence. He also sought to extract as much value as possible from the agreement on detachment, such as mineral, fishing and agricultural rights, meteorological, air and navigational facilities, provision for defence, and British help in obtaining sugar and other trade concessions from the United States (as had already been indicated to the Governor in July and at the meeting on 20 September 1965)[113]. The United Kingdom Prime Minister, for his part, wished to secure the agreement of the Council of Ministers to detachment, even though, as a matter of law, it was considered that detachment could be effected without agreement.

2.68. With a very thin majority, Premier Ramgoolam feared that if a referendum on independence vs. association with the United Kingdom were held, the public would opt for association[114].

2.69. Thus, what was at stake was whether the United Kingdom would agree on Mauritius' independence with its representatives during the Constitutional Conference, or decide to hold a referendum on the matter, both legitimate options. Premier Ramgoolam and his colleagues, who had already expressed their positive attitude towards an agreement on detachment in exchange for benefits, as early as July 1965, had it in their minds that if they pressed too hard on what those benefits were to be, they would push the United Kingdom towards the position of the PMSD[115].

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[111] Written Statement of Mauritius, paras 3.9-3.12.
[112] *Ibid*., para. 3.23.
[113] Written Statement of the United Kingdom, para. 3.11-3.23; Annex 26; Annex 29.
[114] Jean Houbert, "Mauritius: Independence and Dependence", *Journal of Modern African Studies*, Vol. 19.1 (1981), pp. 75-105, p. 84 (hereafter: Houbert) (**Annex 96**).
[115] *Ibid*.

2.70. Thus, if the agreement on detachment in exchange for benefits played a role in the Constitutional Conference, it was in a particular context. The United Kingdom was interested in detachment, with the consent of Mauritius (which Mauritius itself does not deny in these proceedings), and this was well known to the Mauritian political factions. They were internally divided on whether to hold a referendum on the preferred form of self-governance or agree at the Conference on independence. At the same time, all of the Ministers were inclined to agree to detachment because they felt that the benefits Mauritius was to receive from the agreement, and their willingness to play a role in the defence of the Commonwealth, were of more value than the remote islands. Each side was looking to secure a public British commitment to its own position against the position of the other. Against this backdrop, an agreement 'in principle' was reached with the consent of Ramgoolam and his colleagues, who - after negotiating the most favourable benefits in return - concluded that the price for the Chagos Archipelago was satisfactory.

D. The aftermath of the Constitutional Conference - the 5 November 1965 agreement by the Mauritius Council of Ministers

2.71. Events in Mauritius in the aftermath of the Conference, leading up to the consent given by the Council of Ministers to what was agreed in principle in London, confirms that consent was given freely. The agreement reached on detachment in exchange for benefits was known to the public in the lead up to the 1967 general election. The PMSD attempted to make a political issue of detachment – not by challenging it as such – but rather by asserting that the benefits received in exchange were insufficient.

2.72. A fundamental flaw in the position taken by Mauritius in these advisory proceedings is that it ignores the chronology of events. One key fact that Mauritius fails to address is the following: the United Kingdom position on independence was announced many weeks before Mauritius' Council of Ministers debated the issue of detachment of the Chagos Archipelago and agreed to it.

2.73. On *24 September 1965*, at the end of the Constitutional Conference, the British Government publicly announced its *decision and commitment* to move towards Mauritius' independence:

> The Secretary of State accordingly announced at a Plenary meeting of the Conference on Friday, 24th September, his view that it was right that Mauritius should be independent and take her place among the sovereign nations of the world. When the electoral Commission had reported, a date would be fixed for a general election under the new system, and a new Government would be formed. In consultation with this Government, Her Majesty's Government would be prepared to fix a date and take the necessary steps to declare Mauritius independent, after a period of six months full internal self-government if a resolution asking for this was passed by a simple majority of the new Assembly[116].

2.74. On *6 October 1965*, the Colonial Office wrote to the Governor, sending the finalised record of the 23 September meeting, with an emphasis on the terms of the agreement reached and affirmation that both Ramgoolam and Minister Mohamed had confirmed the accuracy of the meeting record. The Governor was asked to seek confirmation that the Mauritius Government was willing to agree to the detachment of the Chagos Archipelago on the conditions set out in the final record of the discussion at Lancaster House[117].

2.75. After considering the matter during the intervening month, the Council of Ministers confirmed their agreement to detachment on *5 November 1965*, subject to certain further understandings recorded in the Minutes of Proceedings of the Meeting[118] and in a telegram from the Governor to the Secretary of State of the same date[119]. Despite the efforts of Mauritius in its Written Statement to portray the Council of Ministers as a mouthpiece for the British Government[120], this decision was that of the elected representatives of the people of Mauritius – a fact the Select Committee acknowledged (and criticised the Ministers for)[121]. While Mauritius accepts that the Ministers were authorised to negotiate and agree on independence on behalf of the people, it seeks to argue that they were somehow unqualified to agree on detachment, on behalf of the same people.

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[116] Command Paper, Mauritius Constitutional Conference 1965, para. 20 (**Annex 22**).
[117] Colonial Office Telegram, No. 423 to the Governor of Mauritius, 6 October 1965 (**Annex 35**).
[118] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 36 (**Annex 90)**.
[119] United Kingdom Telegram No. 247 to the Colonial Office, 5 November 1965 (**Annex 37**).
[120] Written Statement of Mauritius, para. 3.13.
[121] See para. 2.61 above.

2.76. Thus, the United Kingdom's policy in support of Mauritius' independence had been announced on 24 September 1965, the last day of the Constitutional Conference, well before the agreement to detachment by the Council of Ministers on 5 November 1965. If the Council of Ministers had refused on 5 November 1965 to agree to detachment on the terms negotiated by the party leaders in September in London, the move towards independence would not have been de-railed.

E. The 1967 General Election and the Legislative Assembly's vote for independence

2.77. As explained in the United Kingdom's Written Statement, and above,

> Detachment was a matter of public record. It was effected by law, duly published, announced in the UK Parliament, announced at the United Nations, raised in the Mauritius Legislative Assembly, and controversy over the level of compensation led one political party to leave the coalition. As Mauritius moved towards independence in 1968, it was thus public knowledge that detachment had taken place and that the Chagos Archipelago would not be part of the territory of the independent Mauritius[122].

2.78. Notwithstanding his consent on detachment, Premier Ramgoolam came back to Mauritius as a hero. As he recollects in his memoirs:

> upon my return from the triumphant constitutional conference I was once again received warmly at the airport and cheered all along the way to Port Louis by thousands of enthusiastic people[123].

There is no evidence that detachment was of concern to the public at all.

2.79. The PMSD, on the other hand, was disappointed with the decision not to hold a referendum. Ramgoolam recalls in his memoirs that

> [a]s a result of our victory at the conference the PMSD left the Coalition government and started to mobilise all its resources to defeat us in the ensuing election[124].

[122] Written Statement of the United Kingdom, paras. 3.36-3.37.
[123] Seewoosagur Ramgoolam, *Our Struggle*, 1982, p. 109 (**Annex 94**).
[124] *Ibid*.

2.80. Indeed, in 1982/3 the Legislative Assembly Select Committee also found the PMSD to be at fault for the fact that it did not object to detachment, but rather just the amount of compensation[125].

2.81. The PMSD wanted more compensation, not to challenge the detachment:

> A few days later the agreement to excise the Chagos Archipelago from Mauritius was made public and the PMSD took the opportunity to withdraw its three ministers from the Coalition cabinet *on the grounds that the £3 million compensation offered to the Mauritian Government for the excision of the Chagos was too little*. In reality, the PMSD realised it was time to respond to the 'independence Party' challenge. This Duval did when he launched the PMSD's campaign against independence at a huge rally on 5 December[126].

Minister Gaetan Duval from the PMSD was quoted as saying

> We will not accept an Anglo-American base if America and Britain are not ready to buy all our sugar at a preferential price and accept Mauritian immigrants[127].

2.82. Throughout their campaign before the 1967 election, the PMSD continued to push the issue of being underpaid for detachment:

> …on December 5 [1965] the Parti Mauricien organized the largest popular meeting it had ever had. …because the islands in question were worth more than £3 million… Diego Garcia was only an excuse for the meeting, which Duval hoped would bring new people into the Parti Mauricien to support his ultimate goal, preventing independence under labour… No one questioned the contradiction between the accusations Duval was making against the British and the fact that the Parti alternative to independence was association with Britain…[128]

2.83. The same picture emerged in discussions in Parliament:

> *Le chef-adjoint de l'opposition demande des debates. M. Gaetan Duval, chef-adjoint de l'Opposition demande au* Premier: Whether he will give an opportunity to the House to discuss the detachment of the Chagos Archipelago

[125] Report of the Select Committee, p. 33-34 (**Annex 90**).
[126] *Shillington*, p. 65 (emphasis added) (**Annex 91**); *The Times*, Sunday 12 November 1965 (**Annex 93).**
[127] *The Times*, Monday 8 November 1965 (**Annex 97**).
[128] Simmons, p.174 (**Annex 92**).

> from Mauritius, and its inclusion in the British Indian Ocean Territory, especially in view of the stand taken by India and other Afro Asian countries.
>
> Le Minstre Forget: No, Sir, As I understand from the public statement made by the leader of the Opposition on November 12th that there is no disagreement between the opposition and the government on the principle of the detachment and use for defence facilities of the Chagos Archipeligo[129].

2.84. Detachment was not challenged during the general election of August 1967 or in the subsequent debate and vote for independence in the newly elected Legislative Assembly. The public were aware of detachment, the benefits received in exchange being much debated. Yet, there is no evidence that detachment was in issue at the pre-independence election; this was the very time when one would have most expected the public to signal their disapproval of the 1965 Agreement .

2.85. The above, as well as the United Kingdom's Written Statement[130], shows that the agreement on detachment in exchange for benefits was a well-known political topic, covered by the media and in the public eye. The majority of the representatives of Mauritius, and later on the general public, expressed no objection to it in principle. The fact that neither the United Kingdom nor Mauritius can find evidence that even one political party challenged detachment during the general election, shows that despite being well aware of the 1965 Agreement, detachment was uncontroversial. The elections and the subsequent Parliamentary debates on independence positively affirm, therefore, that the representatives of Mauritius accepted detachment and that the people of Mauritius accepted it. Meanwhile, the PMSD, which tried to undermine Ramgoolam's achievements at the Constitutional Conference, sought to use the agreement on detachment to its benefit, but the only challenge was as to the adequacy of compensation given in exchange for the Archipelago, not detachment itself.

F. Reaffirmation of the Agreement by Mauritius post-independence

2.86. Mauritius takes the position that its current stance and claim for sovereignty over the Chagos Archipelago has been consistent from 1965 until this day, referring to carefully

[129] *Le Mauricien*, 15 December 1965, p. 4 (**Annex 98**)
[130] See paras. 3.33-3.36.

selected statements made in international forums by its representatives, almost exclusively from 1980s onwards[131].

2.87. In its Written Statement, the United Kingdom showed conclusively that not only did Mauritius not contest the validity of the agreement on detachment in exchange for benefits, it had, in fact, reaffirmed it with its positive actions and statements for a significant period of time[132]. This same conclusion was reached by the *Chagos Arbitration* Tribunal in its Award: that there now exists an international agreement between the United Kingdom and Mauritius on detachment in exchange for benefits[133].

2.88. As was shown in the United Kingdom's Written Statement, the Chagos Archipelago was not part of the colony of Mauritius immediately prior to independence on 12 March 1968 and the Independence Constitution did not include the Archipelago within the territory of Mauritius[134]. Mauritius did not consider the Chagos Archipelago part of its territory, thus affirming, now as a sovereign State, its acceptance of the 1965 Agreement[135]. This was further confirmed in the bilateral exchanges between Mauritius and the United Kingdom on a number of occasions[136]. It was further reinforced in public statements made by Mauritian officials, including the Head of State[137]. In particular:

a. The materials put forward by Mauritius in its Written Statement strengthen the United Kingdom's position. For example, Mauritius refers to its "more than 30" statements in the General Assembly[138]. Yet all of the statements in its Annex 100 are from 1980 and later, with a single exception. The one pre-1980 statement is from 1974[139]. This statement is most telling. It does not discuss or refer to sovereignty in any way. It expresses concern over the extension of military facilities by the United Kingdom and the United States on Diego Garcia, calling for action conducive of peace in the Indian Ocean, rather than

[131] Written Statement of Mauritius, paras. 4.16-4.22.
[132] Written Statement of the United Kingdom, paras. 3.38-3.50.
[133] *Chagos Arbitration* Award, paras. paras. 4.24-4.28 (**UN Dossier No. 409**).
[134] Written Statement of the United Kingdom, paras. 3.38-3.40.
[135] *Ibid.*, paras. 3.38-3.40.
[136] *Ibid.*, paras. 3.41-3.45.
[137] *Ibid.*, paras. 4.46-3.49.
[138] Written Statement of Mauritius, para. 4.15, Annex 100.
[139] *Ibid.*, Statement by Sir Abdul Razack Mohamed at the 29th Session of the United Nations General Assembly (27 September, 1974).

tension. The absence of any reference to Mauritius' sovereignty over the islands is notable, consistent with other Mauritian and British statements and actions to the effect that the 1965 Agreement was one of mutual agreement, and inconsistent with the case as now presented by Mauritius.

b. The absence of concern about sovereignty is also evident in a speech Ramgoolam gave the same year, 1974, published in a collection of his speeches, to mark Mauritius' sixth anniversary of independence[140]. Ramgoolam there expressed concerns about "rumours of a naval base at Diego Garcia, which Mauritius gave up prior to its Independence…We want the Indian Ocean to be a zone of peace"[141]. There is no claim to Mauritian sovereignty over the Archipelago. He says that Mauritius "gave up" the Chagos Archipelago, with no hint of the duress that Mauritius now claims in these proceedings.

c. In another speech on the occasion of the visit of the British Defence Minister in 1975, Prime Minister Ramgoolam referred to the withdrawal of HMS Mauritius and associated services from Mauritius, to which Mauritius was opposed. Prime Minister Ramgoolam said the following:

> …the withdrawal [of HMS Mauritius] does not mean the end of the interest that Great Britain takes in Mauritius, Today I think this part of the Diego Garcia arrangement is very important strategically and I assure you will weigh all the facts before you completely abandon this part of the world. In fact you are not abandoning it completely; we are only readjusting our common policies and ascertaining with the help of friends a new way of life[142].

Here again, he reaffirms that Mauritius has agreed with the United Kingdom on the detachment of the Chagos Archipelago, and he speaks positively about the continued presence of the United Kingdom in the Indian Ocean.

[140] Sir Seewoosagur Ramgoolam, *Selected Speeches* (1979) (extract) (**Annex 99**).
[141] *Ibid*., p. 134.
[142] *Ibid*., p. 171.

2.89. In its Written Statement, Mauritius also chose to ignore another elementary fact: that Mauritius accepted the benefits under the 1965 Agreement such as the lump sums it received thereunder. Documents attesting to the transfer of benefits under the agreement and the accompanying changes were included in the United Kingdom Written Statement[143].

2.90. In fact, Mauritius had reaffirmed its agreement on detachment in exchange for benefits from independence until the 1980s and reaped its benefits. It was only then that the 1965 Agreement became a heated internal political issue, as is clear from the work of the Select Committee. For example, in 1980, it was reported that

> During 1980… An opposition amendment in the Legislative Assembly to include the islands was rejected, the Minister of Foreign Affairs arguing that "Diego is legally British. There is no getting away from it. This is a fact that cannot be denied. No amount of red ink can make it become blue. In any case, I am not in a hurry to see the Americans go"[144].

2.91. As noted in the United Kingdom Written Statement, in June 1980 an attempt was made to revise the Mauritius Constitution to include the Chagos Archipelago within its territory[145]. After this attempt failed, the opposition framed this failure as a mistake[146]. The next day, the Prime Minister stated the following:

> Last night, a request was made in the Assembly that we should include Diego Garcia as a territory of the State of Mauritius. If we had done that we would have looked ridiculous in the eyes of the world, because after excision, Diego Garcia doesn't belong to us. ….[147]

The Prime Minister made similar comments as late as November 1980[148].

2.92. It is precisely the attitude of the opposition that caused a 180-degree shift in the Mauritius position in the 1980s, when it came into power. It was only in July 1982, following the defeat of Ramgoolam's Labour Party in the general election, that the

[143] Written Statement of the United Kingdom, paras. 3.43-3.48.
[144] Houbert, 1981, p. 85, quoting from *Le Mauricien*, 27 June 1980 (**Annex 96**).
[145] Written Statement of the United Kingdom, para. 3.47.
[146] *Ibid*.
[147] *Ibid*., para. 3.48.
[148] *Ibid*., para. 3.49.

Legislative Assembly enacted the Interpretation and General Clauses (Amendment) Act, which purported to include the Chagos Archipelago within the territory of Mauritius, and to do so with retrospective effect.

2.93. Indeed, it was the new Mauritius Prime Minister, Anerood Jugnauth, who said in 1982 that "those who were in power in this country after independence… never asserted our sovereignty. They went so far as ... almost saying that that part of the world did not form part of Mauritian territory and that the legitimate country that had the right of sovereignty on Diego Garcia and the Chagos Islands - that had been excised from the Mauritian territory - was the United Kingdom"[149].

2.94. To claim now before the Court, that this was the consistent position of Mauritius from independence is a complete distortion of the facts.

2.95. The same reaffirmation of the agreement between the United Kingdom and Mauritius is evident by looking at the actions of the international community. On 16 December 1965, the General Assembly adopted resolution 2066 (XX) on the "Question of Mauritius", and later resolutions 2232 and 2357 in 1966 and 1967 respectively. The content of these resolutions is discussed in the United Kingdom's Written Statement[150]. One would expect that this stance of the General Assembly would only have been bolstered after Mauritius' independence in 1968 without the Chagos Archipelago. However, the silence of the General Assembly in the years thereafter is striking. The silence can be explained given the position of Mauritius itself, which consented to the detachment in exchange for benefits and was binding under international law and which did not raise the matter in the General Assembly.

2.96. Nor were there any statements by other organisations on this matter until Mauritius changed its position after 1980. Just like Mauritius itself, others in the international community did not engage on this issue for many years following Mauritius' independence, despite the opposition of some States to a United States military facility in the Indian Ocean.

[149] Debate in Mauritius' Legislative Assembly of 6 July 1982, col. 336 (**Annex 43**).
[150] United Kingdom Written Statement, paras. 8.7, 8.50-8.54,

G. Conclusions

2.97. The narrative put forward by Mauritius, in a distortion of its official position for a significant period after independence, does not withstand scrutiny.

2.98. What the facts show is that the discussions on 23 September 1965 between Mauritian representatives and the United Kingdom resulted in an in-principle agreement to the detachment of the Chagos Archipelago in exchange for money, trade advantages, specified rights and undertakings, with the free consent of the elected representatives of Mauritius.

2.99. Six weeks later, following additional undertakings demanded by Mauritius, on 5 November 1965 the Mauritius Council of Ministers formally agreed to detachment, resulting in the 1965 Agreement. This was many weeks after the United Kingdom had announced its position in favour of independence and committed itself publicly to independence. The people of Mauritius further expressed their acceptance of the detachment by voting for independence – with the detachment of the Chagos Archipelago a matter of public record – in the pre-independence elections in August 1967, as did the Legislative Assembly later that August.

2.100. For many years after independence, Mauritius confirmed its acceptance of detachment in its domestic politics. Internationally, Mauritian Ministers reaffirmed the 1965 Agreement on several occasions, at the highest level.

2.101. Mauritius' narrative of the events, on the other hand, does not represent an accurate portrayal of the facts. Mauritius has presented a narrative selectively relying on certain documents, and ignoring others that do not suit its case. It conflates and condenses events, placing them out of order and context, while conveniently skipping over periods during which the evidence, or lack thereof, challenges its position. Moreover, many of the documents relied upon by Mauritius undermine its current position.

PART TWO: DISCRETION

CHAPTER III

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

3.1. As is accepted in all the Written Statements, the Court enjoys a discretion as to whether to give an advisory opinion pursuant to Article 65(1) of the Statute[151]. Moreover, there is broad agreement – including from Mauritius – that the discretion should be exercised so as not to answer a request for an advisory opinion where to do so "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"[152].

3.2. The key issue before the Court is whether, as the United Kingdom contends but as is contested by Mauritius, answering the current Request would have the impermissible effect of circumvention of this fundamental principle – because the Questions asked appear inevitably to require the Court to state its opinion on a longstanding bilateral dispute over (in particular) sovereignty over the Chagos Archipelago. Notably, Mauritius does not challenge the existence of the longstanding bilateral dispute over sovereignty, but rather it seeks to recast this dispute as a matter of decolonization[153] (see further under **section A(i)** below), and its principal focus is on attempting to show that consent to judicial settlement is not being circumvented[154] (see further under **section A(ii)**).

3.3. The United Kingdom maintains its position that, unless the principle of non-circumvention is to be abandoned altogether – which would be contrary to the Court's jurisprudence, to the recognition and acceptance of that jurisprudence in the various Written Statements, and to a fundamental principle of international law – it falls to be

[151] See e.g. Written Statement of Mauritius, para. 5.18.
[152] *Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71, referred to at e.g. Written Statement of Mauritius, para. 5.29. As to States supporting Mauritius' position generally but agreeing on the principle of non-circumvention, see Written Statements of: Argentina, para. 26; Brazil, para. 11; Cyprus, para. 24; Guatemala, para. 24.
[153] Written Statement of Mauritius, para. 1.38.
[154] Written Statement of Mauritius, paras. 1.14, 5.29-5.37.

applied in this case[155]. A bilateral dispute is being put before the Court, and it is plain from Mauritius' Written Statement that the Court is indeed being asked to determine a series of bilateral matters that have long been in dispute between Mauritius and the United Kingdom, including as to the validity and effect of the 1965 Agreement reached between the United Kingdom and the Mauritian Council of Ministers on the detachment of the Chagos Archipelago[156], as well as the post-1968 reaffirmations of that Agreement (which Mauritius has thus far elected to ignore, as shown in **Chapter II**).

3.4. Such matters concern the two States (*qua* States), and cannot correctly be re-characterised as matters of decolonization. It is for this reason that Mauritius repeatedly sought to have the dispute resolved pursuant to the contentious jurisdiction of this Court and has, in particular, put the very same matters as are now argued in its Written Statement before the Arbitral Tribunal in the *Chagos Arbitration*[157].

3.5. The position of the United Kingdom that the Court's discretion should be exercised so as not to answer the Questions is consistent with the position expressed in the Written Statements of Australia, Chile, France, Israel and the United States. The United Kingdom also notes that this is not a case where the views of all States are at polar opposites. Whereas various Written Statements support the position of Mauritius, a number of States occupy a middle ground, expressing serious concern as to the exercise of the advisory opinion jurisdiction where a bilateral dispute is in effect being put before the Court: see the Written Statements of China[158], Germany[159], the Republic of Korea[160] and the Russian Federation[161].

[155] Written Statement of the United Kingdom, para. 7.21.
[156] Written Statement of Mauritius, paras. 6.95-6108.
[157] Written Statement of the United Kingdom, paras. 5.19 and 6.1-6.21. It is telling that, although supportive of Mauritius' position, India refers to Mauritius and the United Kingdom as the "Parties". See Written Statement of India, para. 12.
[158] Written Statement of China, para. 18.
[159] Written Statement of Germany, with specific regard to the correct interpretation of the Questions put to the Court. See e.g. at paras. 151-154
[160] Written Statement of the Republic of Korea, para. 16 et seq, suggesting criteria for determining the existence of "compelling reasons" such that the Court would exercise its discretion not to answer a request for an advisory opinion. These concern whether: (a) the General Assembly intends in practical terms to impose a judicial resolution of a dispute, (b) the question is practically identical to the subject matter of a past contentious case presented before an international court or tribunal, and (c) the question asked rests on the inherent judicial function of courts to confirm and identify exclusive rights in a contentious setting, such as territorial sovereignty over a certain piece of land.
[161] Written Statement of the Russian Federation, paras. 29-32.

A. Responsive Points

3.6. The United Kingdom responds below to the specific points on the exercise of discretion made by Mauritius in its Written Statement. The United Kingdom also picks up where appropriate on points that have been made by other States in support of Mauritius' position on discretion.

(i) The existence of the longstanding bilateral dispute

3.7. In its Written Statement, Mauritius seeks to minimise the longstanding bilateral dispute that exists between it and the United Kingdom concerning (in particular) sovereignty over the Chagos Archipelago. Thus, for example, in its consideration of the issue of discretion[162], Mauritius has elected to ignore altogether the important fact that it has put the very same matters and arguments that are now in its Written Statement before the Arbitral Tribunal in the *Chagos Arbitration*[163].

3.8. It is noted that Argentina, while supporting Mauritius' position on discretion, is candid in accepting that: "There is no doubt that a territorial dispute exists between Mauritius and the United Kingdom on matters directly related to the questions put by the General Assembly to the Court."[164] Mauritius does say that "it has for decades sought to bring the colonisation of the Chagos Archipelago to an end, raising the matter in a range of international fora as well as directly with the administering power". It continues however:

> That does not make the dispute a 'bilateral' one: although plainly any ongoing unlawful colonisation will give rise to a sovereignty dispute between the State whose territory is colonised and the administering power, this does not remove the matter from the advisory jurisdiction of the Court. Otherwise the perverse

[162] Written Statement of Mauritius, paras. 5.18-5.38. Notably, however, when it comes to its substantive answers to the Questions, Mauritius relies heavily on the views expressed by the dissenting arbitrators. See e.g. *Ibid*. at para. 1.14.
[163] Written Statement of the United Kingdom, paras. 1.2, 5.19 and 6.1-6.21. Cf. the second criterion as to the exercise of discretion put forward in the Written Statement of the Republic of Korea, at paras. 17-22 (whether the question is practically identical to the subject matter of a past contentious case presented before an international court or tribunal).
[164] Written Statement of Argentina, para. 23.

> result would be that some of the most important legal issues in the international legal order could not be the subject of advice from the Court … .[165]

3.9. In other words, according to Mauritius, although the dispute may in fact be bilateral in nature (i.e. between two States), it is not to be regarded as bilateral for the purposes of the Court's jurisprudence on non-circumvention. This is misconceived for three reasons.

3.10. First, Mauritius' contention is based on a faulty premise. Even assuming the existence of "an unlawful colonisation", this may or may not give rise to a dispute, and that dispute may or may not involve an issue of territorial sovereignty. While Mauritius seeks to present the issue as one of general principle, the issue for the Court is whether the particular dispute between Mauritius and the United Kingdom is bilateral in nature such that the principle on non-circumvention may be engaged. This is plainly the case, including for the reasons stated at paragraph 7.15 of the United Kingdom's Written Statement, i.e. consent was given to detachment by the Mauritian Council of Ministers in the 1965 Agreement, and it is only by Mauritius putting the validity of that consent into issue in these proceedings that the issues raised by the Questions can arise. Moreover, it was only long after independence, from the early 1980s, that the dispute arose in the bilateral relations of the United Kingdom and Mauritius; there was no dispute at the time of decolonization or for more than a decade thereafter.

3.11. Second, Mauritius' argument is inconsistent with the Court's jurisprudence, including most obviously *Western Sahara*. If the answer were simply that disputes between a former colony and a former administering Power were not to be regarded as bilateral in nature and thus did not engage the principle on non-circumvention, the Court in *Western Sahara* would not have had any concern about stating its view on the ongoing sovereign rights of Spain. By contrast, however, the Court's reasoning on the absence of circumvention was heavily dependent on the point that the settlement of the issue as to the rights of Morocco over Western Sahara at the time of colonization would <u>not</u>

[165] Written Statement of Mauritius, para. 1.38. As to Mauritius' reference to legal issues of particular importance, it is well-established in contentious cases that the existence of substantive obligations and the existence of consent to jurisdiction are two quite separate matters – even in the case of norms that are *jus cogens*. See e.g. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment, I.C.J. Reports 2002*, at p. 32, para. 64.

affect the rights of Spain "today" as the administering Power (see further under **section A(ii)** below)[166].

3.12. Third, this is not a case concerning a matter of decolonization that, in advisory proceedings, is opportunistically being portrayed by an administering Power as a bilateral dispute. The position is precisely the opposite. It is only now, after Mauritius (*qua* State) has sought for many years to resolve a dispute with the United Kingdom over (in particular) territorial sovereignty at the bilateral level and before different bilateral judicial and arbitral forums, that the issue has been brought by Mauritius before the General Assembly and this Court and presented as a matter of decolonization[167].

3.13. That the Request engages a longstanding bilateral dispute has only been confirmed by the case now put before the Court by Mauritius in its Written Statement.

3.14. It is notable, first, that Mauritius' Written Statement concludes with what is in effect the *dispositif* that it seeks ("submits")[168]. In particular, Mauritius is asking the Court to make what amounts to a series of orders that allow little or no space for action from the General Assembly, saying that "international law requires that":

a. "The process of decolonisation of Mauritius be completed immediately … *so that Mauritius is able to exercise sovereignty over the totality of its territory*"[169]. It thus asks for what is in effect a determination as to its sovereignty over the Chagos Archipelago. This is what Mauritius had sought – unsuccessfully – in the bilateral arbitral proceedings in the *Chagos Arbitration*[170].

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"[171]. In bilateral communications with the United Kingdom,

[166] *Western Sahara, I.C.J. Reports 1975*, p. 27, para. 42.
[167] Written Statement of the United Kingdom, paras. 7.13-7.14.
[168] Written Statement of Mauritius, p. 285.
[169] Written Statement of Mauritius, p. 285, para. 3(a), emphasis added.
[170] See Written Statement of the United Kingdom, Chapter VI, in particular at para. 6.5 (referring to Mauritius Memorial, p. 155 and paras. 6.8-6.30). See also the *dispositif* in the Award in the *Chagos Arbitration*, para. 547A(1).
[171] Written Statement of Mauritius, p. 285, para. 3(b).

Mauritius has already claimed that the United Kingdom has breached the Convention on the Elimination of All Forms of Racial Discrimination "by preventing the exercise of the right of return of the former inhabitants of the Chagos Archipelago, as well as the right of entry of other Mauritian nationals"[172]. Further, in seeking the current statement from the Court as to resettlement, Mauritius ignores altogether the effect of the 1982 bilateral treaty that it concluded with the United Kingdom concerning the settlement of the claims on behalf of, as well as by, the Chagossians that had gone to Mauritius (the 1982 Agreement)[173], notwithstanding the existence of the 2012 decision of the European Court of Human Rights on this very topic[174].

3.15. Second, in the passage of its Written Statement setting out its case on what it calls "the legal consequences while decolonisation is being completed", Mauritius in effect asks the Court to make a series of detailed directions as to how the bilateral relations between the United Kingdom and Mauritius are to be conducted immediately following the issuance of an Advisory Opinion[175]. Indeed, as Mauritius appears to accept[176], the statements sought from the Court overlap with pronouncements already made by the Arbitral Tribunal in the *Chagos Arbitration*[177]. Thus, on Mauritius' case, the Court's advisory jurisdiction is to be used to procure bilaterally determinative directions just as were sought by Mauritius in the *Chagos Arbitration*, but with an outcome that it considers more favourable.

3.16. Further, consistent with the United Kingdom's position that a bilateral dispute has been put before the Court, it is only the Written Statements of Mauritius and the United Kingdom that contain any detailed consideration of the underlying facts – facts that are key to any response to the Questions that have been posed[178].

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[172] See further Written Statement of the United Kingdom, para. 5.19(d), referring to letter from Minister of Foreign Affairs, Regional Integration and International Trade of Mauritius to UK Foreign Secretary, 20 October 2011 (**Annex 70**).
[173] See further Written Statement of the United Kingdom, paras. 4.9-4.18.
[174] Mauritius confines its reference to the fact that the European Court of Human Rights has found that the very great majority of Chagossians in Mauritius have settled their claims with the United Kingdom to one sentence in a footnote (see Written Statement of Mauritius, fn. 510, p. 161).
[175] Written Statement of Mauritius, paras. 7.42-7.61.
[176] *Ibid.*, para. 7.44.
[177] Cf. Written Statement of the United Kingdom, para. 9.20.
[178] See also Written Statement of South Africa, para. 77: "It is understood that there may be factual disputes about the validity under international law of the agreement reached between the United Kingdom and Mauritius in 1965 regarding the separation of the Chagos Archipelago from Mauritius. South Africa does not have any

(ii) Mauritius' case on non-circumvention

3.17. Mauritius contends by reference to the *Western Sahara* and *Wall* cases 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 is to obtain from the Court an opinion which the General Assembly deems of assistance for the proper exercise of its functions"[179]. This attempt to distil general principles, and to apply them to the current case, is of no assistance to the Court: Mauritius does not engage with the particular and materially different features of *Western Sahara* and the *Wall* case[180].

3.18. As to *Western Sahara*, Mauritius focuses on the rejection by the Court of Spain's argument that the request then at issue would have the effect of circumventing its absence of consent to contentious jurisdiction[181]. Mauritius elects, however, to pass over two key points.

a. That the request in *Western Sahara* arose out of discussions in the Fourth Committee, during which "a legal controversy arose over the status of the said territory at the time of its colonization by Spain", and it was considered "highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem"[182]. Thus, as the Court was in a position to state, there was no issue of circumvention because the issue was "one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing"[183]. By contrast, the Court in the current case is faced with precisely the situation that it regarded as problematic in *Western Sahara*, that is, of the General Assembly bringing before the Court a dispute in order that it could later, on the basis of the Court's opinion, exercise its powers and

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first-hand information on how that agreement was concluded and can therefore not assist the Court in determining whether or not the exception to the principle of *uti possidetis* would find application *in casu*. In the view of South Africa, this question should be addressed by States that have access to information that would assist the Court in making this assessment."

[179] Written Statement of Mauritius, para. 5.29.

[180] Cf. Written Statement of the United Kingdom, paras. 7.17-7.18.

[181] Written Statement of Mauritius, para. 5.27.

[182] See the request of the General Assembly at *Western Sahara, I.C.J. Reports 1975*, p. 14, para. 1.

[183] *Western Sahara*, I.*C.J. Reports 1975*, p. 25, para. 34, and see also at para. 20.

functions for the peaceful settlement of that dispute or controversy[184]. In this respect, it is indisputable that (i) this is the situation that Mauritius expressly sought before the General Assembly[185], and likewise indisputable that (ii) as of July 2016, when the current request was first mooted by Mauritius, the Chagos Archipelago was not and had not for many decades been a matter in which the General Assembly was engaged in any way[186].

b. That the issues raised in the request in *Western Sahara* did not comprise the ongoing dispute over territorial sovereignty. Notably, Mauritius makes no mention at all of the following passage from the Court's Advisory Opinion in *Western Sahara*, although it was plainly central to the Court's decision on the exercise of its discretion:

> 42. Furthermore, the origin and scope of the dispute, as above described, are important in appreciating, from the point of view of the exercise of the Court's discretion, the real significance in this case of the lack of Spain's consent. The issue between Morocco and Spain regarding Western Sahara *is not one as to the legal status of the territory today*, but one as to the rights of Morocco over it at the time of colonization. *The settlement of this issue will not affect the rights of Spain today as the administering Power*, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it' *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950,* p. 72).
>
> 43. A second way in which Spain has put the objection of lack of its consent is 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. *The questions in the request do not however relate to a territorial dispute, in the proper sense of the term, between the interested States. They do not put Spain's*

[184] *Ibid*, pp. 26-27, para. 39. As to the circumstances in which resolution 71/292 was made, see Written Statement of the United Kingdom, paras. 1.8-1.16.
[185] See UN Doc A/71/PV.88 (22 June 2017), p. 8, representative of Mauritius (**UN Dossier No. 6**):
"Consequently, as there is no prospect of any end to the colonization of Mauritius, the General Assembly has a continuing responsibility to act. More than five decades have passed and now is the time to act. It is fitting for the General Assembly to fulfil that function on the basis of guidance from the International Court of Justice as to the legality of the excision of the Chagos archipelago in 1965."
[186] Cf. Written Statement of Argentina, para. 26.

> *present position as the administering Power of the territory in issue before the Court: resolution 3292 (XXIX) itself recognizes the current legal status of Spain as administering Power.* Nor is in issue before the Court the validity of the titles which led to Spain's becoming the administering Power of the territory, and this was recognized in the oral proceedings. *The Court finds that the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory.* [187]

3.19. The failure to address (or even refer to) this key passage is striking.

a. It is not as if that failure could be explained by Mauritius adopting the position that the Request does not, in fact, require engagement in the disputed issue of the current territorial sovereignty over the Chagos Archipelago. No such position is put forward by Mauritius in its Written Statement.

b. It is Question (b) of the Request – drafted by Mauritius[188] – that requires the focus on the legal consequences "arising from the continued administration of the United Kingdom … of the Chagos Archipelago". Yet, when it comes to explaining why it considers that the Court's response to Question (b) "is necessary for the General Assembly", all Mauritius does is to paraphrase the Question in a few lines, and adds no substantive explanation at all[189].

c. Thus, Mauritius is arguing that the Court should depart in a highly significant way from its prior jurisprudence, but with no explanation as to why this is "necessary".

3.20. Mauritius also contends that, in *Western Sahara*, the Court stated that no State "could validly object … to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers"[190]. However, this is merely to take out of context a passage of the Court's Opinion dealing with the separate issue of Spain's

[187] *Ibid.*, pp. 27-28, paras. 42-43 (emphasis added).
[188] Written Statement of the United Kingdom, para. 7.16.
[189] Written Statement of Mauritius, para. 5.35; see also at para. 1.40.
[190] Written Statement of Mauritius, para. 5.37, referring to *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 30.

general consent to the advisory jurisdiction of the Court, before the Court then turned to the issue of discretion and judicial propriety, which is the issue that is of central importance in the current case. In the passage cited by Mauritius, the Court was simply not addressing the critical question that it highlighted later in the judgment, i.e. as to whether to give a reply to the General Assembly's request 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. It is undisputed, even by Mauritius, that there may be situations where the Court should decline – for reasons of judicial propriety – to give an advisory opinion on the subject matter of decolonization of non-self-governing territories.

3.21. As to Mauritius' references to the *Wall* case, there is no equivalence between the dispute that was at issue there and the dispute in the current case. In particular:

a. The issue of sovereignty over the Chagos Archipelago is the matter of central dispute in the relations between Mauritius and the United Kingdom. By contrast, the dispute over the construction of the Wall was merely one single and limited facet of the longstanding dispute between Israel and Palestine, and was not moreover a bilateral dispute with respect to sovereignty over territory[191].

b. The Court in the *Wall* case was presented with a question "of particularly acute concern to the United Nations"[192]. The bilateral dispute that is now being put before the Court is not analogous in this respect, and likewise so far as concerns the alleged existence of "a much broader frame of reference than a bilateral dispute"[193]. Whilst Mauritius seeks to suggest that, for the General Assembly, the matter has "long been amongst its highest priorities"[194], this is to ignore the

[191] Cf. Written Statement of Mauritius, para. 5.24, giving an inaccurate impression of the UK's position in its Written Statement of January 2004 in the *Wall* case, where the United Kingdom in fact said at para. 3.32 (the para. To which Mauritius now refers): "Speaker after speaker in the various debates in the General Assembly and the Security Council made clear that it was not the construction of the wall *per se* which involved a violation of international law but the construction of part of it on the occupied territory. Possible implications for title to territory have been identified as a principal concern. The issues are thus clearly part of a bilateral dispute between Israel and Palestine and the principle restated in *Western Sahara* is accordingly applicable."
[192] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, at pp. 158-159, paras. 49-50.
[193] Cf. Written Statement of Mauritius, para. 5.25.
[194] Cf. Written Statement of Mauritius, para. 5.21.

obvious point that the Chagos Archipelago has not been a matter on which the General Assembly has been actively engaged for many decades (cf. the dispute between Israel and Palestine, and cf. also how, in *Western Sahara*, the issue was "one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing"[195]).

c. Mauritius places much reliance on the resolution adopted by the General Assembly in December 2010 on the Fiftieth Anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples[196], yet this resolution is in entirely general terms. It is not suggested by Mauritius that the resolution was in part motivated by, or even that any mention was made in the General Assembly of, matters with respect to the Chagos Archipelago.

d. It is of course correct to say that decolonization is a matter on which the General Assembly has remained engaged in general terms, but this can only be of limited significance because the Request is not concerned with the process of decolonization as a matter of general principle[197]. By analogy to the *Wall* case, the relevant question would be whether the disputed issues raised by the Request fit within "a much broader frame of reference" concerning the specific interest of the General Assembly in the ongoing relations between Mauritius and the United Kingdom. But plainly this is not the case: the General Assembly has had no interest or involvement in Mauritius/UK relations that is in anyway analogous to the United Nations' interest in, and indeed responsibility concerning, the relations between Israel and Palestine[198].

3.22. Thus, notwithstanding its reference to *Western Sahara* and the *Wall*, Mauritius has not pointed to, and cannot point to, any case where the Court has exercised its discretion to answer a Request that asks the Court to state its position on an ongoing dispute over sovereignty over territory.

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[195] *Western Sahara, I.C.J. Reports 1975*, p. 25, para. 34, and see also at para. 20. Cf. Written Statement of Mauritius, para. 5.30.
[196] Written Statement of Mauritius, para. 5.33, referring to UN Doc A/RES/65/118 (10 Dec. 2010), pp. 2-3, paras. 2 and 9.
[197] Cf. Written Statement of the United Kingdom, para. 7.16.
[198] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, at pp. 158-159, paras. 49-50.

3.23. Mauritius seeks to support its case on non-circumvention by the assertion that "the obligations relating to decolonization – including the principle of self-determination – are obligations *erga omnes*, [and hence] they cannot be regarded as simply a bilateral matter" [199]. As to this:

a. Mauritius refers in support to a passage on obligations *erga omnes* taken from the *Wall* case. However, the passage in question[200] is located in the part of the Advisory Opinion concerned with the legality of the construction of the wall, and the issue of the existence or otherwise of *erga omnes* obligation nowhere features in the Court's consideration of issues going to its discretion[201]. That is unsurprising: as is plain from the *East Timor* case (to which the *Wall* case refers), the fact that a given norm has an *erga omnes* character does not impact on the question of whether a State has consented to jurisdiction with respect to the application of that norm[202].

b. The reference to obligations *erga omnes* not only assumes that any such obligation was in existence at the relevant times[203], but also ignores the fact that Mauritius consented to the detachment of the Chagos Archipelago and subsequently reaffirmed that consent, as was fully open to it regardless of the nature of the international law on self-determination. No third State possesses some form of *erga omnes* right or interest that could prevent Mauritius from giving such consent, and the question of whether such consent was valid or not is a matter that Mauritius alone could put into dispute in the current proceedings (albeit without foundation)[204]. It is not surprising, therefore, that third States and international organizations made no statements at all on this issue during the

[199] Written Statement of Mauritius, para. 5.31. See also Written Statement of Brazil, para. 12; Written Statement of Cyprus, para. 3; Written Statement of Serbia, para. 26.
[200] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199, para. 156.
[201] *Ibid*, paras. 43-65.
[202] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 102, para. 29. The Court has made a similar point with respect to norms of *jus cogens* in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment, I.C.J. Reports 2002*, at p. 32, para. 64: cf. the reference to such norms in the Written Statement of Cyprus, para. 3.
[203] Cf. Written Statement of the United Kingdom, para. 8.27 et seq. Note also that it is incorrect to speak of "obligations relating to decolonization", as decolonization is a political process. See further **Chapter IV** below.
[204] See Written Statement of the United Kingdom, para. 7.15.

extensive period in which Mauritius reaffirmed the 1965 Agreement as an independent State, as was shown in Chapter II.

(iii) Other factors going to judicial propriety

3.24. As noted by the United Kingdom[205], the Court is being asked to engage with a complex and contested set of facts and to state its view (it appears) on the disputed sovereignty over the Chagos Archipelago. However, the Court is being presented with only an incomplete record of the facts, whilst the United Kingdom is not being accorded the protections inherent in a contentious procedure. In contentious proceedings, there would be a full written phase, and this is a case where in all probability the hearing would span at least two weeks, within which time the respondent State would of course have a full opportunity to respond to the case being made against it. Such a right of reply at an oral phase is of particular importance where, as in the current proceedings, written submissions are made simultaneously. Yet, the United Kingdom will have no right of reply in the upcoming oral phase, while the submissions of Mauritius and the United Kingdom will be made in just one day.

3.25. As follows from the above, the Court will not have the benefit of a complete factual picture and full and responsive submissions from the key States, whilst the United Kingdom will not have the benefit of an opportunity to reply in any considered way to the oral submissions of Mauritius or of an opportunity to reply in any way to the oral submissions of other States appearing before the Court. These are matters of obvious and serious concern so far as concerns the integrity of the proceedings; yet these are matters that Mauritius has ignored altogether in its Written Statement.

B. Conclusions

3.26. The United Kingdom maintains its position that, unless the Court can engage with the Request without making determinations on or directly concerning the longstanding

[205] Written Statement of the United Kingdom, para. 7.18(e) and (f).

dispute between Mauritius and the United Kingdom, the giving of an advisory opinion in this case would not be consistent with judicial propriety.

3.27. As follows from the Advisory Opinion in *Western Sahara*, and as is strongly supported by the various Written Statements now before the Court (regardless of whether these are in favour of or are against the exercise of discretion to give an opinion in this case), it is established that the giving of an advisory opinion is incompatible with the Court's judicial character where 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. This is precisely such a case.

PART THREE:
THE LEGAL ISSUES ARISING FROM THE QUESTIONS

This Part consists of consists of two chapters that address Questions (a) and (b) of the Request for the Advisory Opinion. Mauritius is essentially asking the Court to issue a *dispositif* as if these were contentious proceedings between two States. It is seeking to place a strictly bilateral dispute before the Court, circumventing the lack of consent by one of the Parties to the Court's jurisdiction.

The United Kingdom maintains that the Court should refrain from taking up the referral of this bilateral dispute. Chapters IV and V are thus offered in the alternative, should the Court nevertheless decide to respond to Questions (a) and (b). The chapters offer observations on arguments and demonstrate the complex and contested facts that the Court would have to determine in order to resolve the dispute.

CHAPTER IV

RESPONSE TO QUESTION (a): THE PROCESS OF DECOLONIZATION WAS LAWFULLY COMPLETED IN 1968

4.1. Question (a) reads:

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

4.2. Mauritius' answer to Question (a) in Chapter 6 of its Written Statement relies on a factual case on the (lack of) consent of the elected representatives of Mauritius and four legal arguments on self-determination. **Chapter II** has highlighted the factual distortions presented by Mauritius in its Written Statement. **Section A** of this Chapter explains that Mauritius' case on the invalidity of consent has no factual or legal basis. The valid consent of the Mauritius representatives to the detachment of the Chagos Archipelago provides the short answer to Question (a) regardless of the legal status and scope of the right to self-determination in 1965/68.

4.3. **Sections B to E** of this Chapter address Mauritius' four legal arguments on self-determination:

> (1) that the two separate concepts of decolonization and self-determination can be conflated in answering Question (a);
>
> (2) the right to self-determination had been "firmly established" in international law by 1965[206];
>
> (3) a "legal corollary" (or an "associated right") of self-determination is the territorial integrity of the "entire territory" or "totality" of a non-self-governing territory, which prohibits the "arbitrary division" of territory in the years prior to independence. Mauritius asserts that such a corollary had been established in

[206] Written Statement of Mauritius, para. 6.3(2).

operative paragraph 6 of General Assembly resolution 1514 (XV) (1960) and was a rule of customary international law by 1965[207]; and

(4) self-determination requires the "free and genuine consent of the population concerned"[208]. Mauritius favours "referenda/plebiscites" for the expression of such consent[209], but acknowledges that consent can be, and has been, expressed through elections[210].

4.4. On (1), this presumption is incorrect. Decolonization is a political process and can be assessed on the facts; self-determination is a legal concept and relates to the often-complex political empowerment of a 'people', which can be manifested in many ways and is not tied to territorial integrity (**Section B**).

4.5. On (2), the United Kingdom avers that the right to self-determination had not been established in international law by 1965. The sources cited by Mauritius are incomplete or inconclusive. The right to self-determination crystallized after the 1960s. The first consensus resolution on a "right" to self-determination (as opposed to a "principle") was the Friendly Relations Declaration adopted on 24 October 1970, which was itself in quite different terms to earlier resolutions. And the first codification in a binding instrument was on 3 January 1976, with the entry into force of the International Covenant on Economic, Social and Cultural Rights (**Section C)**.

4.6. On (3), the UK disputes that at the relevant time a right to the territorial integrity of the totality of a non-self-governing territory was part of any right to self-determination. The examples cited by Mauritius, including resolution 1514 (XV), do not support its claim. Self-determination is concerned with the political, economic, social and cultural empowerment of a 'people'. Territory is important to the extent it defines and allows a 'people' meaningfully to exercise their right to self-determination, but it does not require that the boundaries of the territory remain entirely unchanged during some unspecified period prior to independence (**Section D).**

[207] Written Statement of Mauritius, paras. 6.3(4) and (7)), 6.50(3), 6.58 and 1.4(iv).
[208] Written Statement of Mauritius, para. 6.3(3).
[209] Written Statement of Mauritius, paras. 6.58-60, 1.41(iii)
[210] Written Statement of Mauritius, paras.6.3(3) ("Self-determination required the free and genuine consent of the population concerned – as expressed, for example, through referenda, *elections* and plebiscites – so as to determine the future of the territory.") (emphasis added).

4.7. On (4), the United Kingdom agrees that the freely expressed will of the people is an essential element of today's understanding of self-determination. It rejects any suggestion that a UN-supervised plebiscite is the only method of expressing such consent. There are a variety of ways in which peoples may validly determine their political status, including the consent of their elected representatives and the holding of constitutional conferences and general elections, which is what happened in Mauritius' case (**Section E**).

A. Mauritius validly consented to the detachment of the Chagos Archipelago through its elected representatives

4.8. The arguments of Mauritius in Chapter 6, Section V of its Written Statement repeat those it made during the *Chagos Arbitration*. The United Kingdom has already responded, at length, in the *Chagos Arbitration* and in its Written Statement.

4.9. Mauritius consented to the detachment through its elected representatives in 1965. The people of Mauritius further expressed their acceptance of the detachment by voting for independence – with the detachment of the Chagos Archipelago in the public domain – in the general election in August 1967, as did the Legislative Assembly later that month[211]. The process of decolonization was thus lawfully completed in 1968. Mauritius' consent, reaffirmed by subsequent conduct, provides the answer to Question (a) regardless of the legal arguments on self-determination set out below (for completeness) because even according to today's understanding of self-determination, there is no restriction that would prevent the detachment of the Chagos Archipelago by consent of the elected representatives of Mauritius.

4.10. As **Chapter II** has demonstrated, the narrative of Mauritius in its Written Statement omits the exchanges that began in July 1965; distorts what happened at the meetings on 23 September 1965; omits the fact that the United Kingdom Secretary of State publicly announced the United Kingdom's decision and commitment to move towards

[211] **Chapter II** above and Written Statement of the United Kingdom, Chapters III and VIII, Section B.

Mauritius' independence several weeks before the 1965 Agreement was concluded; skips over the intervening six weeks of negotiations and the securing from the United Kingdom of substantial benefits and compensation for Mauritius; glosses over the significance of the consent by the Council of Ministers to the Agreement on 5 November 1965; simplifies and distorts the internal political debate in Mauritius whereby one party (the PMSD) was pushing for a referendum not to replace the general election or protest the detachment *per se* but instead to promote the option of association with the United Kingdom; overlooks the PMSD's objection to detachment was as regards the adequacy of compensation not any allegation of duress; ignores the free will expressed by the Mauritius electorate in the 1967 general election and the vote for independence of the Legislative Assembly – both of which took place in the full knowledge of the 1965 Agreement; and disregards Mauritius' reaffirmation of the Agreement for a significant period as an independent sovereign State.

4.11. It need only be noted here that if the consent of the Mauritian Ministers "was sought for essentially political reasons"[212], that would not alter the fact that consent was sought and obtained over a staged process, with time for reflection and further negotiation on the part of the Mauritians. It is also incorrect for Mauritius to assert that the people of Mauritius were "not able to express a view on the issue of detachment" in the 1967 general election for the Legislative Assembly[213]. There was no 'fait accompli'. It was entirely open to the people to have made their objections known and elected a party that would have renegotiated or rejected the detachment of the Chagos Archipelago. But instead, on a very high turn-out, those in favour of independence (who had negotiated the detachment) won the election. The electorate voted positively in favour of independence by reference to the territory of Mauritius as it stood in 1967, namely without the Chagos Archipelago.

4.12. Mauritius' argument that that 1965 Agreement was "extracted in circumstances of duress"[214] is a factual/legal argument first made to the United Kingdom as late as 2012, in the Memorial of Mauritius in the *Chagos Arbitration*. As explained in the United

[212] Written Statement of Mauritius, para. 6.89.
[213] Written Statement of Mauritius, para. 6.93.
[214] Written Statement of Mauritius, para. 6.96.

Kingdom Written Statement (Chapter 3) and **Chapter II** above, Mauritius' allegation of duress is inconsistent with both the documentary record and the timing of key events.

4.13. It is striking that in its Written Statement, Mauritius provides no answer to the fact that the United Kingdom position on independence was announced many weeks before Mauritius' Council of Ministers debated the issue of detachment of the Chagos Archipelago and agreed to it. It adduces no contemporaneous evidence to say that Premier Ramgoolam understood a threat to have been made; his own words and actions show that he saw the 1965 Agreement in exchange for benefits as a 'victory' and 'triumph'[215]. And Mauritius fails to establish a legal standard for duress, whether under the Vienna Convention on the Law of Treaties or British constitutional law[216]. The vitiating effect of duress on an agreement is not to be found lightly. It is a high standard requiring clear and convincing evidence of acts or threats against the State's representative as an individual or the threat of force[217].

4.14. It is also striking that Mauritius ignores its repeated reaffirmations of the 1965 Agreement over the years – its conduct being consistent with its valid consent to the detachment of the Chagos Archipelago. Shaw, whose academic writings are relied on by Mauritius throughout its pleadings, in fact notes that its case is weakened by evidence of its acceptance of the detachment. He cites the official 1980 map that excluded the Chagos Archipelago, the Legislative Assembly's rejection of a proposal to include the islands in the Constitution, and the Minister for Foreign Affairs' statement that "Diego is legally British. There is no getting away from it. This is a fact that cannot be denied"[218]. The Mauritian Prime Minister acknowledged British sovereignty over Diego Garcia on 17 July 1980[219].

[215] See paras 2.55 and 2.78 above.
[216] Cf. Written Statement of the United Kingdom, paras. 8.16-8.17.
[217] Articles 51 and 52 of the Vienna Convention on the Law of Treaties; see Written Statement of the United Kingdom, para. 8.17.
[218] Malcolm Shaw, *Title to Territory in Africa: International Legal* Issues (13 March 1986), Written Statement of Mauritius, Annex 135, p. 132.
[219] Written Statement of Mauritius, Annex 135, p. 132.

B. Decolonization and self-determination are not co-extensive

4.15. Question (a) asks whether the "decolonization" of Mauritius has been lawfully completed. Mauritius wrongly conflates decolonization and self-determination. It speaks of the "*law* of decolonization"[220], although the legal content it asserts comes from the right to self-determination. Mauritius seeks to obscure the longstanding bilateral dispute with the United Kingdom over sovereignty by reformulating it as a matter concerning decolonization, as a legal, rather than political, concept. As the United States has correctly observed in its Written Statement, the UN General Assembly's policy of decolonization during the 1950s and 1960s is distinct from whether a specific legal obligation existed at the relevant time that would have prohibited the detachment of the Chagos Archipelago by the United Kingdom[221].

4.16. Decolonization is a political process, not a legal principle or right under international law. The process of decolonization seeks to eliminate colonial domination over parts of the world. Decolonization is limited to those political arrangements considered to be "colonial". Self-determination, on the other hand, may apply to any group deemed a "people" and need not be in a colonial context.

4.17. Appreciating the difference between "decolonization" and "self-determination" is important for these advisory proceedings. Although the *political* process of decolonization went on for many decades at the League of Nations and the United Nations, a *legal* right of self-determination emerged after the 1960s. However, the concepts are not co-extensive. Mauritius was lawfully decolonized in 1968 regardless of whether the legal right to self-determination existed at the relevant time (**Section C** below). Moreover, even if a right to self-determination had existed at that time, it would not determine the boundaries of the newly independent State of Mauritius because it goes to the realisation of the rights of the people, not the extent of the territory, as explained in **Section D** below.

[220] Written Statement of Mauritius, para. 6.3.
[221] Written Statement of the United States, paras. 4.18-4.20.

C. There was no right to self-determination under international law in 1965/1968

4.18. As the United Kingdom said in its Written Statement[222], the question of whether there was a right to self-determination under international law in 1965/1968 is not determinative of Question (a). Even if such a right existed in 1965/1968, it does not follow that the content of the right prohibited the detachment of the Chagos Archipelago because self-determination concerns political status and economic, social and cultural development, not the territorial integrity of the "totality" of the territory where a people reside.

4.19. Despite the wording of Question (a) ("process of decolonization", not right to self-determination) and the irrelevance to the dispute of whether such the right existed at the time, Mauritius argues, as it did in the *Chagos Arbitration*, that the right to self-determination is relevant and was clearly established in 1965[223]. It acknowledges that a right applicable to non-self-governing territories was not included in the UN Charter[224]. It relies on the activities of the General Assembly and of the Security Council as well as academic commentary for its claim as to when the non-binding principle of self-determination evolved into a binding right.

4.20. The United Kingdom recalls that General Assembly resolutions are, subject to narrow exceptions, recommendatory in nature[225]. Mauritius seeks to rebut this proposition with a quotation from the *Namibia* Advisory Opinion that "it would not be correct to assume

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[222] Written Statement of the United Kingdom, para. 8.65.

[223] Written Statement of Mauritius, Chapter 6, Section II. See also *Chagos Arbitration* Award, para. 172 (**UN Dossier No. 409**) and the references to Mauritius' pleadings in that case.

[224] Mauritius notes that the French text of Article 1(2) of the Charter refers to the *right* (*droit*) to self-determination and is as authoritative as English version, which refers to the "*principle*… of self-determination": Written Statement of Mauritius, para. 6.22. See also Written Statements of the African Union, para. 81 and Djibouti, para. 28. Mauritius, the AU and Djibouti fail to note that the other four language versions of the Charter (Arabic, Chinese, Russian and Spanish), all refer to "principle" not a "right". In any event, the linkage of 'self-determination' with 'equal rights' in Article 1(2) of the Charter makes it clear that it was the equal rights of *States* that was being provided for, not of individuals. Elsewhere in its Written Statement, Mauritius observes that Chapter XI of the Charter "did not immediately provide for the application of a right of self-determination to Non-Self-Governing Territories" (para. 6.14). It is noteworthy that in quoting from Chapter XI of the Charter, Mauritius consistently omits words that nuance the undertakings of Member States in respect of non-self-governing territories: Written Statement of Mauritius, para. 6.13, See eg: Article 73(b): "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, <u>according to the particular circumstances of each territory and its peoples and their varying stages of advancement</u> (underlined words were omitted).

[225] Written Statement of the United Kingdom, paras. 8.32 and 8.67.

that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design"[226]. But the Court was referring to a highly specific situation: resolution 2145 (XXI) terminated the Mandate of South Africa as it was empowered to do in accordance with the conclusion reached by the Court in its 1950 Advisory Opinion and confirmed in its 1962 Judgment in the *South West Africa* cases (which was binding on South Africa as a party to the case) [227]. This is not a situation that can be extrapolated to any General Assembly resolution, let alone a resolution such as 1514 (XV) that was drafted as an aspirational instrument setting out desired principles, not precise obligations[228]. Similarly, the resolutions that Mauritius cites from the 1950s were aspirational and did not reflect extant obligations under international law.[229]

4.21. Mauritius emphasises resolution 1514 (XV) (1960) as "a watershed for the formal recognition of a legal right to self-determination on the part of the Non-Self-Governing Territories"[230]. But the views of States on the resolution were divided at the time[231]. As Robert Rosenstock, the legal adviser to the United States Mission to the United Nations at the time, explained with characteristic vigour[232]:

> Most of the African and Asian nations regard it as a document only slightly less sacred than the Charter and as stating the law in relation to all colonial situations. Other states, particularly those in the West, do not hold the resolution in like esteem and are inclined to regard some of its paragraphs are considerably overstated, even as statements of political desiderata.

4.22. This does not meet the test that a rule of customary international law requires "extensive and virtually uniform" State practice and "evidence of a belief that this practice is

[226] Written Statement of Mauritius, fn 587, citing *South West Africa (Advisory Opinion), I.C.J. Reports 1970*, p. 50, para. 105.
[227] *South West Africa (Advisory Opinion), I.C.J. Reports 1971*, p. 50, para. 105.
[228] See Written Statement of the United Kingdom, para. 8.33.
[229] Written Statement of Mauritius, paras. 6.23-6.26.
[230] Written Statement of Mauritius, para. 6.33.
[231] See Written Statement of the United States, paras. 4.42-4.46 for comprehensive references to the views of States during the discussions.
[232] Robert Rosenstock 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713, 730 (**Annex 100**).

rendered obligatory by the existence of a rule of law requiring it"[233]. Rosenstock adds that it was not until the Friendly Relations Declaration of 1970 that the "right" to self-determination was recognised: "Many States had never before accepted self-determination as a right"[234]. Even then, the consensus among States was not reached easily. The Friendly Relations Declaration involved six years of careful drafting within the Sixth Committee and there was disagreement on many aspects of self-determination that were not resolved until April 1970[235].

Shaw, who is relied on by Mauritius in its Written Statement for other points, presents a nuanced view of the impact of resolution 1514 (XV). He notes that it was treated by some as a binding interpretation of the Charter, but by others as "nothing more than a general statement of objectives". He notes the "significant criticism" of the inconsistencies between resolution 1514 (XV) and the Charter[236].

4.23. Mauritius points out that the Court stated in the *Western Sahara* Advisory Opinion that resolution 1514 (XV) became "the basis for the process of decolonization"[237]. This statement – made in 1975 – does not endorse the view that self-determination became a binding right in 1960. Rather it refers to the resolution's role in the development of the political process of decolonization resulting in the creation of new UN Member States. In 1971, the Court had the first occasion to refer to resolution 1514 (XV) in its *Namibia* Advisory Opinion where it characterised the resolution as a "further important stage" in the development of international law[238]. That Opinion referred to a "principle" of self-determination[239].

4.24. As for the International Covenants, which refer to a "right" to self-determination in Common Article 1, Mauritius only mentions these in passing. It acknowledges that during the negotiation of the Covenants there was a division of opinion between those

[233] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands), Judgment, I.C.J. Reports 1969*, p. 3 at p. 43-44, paras. 74-77.
[234] Rosenstock, p. 731 (**Annex 100**).
[235] 1970 Report of the Special Committee on Friendly Relations, UN Doc. A/8018 (1970) (extracts), para. 68 (**Annex 101**).
[236] Shaw, Written Statement of Mauritius, Annex 135, pp 77-79.
[237] Written Statement of Mauritius, para. 6.33.
[238] *I.C.J. Reports 1971*, p. 31, para. 52.
[239] *Ibid.*

who saw self-determination as a "political principle" and those who saw it as a "legal right"[240]. However, Mauritius wrongly asserts that this deep divide was "resolved early in the negotiations in favour of the latter" [241]. The Covenants were not adopted until 16 December 1966 (after the detachment of the Chagos Archipelago in 1965) and did not enter into force until 1976. As explained in its Written Statement, the United Kingdom consistently, throughout the 1950s and 1960s, objected to references to a "right" of self-determination[242].

4.25. Mauritius cites several academics in support of its claim that self-determination was a right under customary international law by 1965[243]. Not only are their views only a "subsidiary means" for determining rules of law[244], but they are also less definitive than Mauritius suggests.

a. Higgins, writing in 1963, concluded that self-determination "has developed into an international legal right", but she also noted that the "extent and scope of the right is still open to some debate"[245]. On the question of what is the nature of the right (as opposed to its mere existence), she observes that "[t]he present stage of development of international law and relations" only allows for "certain tentative observations"[246].

b. Shaw is quoted out of context by Mauritius[247]. Although he does note the "large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary international law", he does not conclude that such a rule had emerged by 1965.

[240] Written Statement of Mauritius, para. 6.24.
[241] *Ibid.*
[242] Written Statement of the United Kingdom, para. 8.71. For an overview of the evolution in the United Kingdom's approach to self-determination from regarding it as a 'political principle' in 1960 to accepting it as a binding obligation in 1976, see I. Hendry and S. Dickson, *British Overseas Territory Law* (2011), pp. 251-253 (**Annex 102**).
[243] Written Statement of Mauritius, paras. 6.22, 6.29-6.30.
[244] ICJ Statute, Article 38(1)(d).
[245] Written Statement of Mauritius, Annex 19, pp. 103-4.
[246] *Ibid*, p. 104.
[247] Written Statement of Mauritius, para. 6.30.

c. Raič only says that it "*seems tenable*" that resolution 1514 (XV) reflected an existing rule of customary international law and he says that the view that the resolution "is an authoritative interpretation of the Charter… cannot be maintained, at least not in the sense that the entire resolution would be an authoritative interpretation"[248]. He concludes that the right to self-determination "developed in to a rule of customary law in the course of the 1960s"[249].

d. Mauritius cites Mensah and Oeter for the proposition that "the existence of a right to self-determination can be dated back to the coming into force of the Charter"[250]. Mensah's generic statement that the right to self-determination "has been one of the corner stones of the United Nations' activities since 1945" is taken from his 1963 unpublished doctoral thesis available in the Yale Law Library[251]. He oscillates between calling self-determination a "principle" and a "right".

e. As regards Oeter, he in fact says that "[i]t remains doubtful whether the formula in Art. 1(2) of the Charter originally intended to codify self-determination as a legal right"[252]. He states that the "old (political) principle" of self-determination was transformed into a collective right in two UN Human Rights Covenants[253], which, as noted above, entered into force in 1976.

4.26. Emerson, writing in 1971, contested Higgins' assertion in 1963 that the right was customary international law, and drew attention to Gross' work which used the same evidence of State practice and *opinio juris* to conclude that no customary rule existed[254]. Sinha, writing in 1973, similarly found no "affirmative determination" that the right to self-determination was customary international law[255]. In 1967, Schwarzenberger stated that self-determination "is not part and parcel of international

[248] Written Statement of Mauritius, Annex 145, pp. 216-217. Emphasis added.
[249] Written Statement of Mauritius, Annex 145, pp. 217-218.
[250] Written Statement of Mauritius, para. 6.22.
[251] Written Statement of Mauritius, Annex 94, p. 23.
[252] Written Statement of Mauritius, Annex 160, p. 315.
[253] *Ibid*. pp. 315, 322.
[254] Rupert Emerson, 'Self-Determination' (1971) 65 *American Journal of International Law* 459, 461 **(Annex 103)** citing the then-forthcoming chapter by Leo Gross, "The Right of Self-Determination in International Law," in Kilson (ed) *New States in the Modem World* (1975) 137, 139 **(Annex 104).**
[255] S. Prakash Sinha, 'Is Self-Determination Passe?' (1973) 12 *Columbia Journal of Transnational Law* 260, 271 (**Annex 105**).

customary law"[256]. In 1968, Verzijl wrote that self-determination was not customary international law[257]. Jennings and Brownlie also took the view that self-determination was not a legal right in the 1960s[258]. Fitzmaurice, in his report to the centenary session of the *Institut de droit international* in 1973, stated that he regarded the notion of a legal "right" of self-determination as a "nonsense"[259].

4.27. The next source that Mauritius relies on for its claim that self-determination was a customary right by 1965 are resolutions of the Security Council. It refers to 30 resolutions, of which only three pre-date Mauritius' independence in 1968. There is nothing in any of the resolutions to suggest that individual Security Council members, let alone the Council as a whole, considered resolution 1514 (XV) to be binding. The two resolutions that preceded the detachment of the Chagos Archipelago – resolutions 180 and 183 (1963) on territories under Portuguese administration - were concerned with Portugal's policies of claiming non-self-governing territories to be integral parts of metropolitan Portugal contrary to the Charter and resolutions of the Assembly and Council and leading to serious disturbance to peace and security in Africa. Three of the permanent members of the Council abstained from the vote on resolution 180[260] .

4.28. Resolution 232 (1966) on Southern Rhodesia makes no mention of self-determination. It reaffirms the rights of the people of Southern Rhodesia to "freedom and independence" while appealing to all States "to do their utmost to break off economic relations with Southern Rhodesia" to protest the racist form of government being imposed on the people.

[256] Georg Schwarzenberger, *A Manual of International Law* (5th edn, 1967) 74 (**Annex 106)**.
[257] JHW Verzijl (*International Law in Historical Perspective* (1968), 324 **(Annex 107)**.
[258] RY Jennings, *The Acquisition of Territory in International Law* (1963), 78 **(Annex 108).**; Ian Brownlie, *Principles of Public International Law* (1966), 483-4 **(Annex 109).**
[259] GG Fitzmaurice, "The Future of Public International Law", *Livre du Centenaire 1873-1973*, Institut de droit international, (extract), p. 233 (**Annex 110**).
[260] UN Doc S/PV.1049 (31 July 1963), para. 17 (France, United Kingdom, United States). The United Kingdom stated that it could not vote in favour of para. 1 of resolution that "confirm[ed] General Assembly Resolution 1514 (XV)" because it was "out of place" and reiterated that self-determination is a "principle" (paras. 44-45). See also UN Doc S/PV.1083 and Corr. 1 (11 December 1963), para. 76 ("We believe also that self-determination partakes in essence of politics, rather that of obligation in law").

D. Territorial integrity of the "totality" of the previous non-self-governing territory prior to independence is not part of the right to self-determination and is not customary international law

4.29. Territorial integrity is a fundamental principle of international law. The question is how it operates with respect to non-self-governing territories.

4.30. Mauritius asserts that a "legal corollary" or an "associated right" of self-determination is the territorial integrity of the "totality" of a non-self-governing territory, which prohibits the "arbitrary division" of territory prior to independence[261]. This misconstrues the relationship between territorial integrity and self-determination and is based on a selective and flawed interpretation of the law and practice, including resolution 1514 (XV).

4.31. Territorial integrity and self-determination are not neat corollaries. The principles can pull in different directions: a claim to self-determination may be a claim *against* territorial integrity (eg if the arbitrarily drawn colonial boundaries suppress the political empowerment of a people by creating divisions on the ground). Independent statehood is not the only way to realise the right to self-determination. As the 1970 Friendly Relations Declaration sets out, a people may achieve self-determination through "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people."[262]

4.32. Mauritius' argument that a new State must be "formed from the totality of the previous Non-Self-Governing Territory" no longer relies on an expansive interpretation of the principle of *uti possidetis*[263]. It concedes in a footnote to the Written Statement that *uti possidetis* is a principle "concerned with preserving the status quo after independence, and has a role distinct from that of the principle of territorial

[261] Written Statement of Mauritius, paras. 6.3(4) and (7)), 6.50(3), 6.58 and 1.4(iv).
[262] See also Resolution 1541 (XV) (1960), Principle VI.
[263] Written Statement of Mauritius, para. 6.58 cf. Mauritius' Memorial, *Chagos Arbitration*, paras 6.23-6.24, available at https://pcacases.com/web/sendAttach/1796.

integrity, insofar as the latter was applied to self-determination units prior to independence"[264].

4.33. Mauritius therefore seeks to show that a rule of "territorial integrity" separate to *uti possidetis* emerged "well before" 1965[265]. The practice it cites fails to establish such a rule. The examples are dealt with below in the order in which Mauritius presents them.

4.34. **Cyprus 1958**: Mauritius claims that in 1958 "while debating the U.K.'s proposal for the partition of Cyprus, the vast majority of States in the First Committee [of] the General Assembly strongly opposed partition as violating the right to self-determination"[266]. The situation in the debate was in fact more complex than Mauritius presents. The United Kingdom's proposals on Cyprus in 1958 did not set out a plan for partition. As the British delegate explained during the debate, the plan entailed, on an interim basis, a Greek and Turkish representative cooperating with the British colonial governor, with each community having its own separate house of representatives to manage communal and internal security affairs[267]. The international status of the island was to remain unchanged for seven years, with its future "completely open and unprejudiced"[268]. Greece did accuse the United Kingdom of attempting to bring about "partition", but the British delegate emphasised that "the two communal assemblies had not been designed to lead to separatism on Cyprus"[269]. The States that spoke during the debate held a variety of views. Of the States that Mauritius refers to in its Written Statement, many of their interventions were more nuanced than presented. Morocco, Poland and Saudi Arabia recognised the right of Cypriots to self-determination but did not mention

[264] Written Statement of Mauritius, fn 699.
[265] Written Statement of Mauritius, para. 6.50(3).
[266] Written Statement of Mauritius, para. 6.50(3).
[267] General Assembly, First Committee, 996th Meeting, Tuesday, 25 November 1958, 10:40 am, paras. 42-44 (A/C.1/SR.996); General Assembly, First Committee, 1003rd Meeting, Monday, 1 December 1958, 3:15 p.m., paras. 58-59 (A/C.1/SR.1003) (**Annex 111**).
[268] General Assembly, First Committee, 996th Meeting, Tuesday, 25 November 1958, 10:40 am, para. 44 (A/C.1/SR.996) (**Annex 111**).
[269] *Ibid*. paras. 9 and 52.

partition[270]. Yugoslavia[271] opposed partition, but accepted that the United Kingdom proposal did not envisage that; it made no mention of self-determination. Nepal[272] also opposed partition but not in terms of impeding the right to self-determination. Spain[273] called for "close study" of the United Kingdom's proposal, while it acknowledged that it did not favour partition. And the United Kingdom received supportive or neutral comments (not mentioned by Mauritius) from Australia, Ceylon, China, Colombia, Ethiopia, France, Iran, The Netherlands, Pakistan, Portugal, and Turkey[274].

4.35. **General Assembly resolution 1514 (XV) (1960), paragraph 6**: Mauritius invokes resolution 1514 (XV) to assert that self-determination was a binding rule of customary international law already in 1960 (addressed in **Section C** above) and, more specifically, that paragraph 6 established a right of total territorial integrity for non-self-governing territories. As the United Kingdom explained in its Written Statement, a close reading of the resolution and the circumstances of its drafting and adoption reveal that it did not reflect customary international law[275]. Not only are General Assembly resolutions in general recommendatory rather than mandatory, but the hasty negotiation of paragraph 6 demonstrated divided and unresolved views as to its meaning. Franck and Hoffman, in a section of their article that was not included in the extract provided by Mauritius in Annex 109, explains the lack of clarity regarding resolution 1514 (XV):

> The debates are unclear as to the intended coverage of the paragraph 6 exception to the right of self-determination. Jordan, for example, believed that "[t]he usurpation of a part of the Arab territory of Palestine by the joint aggression of colonialism and Zionism" constituted an example of a situation where the right to recover territorial integrity must take priority over self-determination of the peoples in the territory. Similarly, Indonesia saw paragraph 6 as an invitation to

[270]General Assembly, First Committee, 1005th Meeting, Tuesday, 2 December 1958, 3.5 pm, (A/C.1/SR.1005, Morocco); General Assembly, First Committee, 1000th Meeting, Friday, 28 November 1958, 11 am (A/C.1/SR.1000, Poland); General Assembly, First Committee, 1004th Meeting, Tuesday, 2 December 1958, 10:45am (A/C.1/SR.1004, Saudi Arabia).
[271] General Assembly, First Committee, 1000th Meeting, Friday, 28 November 1958, 11 am (A/C.1/SR.1000, Yugoslavia);
[272] General Assembly, First Committee, 1005th Meeting, Tuesday, 2 December 1958, 3.5 pm (A/C.1/SR.1005, Nepal).
[273] General Assembly, First Committee, 1003rd Meeting, Monday, 1 December 1958, 3:15 pm (A/C.1/SR.1003, Spain).
[274] UN Docs. A/C.1/SR.1000 (Australia, Colombia, Iran); A/C.1/SR.1002 (Ceylon, China); A/C.1/SR.1004 (Ethiopia, Pakistan); A/C.1/SR.998 (France); A/C.1/SR.1003 (The Netherlands, Portugal); A/C.1/SR.997 (Turkey).
[275] Written Statement of the United Kingdom, Chapter VIII, Section C.

> absorb the Dutch colony of Western New Guinea (West Irian) regardless of the preferences of the inhabitants. The Indonesian representative assured Guatemala that "the idea expressed in the Guatemalan amendment is already fully expressed in paragraph 6 of our draft resolution, and... that the territories and peoples he had in mind have been taken into consideration in our paragraph 6." This makes all the more poignant Indonesia's abandonment of the Guatemalan case during the vote on the Belize resolution in the 30th session of the General Assembly. Morocco, too, emphasized its understanding that paragraph 6 was intended to counteract the "silent tactics of the viper - of French colonialism - to partition Morocco and disrupt its national territorial unity, by setting up an artificial State in the area of Southern Morocco which the colonialists call Mauritania" [276].

4.36. As Franck and Hoffman observe, paragraph 6 was seen by Indonesia and Morocco, key sponsors of the resolution, as justifying the subversion of territorial sovereignty over a non-self-governing territory in favour of re-integration into its territory based on the existence of pre-colonial ties. After the adoption of the resolution, it was relied on by Benin (Dahomey) in its seizure of the Portuguese enclave of São João Baptista de Ajudá in 1961 and by India in its annexation of the Portuguese territories of Goa, Daman and Diu a few months later.

4.37. This interpretation of paragraph 6, however, did not appear to be shared by other States, but it was also not expressly rebutted during the debate. Clark observes that the Katanga crisis loomed over the debate on paragraph 6. He says

> [T]he underlying purpose [of paragraph 6] was to prevent a part of the non-self-governing territory, in particularly the wealthiest part, from negotiating a separate agreement with the former colonial power. There were also fears that the wealthier part might become, apart from the remainder of the territory, an associate state of that power[277].

4.38. The province of Katanga's attempt to secede from the Republic of the Congo (now the DRC) differed from the present dispute over the Chagos Archipelago. The Republic of the Congo became independent from Belgium on 30 June 1960. The Katanga crisis arose *after* independence and concerned an attempt to secede, not a detachment prior

[276] Thomas Franck and Paul Hoffman, 'The Right to Self-Determination in Very Small Places' (1976) 8 *NYU Journal of International Law and Politics* 331, 370 (**Annex 112**) cf extract in Written Statement of Mauritius, Annex 109.
[277] Roger S. Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression" (1980) 7 *Yale Journal of World Public Order* 2, 30 (**Annex 113**).

to independence. Further, no question of consent by the Congolese authorities arose since they were clearly opposed to the attempted secession.

4.39. Franck and Hoffman observe that resolution 1514 was "cited as frequently *against* as *for* the proposition that these small territories have a right to self-determination"[278]. Clark notes that "paragraph six has been invoked primarily to support denying a right of secession to parts of a territory *at or subsequent to independence*"[279], not to support a right to territorial integrity in the years preceding independence.

4.40. The quotation of the United Kingdom representative in the Committee of 24 in September 1964 in paragraph 6.75 of Mauritius' Written Statement has been taken out of context. The meeting record was not annexed to Mauritius' Written Statement, nor was it included in the extract in the UN Dossier No. 251. The statement was made by the United Kingdom during the Committee's consideration of Gibraltar in response to the Spanish representative's case for denying the application of the principle of self-determination to Gibraltar based on an erroneous interpretation of paragraph 6 of resolution 1514 (XV)[280]. The United Kingdom explained that paragraph 6 "could not be twisted to justify attempts by countries to acquire sovereignty over fresh areas of territory under centuries-old disputes"[281]. In this context, the United Kingdom explained that paragraph 6 was aimed at "protecting colonial territories or countries *which had recently become independent*" [282]. The United Kingdom quoted with approval the statement of Iran that "aggression was an even graver crime than otherwise when directed against a *recently independent country* still traversing the difficult initial stages of development" [283]. The United Kingdom recalled the question of the secession of Katanga (from the newly independent Republic of the Congo) which had been before

[278] *Ibid.* 369 (emphasis added). Interestingly, writing in 1976, 8 years after Mauritius' independence, Franck and Hoffman did not include it in the territories and states surveyed in their article. This was because there was no indication that decolonization had not been lawfully completed.
[279] Clark, 31 (**Annex 113**).
[280] General Assembly, Special Committee on Decolonization, 284th Meeting, UN Doc. A/AC.109/PV.284 (30 September 1964) (extract), para. 148 (**Annex 114)**
[281] *Ibid*.
[282] *Ibid*. Emphasis added.
[283] *Ibid*. para. 150.

the Assembly during the discussion and adoption of resolution 1514 (XV) [284]. Moreover, the United Kingdom refers to self-determination as a "principle" in contrast to a "right" in this exchange.

4.41. Mauritius says that paragraph 6 was "re-iterated later" in the 1970 Friendly Relations Declaration[285]. As the United Kingdom has pointed out in its Written Statement[286], the Friendly Relations Declaration deliberately omitted reference to resolution 1514 (XV). Rosenstock, in his analysis of the negotiation and drafting process, explains that "resolution 1514 (XV) was a source of difficulty" for the negotiators[287]. States continued to debate the status and scope of the reference to territorial integrity in paragraph 6 of resolution 1514 (XV)[288]. Rosenstock observes that paragraph 7 of the Friendly Relations Declaration, which refers to "the territorial integrity or political unity of sovereign and independent States", was "an affirmation of the applicability of the principle to peoples within *existing states* and the necessity for governments to represent the governed"[289]. Paragraph 8, which refers to the "partial or total disruption of the national unity and territorial integrity of any other State or country" addresses, together with paragraph 5, the problem of the use of force to deny peoples the right to self-determination.[290]

4.42. **Algeria 1960-1**: Mauritius argues that the UN General Assembly "repeatedly emphasised the need to respect Algeria's unity and territorial integrity" in the context of French proposals to divide the territory[291]. It asserts that this shows the principle of territorial integrity of non-self-governing territories became an established part of UN practice[292]. First, there are only two General Assembly

[284] *Ibid*. para. 148.
[285] Written Statement of Mauritius, para. 6.50(3).
[286] Written Statement of the United Kingdom, paras. 8.47-8.48.
[287] Rosenstock, 730 (**Annex 100**).
[288] Eg Compare UN Doc. A/AC.125/SR.91 (23 September 1968) p. 114 (Ghana: paragraph 6 meant "the principle of self-determination was limited to political units already defined as *countries or colonies*"); UN Doc. A/AC.125/SR.68 (4 December 1967) p. 10 (India: paragraph 6 "stressed that the principle of self-determination could not be invoked to justify 'the partial or total disruption of the national unity and the territorial integrity' of a *sovereign State*."); UN Doc. A/AC.125/SR.44 (27 July 27, 1966), p. 17 para. 40 (Guatemala: the interpretation of paragraph 6 "that the principle of self-determination could not impair the right of territorial integrity or the right to the recovery of territory" was of "great importance") (**Annex 115)**
[289] Rosenstock, 732 (**Annex 100**).
[290] *Ibid*. 732-3.
[291] Written Statement of Mauritius, para. 6.51.
[292] Written Statement of Mauritius, para. 6.51.

resolutions on Algeria that refer to respecting its "territorial integrity", and both were adopted with a substantial number of abstentions, including France and the United Kingdom[293]. Second, Algeria's situation cannot be compared to that of Mauritius, nor can it be a basis for a customary rule of territorial integrity for the entire territory of non-self-governing territories. Algeria was not a colony; it was part of metropolitan France, divided into three *départements* with representation in the French National Assembly. Algerian independence came about violently, as the result of a protracted war (1954-1962) led by the nationalist Front de Libération National, in which 1.5 million French citizens were called up to fight. Resolution 1573 (XV) refers to the "threat to international peace and security" posed by the situation in Algeria, and resolution 1724 (XVI) to deep concern about the "continuance of the war". The concern over Algeria's territorial integrity arose from an idea of Prime Minister Michel Debré and President De Gaulle in 1960-61 to partition Algeria along east-west lines and the possibility of continued French control of the Algerian Sahara (which was under French military administration in contrast to the civilian government in the three *départements*). It was in this specific context that the General Assembly passed two resolutions in 1960-61 seeking to calm the situation.

4.43. **General Assembly and Security Council Resolutions:** Mauritius lists a series of resolutions to attempt to show that paragraph 6 of resolution 1514 (XV) reflected a rule of international law in the 1960s[294]. First, 19 of these 21 resolutions post-date the detachment of the Chagos Archipelago in November 1965. Second, a close examination reveals that the resolutions do not support the claim of Mauritius.

a. **South West Africa (Trust Territory)**: The international status of South West Africa and Mauritius/Chagos Archipelago were different and cannot be compared. South West Africa was a Mandate Territory subject to the legal regime established in Article 22 of the League Covenant. Mauritius was never a Mandate or Trust Territory. The United Kingdom had

[293] Resolution 1573 (XV) (1960) was adopted 63-8-27; resolution 1724 (XVI) (1961) was adopted 62-0-38.
[294] Written Statement of Mauritius, para. 6.55 (1)-(10).

uncontested sovereignty over the territory and did not have the same legal obligations as South Africa had in respect of South West Africa. Moreover, the resolutions on South West Africa refer to the ICJ Advisory Opinion of 1950 where the Court said that the fact that South West Africa was a Mandate Territory meant that South Africa "acting alone has not the competence to modify the international status of the Territory of South West Africa and that the competence to determine and modify the international status of the Territory rests with South Africa acting with the consent of the UN"[295]. South Africa was trying to exercise sovereignty where it had none, unlike the United Kingdom with respect to the Chagos Archipelago.

b. **Basutoland, Bechuanaland and Swaziland**: These three territories were entangled with the wider question of South Africa and apartheid. The General Assembly's call not to annex or encroach on their territorial integrity was directed at South Africa, which was seeking to incorporate them and their White settler populations.

c. **Oman**: There is no reference to territorial integrity in these resolutions. They refer to the right of the people of the "Territory as a whole" to self-determination and independence, meaning the Sultanate of Muscat and Oman. The Sultanate was never a United Kingdom colony, dependency or protectorate. The United Kingdom considered its relationship with the Sultanate as between two sovereign States. For this reason, the United Kingdom voted against these three resolutions and maintained the position that the situation fell outside of the Committee of 24.

d. **Aden**: This resolution from 1966 simply takes note of assurances by the United Kingdom regarding the territorial integrity of South Arabia. Interestingly, the territorial integrity that the General Assembly was concerned with was that of the Federation of Southern Arabia, comprising the former colony of Aden and the surrounding protectorate – thus

[295] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at p. 144.

demonstrating the Assembly's acceptance of the merger of non-self-governing territories rather than the strict maintenance of their pre-independence boundaries. The Federation had come together in 1963.

e. **Nauru (Trust Territory)**: The Assembly's reference to "territorial integrity" is forward-looking – it is calling on Member States to respect Nauru's territory integrity *after* it becomes independent. As a small island nation and non-Member State of the UN, the newly-independent Nauru was considered vulnerable to Cold War influences. Moreover, as with South-West Africa, the case of Nauru is not comparable to Mauritius because it was, as a Trust Territory, under a different international legal regime. There was also no question of the territory being divided prior to independence, but rather whether Nauru would emerge to full independence or whether it would have a constitutional or treaty relationship with Australia.

f. **Equatorial Guinea:** As with Aden, the Assembly had accepted the merger of non-self-governing territories and the modification of pre-Independence territorial integrity. The island territory of Fernando Po and the mainland territory of Rio Uni were included separately in the UN list of non-self-governing territories in 1962. In 1963, they merged into the new entity of Equatorial Guinea. After a constitutional conference hosted by Spain in 1967, a referendum on constitutional changes (not UN-supervised) was held in 1968 in which Fernando Po's population only narrowly voted in favour for independence as a merged entity (4763 votes to 4486). The General Assembly did not oppose the territorial changes of Fernando Po and Rio Uni prior to independence.

g. **Gibraltar:** Unlike Mauritius, Spain has never been a non-self-governing territory. Unlike the Chagos Archipelago, Gibraltar is not a former dependency of a larger colonial territory. Also, the United Kingdom does not accept that Gibraltar constitutes a "colonial" situation, and has repeatedly stated this position in the UN's Fourth Committee. The United Kingdom consequently

does not agree that resolving Gibraltar's status will somehow "restore" Spain's territorial integrity. Notably, the General Assembly has been silent on the question of whether Gibraltar, as a non-self-governing territory, should enjoy its own "territorial integrity".

h. **Comoro Archipelago:** These two resolutions are from 1973 and 1974, which is several years after the relevant time for Mauritius to establish any so-called right to territorial integrity of the totality of a non-self-governing territory. The controversy is over the decision of the people of Mayotte in 1976 referenda to retain links with France whereas the rest of the Archipelago (known as Comoros) became independent in 1975. Ever since 1995, the General Committee of the General Assembly has either deferred consideration of Mayotte or recommended that it not be discussed.

i. **French Somaliland:** This single resolution is from 1975. The General Assembly's concern with French Somaliland's territorial integrity was directed at the actions of its neighbours, and particularly Somalia, not France, which was the administering Power. Resolution 3480 (XXX) noted the situation was a "threat to peace" and called on States to renounce their claims to the territory (para. 6). Independence within the boundaries of the non-self-governing territory was seen by the OAU and the UN as a way of preventing a territorial dispute arising between African States. The threat to the territory's integrity was external.

j. **26 Non-Self-Governing Territories, including Mauritius:** This is a reference to two omnibus resolutions 2232 (XXI) and 2357 (XXII) from 1966-1967. These resolutions, which are recommendatory only, express "deep concern" of a generic nature about the "continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories". If there had been a legal right to territorial integrity of non-self-governing territories in 1966-1967, the General Assembly would have referred to the breach of such a right. Paragraph 4 of the resolution, which reiterates the wording of paragraph 6 of resolution 1514 (XV), was put to a separate vote in

which 18 States votes against and 27 abstained (for resolution 2232) and 16 voted against and 16 abstained (for resolution 2357)[296].

4.44. **Academic commentary:** Mauritius cites Shaw and Raič to claim that "a fundamental element of decolonization is that the new State is formed from the totality of the previous Non-Self-Governing Territory"[297]. But these commentators' views – which are only a "subsidiary means" for the determination of rules of law - are much more nuanced than Mauritius suggests. Shaw expressly acknowledges that:

> It is clear that historically States have been regarded as having sovereignty over their colonial territories and that this would include the competence to modify the extent of the territory of a given unit. Many colonial arrangements attest to this[298].

Shaw goes on to say that to permit the administering authority to alter the territorial composition of the colonial entity would undermine the concept of self-determination, but he specifies that this would be the case if it was done "*upon independence"*, not in an undefined pre-independence period. And in the specific case of Mauritius and the United Kingdom, Shaw points to the "apparent acceptance of the arrangement by the Mauritian government from independence until 1980" [299].

4.45. As for Raič, his main point was that "a positive legal rule was developed which held that colonial powers were under an obligation to decolonize in accordance with the wishes of the inhabitants of the colonial territory"[300]. For him, the principle of territorial integrity required "that the fragmentation of the colonial territory before the realization of independence (or integration or association) *as a result of secession by a segment of the colonial population* was not accepted by the United Nations and the international community at large"[301]. There is no claim

[296] **UN Dossier Nos. 172** and **199.**
[297] Written Statement of Mauritius, paras 6.56-6.58.
[298] Written Statement of Mauritius, Annex 135, p. 131.
[299] Written Statement of Mauritius, Annex 135, p. 131-132.
[300] David Raič , *Statehood and the Law of Self-Determination* (2002), Written Statement of Mauritius, Annex 145, p. 208.
[301] Written Statement of Mauritius, Annex 145, p. 208 (emphasis added).

of secession in this case. Raič's concern – not applicable to the case of Mauritius – was of "territorial fragmentation and international destabilisation in view of the often complex ethnic structure of the territories in question"[302]. He also points to numerous exceptions to the principle of territorial integrity in State practice that were accepted by the United Nations[303].

4.46. In short, the practice and academic commentary cited by Mauritius does not establish a "legal corollary" or "associated right" of territorial integrity of the totality of the non-self-governing territory prior to independence, and it certainly does not establish that such a right would have applied to Mauritius and the Chagos Archipelago in 1965.

4.47. Self-determination is concerned with the political, economic, social and cultural empowerment of a 'people'[304]. As the Court has explained, the right gives a 'people' the right to choose their political status[305]. Territory is important to the extent it allows a 'people' meaningfully to exercise their right to self-determination, but it does not require the immutability of the pre-independence boundaries of the territory. The principles of territorial integrity and self-determination will come into conflict if, for example, the administering Power attempts to 'divide and rule' non-self-governing territories by slicing them into unsustainable pieces of land. But that is not the case here. Self-determination of a people does not require that a very remote dependency be retained by the non-self-governing territory. And even if (*quod non*) such a rule had existed in 1965, Mauritius concedes that an exception exists where modification of boundaries is "pursuant to an expression of free consent"[306]. In this case, as explained in the United Kingdom's Written Statement and **Chapter II** of these Written Comments, such consent was freely given by the representatives of Mauritius.

[302] Written Statement of Mauritius, Annex 145, p. 209.
[303] Written Statement of Mauritius, Annex 145, p. 209-10 (Gilbert and Ellice Islands, Rwanda and Burundi, British Cameroons, Trust Territory of the Pacific Islands).
[304] Common Article 1 of the International Covenants; 1970 Friendly Relations Declaration, para. 1 of the "principle of equal rights and self-determination of peoples";
[305] *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. 16, para. 52; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 36, para. 70.
[306] Written Statement of Mauritius, para. 6.58.

4.48. As the United Kingdom set out in its Written Statement, decolonization practice during the 1950s and 1960s involved non-self-governing territories changing their boundaries prior to and upon independence through detachment, merger, partition and other arrangements, often with the acquiescence of the UN[307]. A 'right' to the territorial integrity of the totality of the non-self-governing territory prior to independence is not only unsupported by extensive and virtually uniform State practice, but such a finding would put many existing, settled boundaries into doubt.

4.49. Mauritius asserts that the "unit of self-determination" was the "entire territory of Mauritius"[308]. Both law and practice do not support such a reading of the right to self-determination. The territorial boundaries for the purposes of decolonization are those that exist at the time independence is achieved; the clock stops at that moment[309]. For Mauritius, in March 1968 the Chagos Archipelago was not part of its territory. There was no intention on the part of the United Kingdom to 'divide and rule' Mauritius. The territory of Mauritius in 1968 enabled the meaningful exercise of self-determination. Further, even prior to independence, the Chagos Archipelago, as a lesser dependency 2150 kilometres away, was not an integral part of the territory of Mauritius[310]. The principle of territorial integrity, to the extent it applies to non-self-governing territories prior to independence, would still fall to be applied taking into account important geographic realities.

4.50. The United Nations did not, contrary to what Mauritius contends, recognise the entire territory of Mauritius as the unit of self-determination[311]. Mauritius relies on resolution 2066 (XX) (1965), but as the quotation in paragraph 6.68 of Mauritius' Written Statement shows, the prime concern of the Assembly was detachment "for the purpose of establishing a military base". As the United Kingdom explained in its Written

[307] Written Statement of the United Kingdom, paras. 8.55-8.58. See Written Statement of the United States, paras. 4.65-4.72. See also Written Statement of Mauritius, Annex 119 where the Note from M. Walawalkar of the African Section Research Department to Mr Hewitt, FCO 31/2759 (8 July 1980) refers to "frequent cases of detachment of island dependencies for administrative convenience by both Britain and France, eg. the creation of the separate colony of Seychelles in 1903 out of the colony of Mauritius",
[308] Written Statement of Mauritius, paras. 6.62-6.66.
[309] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 554, at p. 570, para. 33 and pp. 616-617, para. 116.
[310] Written Statement of the United Kingdom, Chapter II.
[311] Written Statement of Mauritius, paras. 6.67-6.72.

Statement[312], the resolution contains no condemnation of the United Kingdom, nor any statement that it has acted in breach of international law. It uses non-binding language, even when referring back to resolution 1514 (XV) ("request[ed]" that the provisions of the resolution be observed in relation to Mauritius).

E. The freely expressed will of the population concerned does not require a plebiscite or referendum

4.51. In its Written Statement, as in its pleadings in the *Chagos Arbitration*, Mauritius argues that a UN-supervised referendum or plebiscite is "the medium" for the freely expressed consent of the population[313]. The practice it cites on the merger or division of the territory of former colonies all relates to UN-supervised plebiscites[314].

4.52. This is a partial picture. As Mauritius acknowledges in passing in its Written Statement, consent can also be validly expressed through elections[315]. There are, in fact, a variety of ways in which a population may express its consent, including constitutional conferences, agreement of elected representatives, elections and parliamentary votes. A referendum is not required for the overall determination of their political status let alone for the specific situation of the modification of territorial boundaries prior to independence, such as the detachment of a dependency.

4.53. The legal requirement stated in the 1970 Friendly Relations Declaration is the existence of the "freely expressed will" of the people concerned. But the choice of method is political and contextual. The majority of the elected representatives of the non-self-governing territory may not want a referendum, as in the case in Mauritius in 1965-68[316].

4.54. There was an unofficial (not UN supervised) referendum followed by elections in Swaziland. Tanganyika had legislative council elections (1958, 1959 and 1960), then transitioned into a parliament with internal self-government in May 1961 and became

[312] Written Statement of the United Kingdom, paras. 8.49-54.
[313] Written Statement of Mauritius, paras. 6.58; Mauritius' Memorial, *Chagos Arbitration*, paras 6.28-6.29.
[314] Written Statement of Mauritius, paras. 6.59-6.60.
[315] Written Statement of Mauritius, paras.6.3(3), 6.44
[316] See paras. 2.63-2.70.

independent in December 1961.[317] There was mixed practice among French colonies in Africa, with some seeking independence through new territorial powers granted to elected territorial governments. The independence referendum in Djibouti was UN monitored, but not UN-supervised.

4.55. Hendry and Dickson summarise that the "consistent practice" of the United Kingdom in the post-war decolonization 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[318].

4.56. In Kenya, Zambia, The Gambia and Guyana, for example, there was a general election for a legislative council which later transitioned to a parliament. This process was accompanied by "key legal steps" including the passage of the necessary United Kingdom legislation and negotiation and formal making of the independence constitution of the territory concerned[319].

4.57. Sometimes public opinion was canvassed by a commission of enquiry. Jordan, which had been a British Mandate, gained independence as the result of a March 1946 treaty with the United Kingdom. Lebanon became fully independent in 1943 when the Chamber of Deputies amended the Constitution to formally end the French Mandate and annul the High Commissioner's powers. In Suriname, a vote in the parliament in favour of independence precipitated negotiations with The Netherlands. Elsewhere in the Caribbean, where there was merger and division among territories, the usual process was an elected assembly followed by the introduction of internal self-government, with parliamentary activity and elections along the way. Upon independence, the Chief Minister led a government that took on responsibility for foreign affairs and defence.

4.58. In sum, the will of the people may be expressed in various ways, not only UN-supervised plebiscites or referenda. And as set out in **Section A** and **Chapter II**,

[317] Tanganyika merged with Zanzibar and Pemba to form the United Republic of Tanganyika and Zanzibar in 1964, which later became the United Republic of Tanzania.
[318] I. Hendry and S. Dickson,, *British Overseas Territory Law* (2011), p. 279 (**Annex 102**).
[319] *Ibid*, pp. 280-284.

Premier Ramgoolam and his ruling party wished to avoid a referendum demanded by the PMSD, which favoured free association with the United Kingdom rather than independence. Mauritius freely consented to the detachment of the Chagos Archipelago through its representatives and expressed its acceptance of the detachment in a general election and parliamentary vote.

F. Conclusions

4.59. Even if the dispute between Mauritius and the United Kingdom were a suitable matter for an advisory opinion, and it is not, Mauritius cannot circumvent the basic fact that its elected representatives agreed to the detachment of the Chagos Archipelago in the years leading up to independence, that this was accepted by the electorate, and that Mauritius subsequently reaffirmed its consent post-independence. It was only after many decades that Mauritius raised the argument that the consent was extracted under duress. This allegation is not supported by the facts, the chronology nor the statements of key protagonists. Mauritius' case does not approach the high standard for proving duress under international law.

4.60. Quite apart from the fact of consent to the detachment, broad concepts of self-determination and territorial integrity do not assist the Court in answering Question (a), should it decide to exercise its discretion to issue an advisory opinion in this case.

4.61. Even if Mauritius established that a general right to self-determination – a right focused on political, economic, social and cultural empowerment – existed by 1965, that would have no impact on the question whether the detachment of the Chagos Archipelago prevented the lawful completion of the process of decolonization of Mauritius. Political, economic, social and cultural empowerment has nothing to do with territorial integrity for an unspecified period prior to independence.

4.62. Similarly, the principle of territorial integrity in the abstract does not shed light on the process of decolonization. The question is whether there is a right to territorial integrity to the totality of the territory of non-self-governing territory. This chapter has shown that boundaries imposed for the purpose of colonial administration have never been

considered immutable prior to independence. The case before the Court concerns the detachment of a remote dependency, not a situation of ‘divide and rule’ nor the secession of the wealthiest part, leaving the remainder to struggle with its new independence. Moreover, the detachment of the Chagos Archipelago was undertaken with Mauritius’ free consent expressed through its elected representatives and repeatedly reaffirmed in subsequent conduct. The process of decolonization was thus lawfully complete on 12 March 1968 when Mauritius gained its independence and was removed from the list of non-self-governing territories maintained by the United Nations.

CHAPTER V

RESPONSE TO QUESTION (b): CONSEQUENCES UNDER INTERNATIONAL LAW OF THE UNITED KINGDOM'S ADMINISTRATION OF THE CHAGOS ARCHIPELAGO

5.1. Question (b) reads:

> 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?

5.2. The United Kingdom maintains in full its position as set out in Chapter IX of its Written Statement, that is to say:

a. For the reasons given in its Written Statement[320], as well as in **Chapter III** above, the Court should exercise its discretion not to respond to the questions posed by the General Assembly. The very terms of Question (b), and Mauritius' demands in Chapter 7 of its Written Statement, show that it is precisely Mauritius' aim to compromise the United Kingdom's legal position through these advisory proceedings.

b. In light of the vague and broad formulation of Question (b), it is difficult to identify with any certainty what the Court is being requested to deal with in its answer[321].

c. It may therefore even be doubted, given that Question (b) is so general and obscure, whether it is a 'legal question' within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court[322].

[320] Written Statement of the United Kingdom, Chapter VII; see also the Written Statements of Australia, Chile, France, Israel and the United States.
[321] Written Statement of the United Kingdom, paras. 9.2-9.11.
[322] Written Statement of Australia, paras. 4 and 17-25.

d. In any event, the Court should not seek to reopen findings of the Arbitral Tribunal in the *Chagos Arbitration* in its 2015 Award[323].

e. If, nevertheless, the Court should decide to respond to the questions, the correct answer to Question (a) is that the decolonization of Mauritius was lawfully completed in 1968, and so the Court need not proceed to answer Question (b)[324].

f. In any event, the present advisory proceedings cannot affect the United Kingdom's continued sovereignty over the Chagos Archipelago until the islands are ceded to Mauritius in accordance with the United Kingdom's undertaking in the 1965 Agreement[325].

g. The decolonization of Mauritius was lawfully completed in 1968 and therefore, contrary to the assumption underlying Question (b), there are no international legal consequences arising from the United Kingdom's continued administration of the British Indian Ocean Territory, other than:

(1) the rights and obligations that flow from any State's sovereignty over territory; and

(2) any additional rights and obligations related to the United Kingdom's administration of the Chagos Archipelago, which flow from international agreements to which the United Kingdom is a party. In the present case, such additional obligations may be found in the 1965 Agreement[326] as interpreted, with binding force, by the Arbitral Tribunal in the *Chagos Arbitration*[327].

h. If nevertheless a response were to be given to Question (b), it would have to be based on the 1965 Agreement, as interpreted by the Arbitral

[323] Written Statement of the United Kingdom, para. 9.14.
[324] Written Statement of the United Kingdom, para. 9.16.
[325] Written Statement of the United Kingdom, para. 9.18.
[326] Written Statement of the United Kingdom, para. 9.19.
[327] *Chagos Arbitration* Award, para. 547 (*Dispositif*) (**UN Dossier No. 409**).

Tribunal in the *Chagos Arbitration* in its binding Award of 18 March 2015[328].

5.3. This Chapter is divided into the following sections: response to Mauritius' arguments based on the law of State responsibility (**Section A**); response to Mauritius' assertions concerning the 'timeframe for completing decolonization' (**Section B**); alleged obligations which, according to Mauritius, would be incumbent upon the United Kingdom during an interim period between the delivery of the advisory opinion and the cession of the Archipelago to Mauritius (**Section C**); and the alleged obligations of third States and international organizations (**Section D**).

A. Mauritius' arguments based on the articles on State responsibility are wholly inappropriate.

5.4. In Chapter 7 of its Written Statement, Mauritius develops a highly artificial line of argument on the basis of the ILC's Articles on State responsibility[329]. For the reasons set out briefly below, reliance on the ILC articles is wholly inappropriate in the circumstances of the present case.

5.5. Mauritius' line of argument is based on the hypothesis that the process of decolonization of Mauritius was not completed on 12 March 1968. The United Kingdom disagrees. As has been shown in **Chapter IV** above, and in the United Kingdom Written Statement, the detachment of the Chagos Archipelago was undertaken with Mauritius' free consent expressed through its elected representatives, and was repeatedly reaffirmed by subsequent conduct. The process of decolonization of Mauritius was completed on 12 March 1968 when Mauritius gained its independence.

5.6. Mauritius' argument is founded on the further hypothesis that, if the process of decolonization was not completed on 12 March 1968 (*quod non*), the 'failure' (as Mauritius puts it) to complete decolonization on that date amounted to "a

[328] Written Statement of the United Kingdom, para. 9.20.
[329] Written Statement of Mauritius, paras. 7.4.-7.10.

continuing wrongful act", which Mauritius describes as "the wrongful maintenance of a colonial situation"[330]. According to Mauritius, this continuing unlawful act "persists to this day", and "the situation must be brought to an end and full legality restored"[331]. The United Kingdom disagrees:

a. Even if decolonization were not completed on 12 March 1968, that would not mean that the United Kingdom had committed an internationally wrongful act vis-à-vis Mauritius. The question whether there was a 'continuing' unlawful act, as Mauritius alleges, simply does not arise, and it is unnecessary for the Court to enter into the fine distinctions drawn by Mauritius in this regard.

b. Even if the United Kingdom remained under an obligation to complete the decolonization of Mauritius, it could not be required, neither by the General Assembly nor by the Court, to do so by a particular date. No date is imposed by law for the decolonization of a non-self-governing territory, and no date is imposed by law for the decolonization of a part of a such territory that has otherwise been decolonized. As explained in Section C below, it could not be for the Court as a judicial body, to set a date.

5.7. Even if there had an unlawful act on 12 March 1968 (*quod non*), that does not mean that there is an unlawful act today, or that the United Kingdom's continued administration of the British Indian Ocean Territory in 2018 is in some way contrary to international law. That would depend upon a consideration of the bilateral relations between the United Kingdom and Mauritius over the intervening fifty years, in so far as they related to the Chagos Archipelago. The Court cannot address the current status of the Chagos Archipelago without taking account of the post-independence reaffirmation of the 1965 Agreement and all subsequent developments between 1968 and the present.

[330] Written Statement of Mauritius, para. 7.10.
[331] Written Statement of Mauritius, para. 7.3(1).

5.8. Thus, as explained in **Chapter III** above, relations between Mauritius and the United Kingdom are not matters upon which the Court can or should opine in the exercise of its advisory jurisdiction. They are bilateral and fact-dependent and cannot properly be the subject of advisory proceedings. To determine what the position is in 2018 the Court would need to consider such bilateral matters as -

a. The status, meaning and reaffirmation of the 1965 Agreement (which has already been the subject of contentious proceedings before an UNCLOS arbitral tribunal leading to a binding Award in 2015 on this matter)[332]. This would involve taking a position on the very extensive bilateral contacts, both formal and informal, between the United Kingdom and Mauritius concerning the Chagos Archipelago, some of which are touched upon in the Written Statements of the United Kingdom and Mauritius, but of which the Court will not have a full or fully argued or evidenced picture.

b. The effect of the 1982 Agreement between Mauritius and the United Kingdom concerning compensation for the Chagossians.

c. The interpretation and application of the 2015 *Chagos Arbitration* Award. This has already been a matter of contention in confidential discussions between the Parties, and there is an obvious risk of the appearance of conflict between the Award and the Court's views as expressed in the present proceedings[333]. (In the event of a conflict, the Award would prevail since it is binding while the present proceedings are not.)

B. Mauritius' assertions concerning the 'timeframe for completing decolonization'

5.9. Since the United Kingdom's continued administration of the British Indian Ocean Territory is not unlawful, the question of a 'timeframe for completing decolonization' does not arise. But even if it did, it would be a matter for

[332] *Chagos Arbitration* Award, para. 61 (**UN Dossier No. 409**).
[333] *Chagos Arbitration* Award, para. 61 (**UN Dossier No. 409**).

discussion between the United Kingdom and Mauritius. Not for decision by the Court.

5.10. Mauritius devotes much space in its Written Statement to its argument that it would follow from a finding that decolonization was not completed in 1968 that the United Kingdom is under an obligation to cede the territory to Mauritius 'immediately' or 'speedily', which it seems to interpret as meaning within a period of less than a year[334]. In its Written Statement, Mauritius even sets out at length when and how the transfer should happen[335]. This ignores the fact that the UN Charter leaves considerable discretion as to timing[336]. It is not for the Court, as a court of law, to lay down such timescale and modalities, and certainly not in advisory proceedings when at least one of the concerned States has not asked it to do so. Nor indeed is it for the General Assembly to do so

5.11. It is noteworthy that this request by Mauritius, along with others described below, is essentially asking the Court to issue a *dispositif* as if these were contentious proceedings between two States. This demonstrates that Mauritius is seeking to place a strictly bilateral dispute before the Court, circumventing the lack of consent by one of the Parties to the Court's jurisdiction.

5.12. In this connection, Mauritius invokes the concluding paragraph of the *Namibia* Advisory Opinion, in which the Court was of the opinion that "South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory"[337]. Mauritius fails to mention the unique position of Namibia, as a territory that had been under a Mandate, which had been validly terminated by the General Assembly. It further fails to point out that, as the Court explained in detail in its Opinion, the Security Council had called upon South Africa "to withdraw its administration from the territory [Namibia] immediately and in any case before 4 November 1969"[338]. Nor are the other cases invoked by Mauritius of any assistance to its case; they all relate to

[334] Written Statement of Mauritius, paras. 7.3(2), 7.10-7.16.
[335] Written Statement of Mauritius, 7.17-7.41.
[336] See, for example, Article 73(b).
[337] Para. 133(1) (emphasis added by Mauritius).
[338] Para. 108, citing Security Council resolutions 264(1969) and 269(1969).

entirely different situations: the obligation to 'cease forthwith' construction works (*Wall* Advisory Opinion); to 'immediately terminate' the detention of the hostages (*Diplomatic and Consular Staff* case); 'immediately to cease' acts as may constitute breaches of specified legal obligations (*Nicaragua* v. *United States of America*);[339] and to 'take without further delay' measures to submit Hissène Habré to its authorities for the purposes of prosecution (*Belgium* v. *Senegal*)[340].

5.13. Mauritius completely ignores the United Kingdom's undertaking to cede the Chagos Archipelago when it is no longer needed for defence purposes, which was found by the Arbitral Tribunal to be a legally binding undertaking.[341] The joint defence facility operated by the United Kingdom and United States continues to play a critical role in ensuring regional and global security. The facility is instrumental in combating some of the most difficult and urgent problems of the 21st century such as terrorism, piracy, transnational crime and instability in its many forms, as well as providing a springboard for responding to humanitarian crises. It is for the United Kingdom alone to determine when the Chagos Archipelago is no longer required for its defence purposes. Mauritius' attempted assurances on the facility's future under their sovereignty lack credibility.

5.14. Mauritius proceeds to devote a lengthy Part III of Chapter 7 of its Written Statement to what it apparently foresees would be practical aspects of a possible future transfer of the Chagos Archipelago to Mauritius[342]. It is not, however, for the Court in these advisory proceedings to opine on such matters. As and when they arose in practice, they would need to be discussed bilaterally between Mauritius and the United Kingdom.

C. Alleged obligations which, according to Mauritius, would apply in an interim period

5.15. In its Written Statement, Mauritius sets out a long list of demands with respect to the conduct of the United Kingdom (vis-à-vis the people of Mauritius) in a period leading

[339] Written Statement of Mauritius, para. 7.12.
[340] *Ibid*., para. 7.13.
[341] *Chagos Arbitration* Award, para. 547B(2)(**UN Dossier No. 409**).
[342] Written Statement of Mauritius, paras. 7.17-7.41

up to the transfer of the Chagos Archipelago to Mauritius[343]. The demands are said to flow from Article 73 of the UN Charter. Mauritius' argument is untenable for a number of reasons.

5.16. First, Article 73 applies in the circumstances set out in its chapeau, which reads:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: …..

The people of Mauritius attained a full measure of self-government upon independence on 12 March 1968. Article 73 of the UN Charter is simply not applicable to the relations between the United Kingdom and Mauritius, which is a sovereign, independent State.

5.17. Second, Mauritius says that the same legal consequences follow from the *Chagos Arbitration* Award. According to Mauritius,

> The same legal consequences follow from the unanimous Award in the *Chagos Marine Protected Area Arbitration*, which held that the administering power'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". The Award emphasised that "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."[344]

Mauritius is thus seeking to have this Court give an advisory opinion covering matters that have already been decided by the Arbitral Tribunal. That would not be appropriate. The United Kingdom has been seeking to enter into discussions on the implementation of the 2015 Arbitral Award; it is Mauritius that has blocked all progress in that regard.

5.18. In Part IV of Chapter 7 of its Written Statement, Mauritius sets out a series of demands for consultation and cooperation. Although these demands are made in

[343] *Ibid.*, para. 7.43.
[344] *Ibid.*, para. 744.

the context of Mauritius' view that a transfer should and could take place swiftly, by their nature they all seem to anticipate a prolonged interim period. In effect, what Mauritius appears to be seeking to do is to persuade the Court to lay down some general or specific rules that should apply from the date of the advisory opinion to the date of transfer, whenever that might be. Mauritius' various demands are addressed very briefly below, chiefly to rebut the misleading statements contained in Mauritius' Written Statement. Even if it were to seek to respond in some fashion to Question (b), it would be entirely inappropriate for the Court, as a court of law, and in the exercise of its advisory jurisdiction, to enter into matters of policy and bilateral relations in the way sought by Mauritius.

5.19. Second, as noted at paragraphs 5.17 and 5.18 above, by Mauritius' own admission, the matters concerned overlap with matters covered by the undertakings given by the United Kingdom to Mauritius in the 1965 Agreement, which were considered in depth in the Award of the Arbitral Tribunal in the *Chagos Arbitration*[345]. It would not be proper for the Court, in these advisory proceedings, to seek to reopen determinations already made by the Arbitral Tribunal.

(a) The demand that the United Kingdom cooperate with Mauritius to advance efforts by Mauritius to resettle Mauritians of Chagossian origin, and to ensure the access of other Mauritian citizens to the Chagos Archipelago in accordance with Mauritian law

5.20 The United Kingdom refers to its Written Statement, in which it has already sought to address the reference in Question (b) to "a programme for the settlement on the Chagos Archipelago of [Mauritius'] nationals"[346]. As was there pointed out, Mauritius has been entirely vague as to its 'programme' for settlement of the Islands, but appears to contemplate Mauritian nationals generally, not just Chagossians. Nor does it appear to contemplate the resettlement of Chagossians who are not Mauritian. Mauritius has not expressed any views as to the feasibility of a settlement programme.

[345] *Chagos Arbitration* Award (**UN Dossier No. 409**).
[346] Written Statement of the United Kingdom, paras. 9.8-9.10.

5.21 In this connection, it is necessary to recall the Agreement between the United Kingdom and Mauritius of 8 October 1982 concerning the renunciation of claims by Chagossians in Mauritius[347] that was considered in the *Chagos Islanders* case before the European Court of Human Rights[348]. In light of the 1982 Agreement, it is clear that Mauritius cannot now make further claims against the United Kingdom on behalf of Chagossians with Mauritian nationality concerning their treatment or possible resettlement, which is what Mauritius is effectively seeking to do in these advisory proceedings.

(b) The demand that Mauritius is afforded access to the natural resources of the Chagos Archipelago

5.22 These matters are already governed bilaterally between the United Kingdom and Mauritius by the undertakings in the 1965 Agreement, which refer to "fishing rights" and that "any mineral or oil discovered in or near the islands should revert to the Mauritian Government". These undertakings were the subject of much debate in the *Chagos Arbitration* and in the Arbitral Tribunal's Award, which is binding as between the Parties.

(c) The demand that the environment of the Chagos Archipelago is fully protected

5.23 The United Kingdom has taken exceptional measures to protect the environment of the Archipelago and its surrounding waters, not least through Ramsar and the proclamation in 2010 of what was then the largest Marine Protected Area (MPA) in the world[349]. And it has sought to cooperate with Mauritius over such measures. Mauritius has consistently refused such cooperation. It has refused to discuss such measures or to cooperate in any way in their implementation.

5.24 The only specific measure mentioned by Mauritius in its Written Statement is that the United Kingdom "should formally bring to an end its purported "MPA", the declaration

[347] Written Statement of the United Kingdom, paras. 4.9-4.13.
[348] Written Statement of the United Kingdom, paras.4.14-4.15.
[349] For details concerning the MPA, see paras. 126-157 of the *Chagos Arbitration* Award (**UN Dossier No. 409**) describing 1. Initial steps regarding the MPA and the United Kingdom's consultations with Mauritius; 2. The Commonwealth Heads of Government Meeting and its aftermath; 3.the declaration of the MPA; and 4. consultations between the United Kingdom and Mauritius following the declaration of the MPA.

of which was unanimously ruled to have been unlawful by the tribunal…"[350]. In fact, the Arbitral Tribunal did not declare that the MPA as a whole was "unlawful"; rather, it declared "that in establishing the MPA … the United Kingdom breached its obligations under Articles 2(5), 56(2) and 194 (4) of the Convention"[351], that is to say, certain obligations resulting from undertakings in the 1965 Agreement[352].

(d) The demand that Mauritius participate in the authorisation, oversight and regulation of scientific research in and around the Archipelago

5.25 This would be for bilateral discussion. It is not a matter that Mauritius has raised with the United Kingdom prior to the present advisory proceedings.

(e) The demand that Mauritius be allowed to make submissions to the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Chagos Archipelago

5.26 This is a bilateral matter, which has already been the subject of much discussion between Mauritius and the United Kingdom. In its Written Statement, Mauritius fails to mention that the delineation of the outer limit of the continental shelf around the Chagos Archipelago has been the subject of numerous bilateral exchanges between the United Kingdom and Mauritius and that it was raised by Mauritius as its Third Submission in the *Chagos Arbitration* and discussed at length in the written pleadings and at the hearing. Although the Arbitral Tribunal found that it was without jurisdiction to determine the Third Submission, it did examine in the Award "the history of the position taken by each Party regarding

[350] Written Statement of Mauritius, para. 7.58.

[351] *Chagos Arbitration* Award, *Dispositif*, para. 547.B (**UN Dossier No. 409**). Para. 547.B of the Award reads:

> In relation to the merits of the Parties' dispute, the Tribunal, having found, inter alia,
> (1) that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea;
> (2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and
> (3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding;
>
> DECLARES, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.

[352] *Chagos Arbitration* Award (**UN Dossier No. 409**), para. 544; see also paras. 537-541.

the issue, both before and after the commencement of arbitration proceedings"[353]. As can be seen from the Award, the United Kingdom has been very constructive about the question of a submission to the Commission on the Limits of the Continental Shelf (CLCS) (which is a matter closely related to the undertaking in the 1965 Agreement "that the benefit of any minerals or oil discovered in or near the islands should be returned to Mauritius").

(f) The demand that Mauritius be able to proceed to a delimitation of the Archipelago's maritime boundaries with the Maldives

5.27 It is the United Kingdom, as the coastal State with sovereignty over the Chagos Archipelago, that is entitled to enter into negotiations with the neighbouring State, the Republic of the Maldives, in order to delimit maritime boundaries; and it is for the United Kingdom, as the coastal State, to agree with the Maldives, if necessary, provisional arrangements of a practical nature as provided for in Articles 74(3) and 83(3) of UNCLOS.

D. Claimed legal consequences for third states and international organizations

5.28 Mauritius interprets Question (b) as requesting the Court to indicate the legal consequences for third States and international organizations. The United Kingdom disagrees. It is by no means apparent that this was intended. As Germany points out in its Written Statement, Question (b) does not contain language implying that it is asking about the legal consequences for all States[354].

E. Conclusions

5.29 The United Kingdom reaffirms the position set out in its Written Statement[355]. The legal consequences of the United Kingdom's continued administration of the Chagos Archipelago have been largely determined, with binding force as between

[353] *Chagos Arbitration* Award (**UN Dossier No. 409**), para. 332 and paras. 333-350.
[354] Written Statement of Germany, para. 124.
[355] Written Statement of the United Kingdom, Chapter IX.

the Parties, in the 2015 *Chagos Arbitration* Award. The legal consequences remain those set out in the Award.

5.30 For all the reasons set out in its Written Statement and above, the United Kingdom remains firmly of the view that the Court should exercise its discretion so as not to answer Question (b).

5.31 As further explained in the United Kingdom's Written Statement and above, if nevertheless a response were to be given to Question (b), it would need to be based on the 1965 Agreement, as interpreted by the Arbitral Tribunal in its binding Award of 18 March 2015, and it could emphasise the points set out in paragraph 9.20 of the United Kingdom's Written Statement.

CONCLUSION

For the reasons given in its Written Statement, and above, the United Kingdom respectfully requests the International Court of Justice to reaffirm the principles upon which it should exercise its discretion under Article 65, paragraph 1, of the Statute, and decline to give answers to the Questions posed by the General Assembly in this case.

Sir Iain Macleod, K.C.M.G

Representative of the United Kingdom of Great Britain and Northern Ireland

14 May 2018

CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein.

Sir Iain Macleod, K.C.M.G

Representative of the United Kingdom of Great Britain and Northern Ireland

14 May 2018

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The Annexes to the United Kingdom's Written Comments are set out below and numbered in the order in which they are referred to in the text.

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Annex 91 Kevin Shillington, *Jugnauth: Prime Minister of Mauritius*, (Hong Kong: Macmillan 1991) (extract)

Annex 92 Adele Smith Simmons, *Modern Mauritius: The politics of de-colonisation*, (Bloomington: Indiana University Press 1982) (extract)

Annex 93 *The Times*, Sunday 13 November 1965

Annex 94 Seewoosagur Ramgoolam, *Our Struggle* (1982) (extract)

Annex 95 A. Ramaoutar Mannick, *Mauritius: The development of a Plural Society*, (Nottingham: Spokesman 1979) (extract)

Annex 96 Jean Houbert, "Mauritius: Independence and Dependence", *Journal of Modern African Studies*, Vol. 19.1 (1981), pp. 75-105

Annex 97 *The Times*, Monday 8 November 1965

Annex 98 *Le Mauricien*, 15 December 1965, p.4

Annex 99 Sir Seewoosagur Ramgoolam, *Selected Speeches* (1979) (extract)

Annex 100 Robert Rosenstock 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey' (1971) 65 *American Journal of International Law* 713

Annex 101 1970 Report of the Special Committee on Friendly Relations, UN Doc. A/8018 (1970) (extracts)

Annex 102 I. Hendry and S. Dickson, *British Overseas Territory Law* (2011) (extracts)

Annex 103 Rupert Emerson, 'Self-Determination' (1971) 65 *American Journal of International Law* 459

Annex 104 Leo Gross, "The Right of Self-Determination in International Law," in Kilson (ed) *New States in the Modem World* (1975) 136

Annex 105 Prakash Sinha, 'Is Self-Determination Passe?' (1973) 12 *Columbia Journal of Transnational Law* 260

Annex 106 Georg Schwarzenberger, *A Manual of International Law* (5th edn, 1967) (extract)

Annex 107 JHW Verzijl, *International Law in Historical Perspective* (1968) (extract)

Annex 108 R.Y. Jennings, *The Acquisition of Territory in International Law* (1963) (extract)

Annex 109 Ian Brownlie, *Principles of Public International Law* (1966) (extract)

Annex 110 GG Fitzmaurice, "The Future of Public International Law", *Livre du Centenaire 1873-1973, Institut de droit international* (extract)

Annex 111 General Assembly First Committee debates on Cyprus 1958: 996th Meeting, Tuesday, 25 November 1958, 10:40 am (A/C.1/SR.996) and 1003rd Meeting, Monday, 1 December 1958, 3:15 p.m. (A/C.1/SR.1003)

Annex 112 Thomas Franck and Paul Hoffman, 'The Right to Self-Determination in Very Small Places' (1976) 8 *NYU Journal of International Law and Politics* 331

Annex 113 Roger S. Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 *Yale Journal of World Public Order* 2

Annex 114 General Assembly, Special Committee on Decolonization, 284th Meeting, UN Doc. A/AC.109/PV.284 (30 September 1964) (extract)

Annex 115 General Assembly Sixth Committee Debates on the aspects of the Friendly Relations Declaration 1966-1968: UN Doc. A/AC.125/SR.91 (23 September 1968); UN Doc. A/AC.125/SR.68 (4 December 1967); UN Doc. A/AC.125/SR.44 (27 July 27, 1966)