Corrigé
Corrected

CR 2018/21

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Monday 3 September 2018, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

***on the* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le lundi 3 septembre 2018, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***sur les* Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian
Salam
Iwasawa, juges

M. Couvreur, greffier

The United Kingdom of Great Britain and Northern Ireland is represented by:

Mr. Robert Buckland, Q.C., M.P., Solicitor General,

Sir Iain Macleod, K.C.M.G., Legal Adviser, Foreign and Commonwealth Office,

H.E. Mr. Peter Wilson, C.M.G., British Ambassador to the Kingdom of the Netherlands,

Mr. Eran Sthoeger, member of the New York Bar, Counsel,

Dr. Philippa Webb, member of the English Bar, 20 Essex Street Chambers, Counsel,

Mr. Jonathan Worboys, member of the English Bar, Henderson Chambers, Counsel,

Mr. Sam Wordsworth, Q.C., member of the English Bar, Essex Court Chambers, Counsel,

Sir Michael Wood, K.C.M.G., member of the English Bar, 20 Essex Street Chambers, Counsel,

Mr. Chris Murphy, Deputy Private Secretary to the Solicitor General,

Mr. Shehzad Charania, Attorney General's Office,

Ms Kirsty Hoyle, Attorney General's Office,

Mr. Andrew Murdoch, Legal Director, Foreign and Commonwealth Office,

Mr. Gavin Watson, Foreign and Commonwealth Office,

Mr. Clive Dow, Foreign and Commonwealth Office,

Ms Emma Harber, Foreign and Commonwealth Office,

Mr. Philip Dixon, British Embassy in the Kingdom of the Netherlands,

Ms Rumaana Habeeb, Foreign and Commonwealth Office,

Mr. Stephen Hilton, Foreign and Commonwealth Office,

Ms Natalie Berry, British Embassy in the Kingdom of the Netherlands,

Lieutenant Maxine Stiles, Royal Navy.

For the complete list of delegations of all participants, please refer to CR 2018/20.

Le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

M. Robert Buckland, Q.C., M.P., *Solicitor General*,

sir Iain Macleod, K.C.M.G., conseiller juridique, ministère des affaires étrangères et du Commonwealth,

S. Exc. M. Peter Wilson, C.M.G., ambassadeur du Royaume-Uni auprès du Royaume des Pays-Bas,

M. Eran Sthoeger, membre du barreau de New York, conseil,

Mme Philippa Webb, membre du barreau d'Angleterre, 20 Essex Street Chambers, conseil,

M. Jonathan Worboys, membre du barreau d'Angleterre, Henderson Chambers, conseil,

M. Sam Wordsworth, Q.C., membre du barreau d'Angleterre, Essex Court Chambers, conseil,

sir Michael Wood, K.C.M.G., membre du barreau d'Angleterre, 20 Essex Street Chambers, conseil,

M. Chris Murphy, secrétaire particulier adjoint du *Solicitor General*,

M. Shehzad Charania, bureau de l'*Attorney General*,

Mme Kirsty Hoyle, bureau de l'*Attorney General*,

M. Andrew Murdoch, directeur juridique, ministère des affaires étrangères et du Commonwealth,

M. Gavin Watson, ministère des affaires étrangères et du Commonwealth,

M. Clive Dow, ministère des affaires étrangères et du Commonwealth,

Mme Emma Harber, ministère des affaires étrangères et du Commonwealth,

M. Philip Dixon, ambassade du Royaume-Uni au Royaume des Pays-Bas,

Mme Rumaana Habeeb, ministère des affaires étrangères et du Commonwealth,

M. Stephen Hilton, ministère des affaires étrangères et du Commonwealth,

Mme Natalie Berry, ambassade du Royaume-Uni au Royaume des Pays-Bas,

Mme Maxine Stiles, lieutenant de vaisseau, marine royale.

Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2018/20.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the United Kingdom of Great Britain and Northern Ireland. I shall now give the floor to Mr. Robert Buckland. You have the floor, Sir.

Mr. BUCKLAND:

1. INTRODUCTORY REMARKS AND THE FACTS

I. Introduction

1. Thank you, Mr. President. Mr. President, Members of the Court, it is indeed an honour to appear before you on behalf of the United Kingdom. The United Kingdom has always been, and remains, a strong supporter of the Court, and of the rule of law in international affairs and has actively helped to lead its development.

2. At the outset, I must reiterate our primary submission, which is that the Court should exercise its discretion so as to decline to respond to the request for an advisory opinion. The proceedings have at their heart the bilateral sovereignty dispute between Mauritius and the United Kingdom. To determine that dispute (even it were proper to do so without the consent of both parties, which it is not), it would be necessary for the Court to reach conclusions on key facts.

3. Amongst these key facts is, first and foremost, the status and effect of the 1965 Agreement, which in many ways forms an independent bilateral dispute. The essential facts are complex; they are vigorously contested between Mauritius and the United Kingdom. Only through the procedure of a contentious case could the Court be in a position, as a court of law, to reach the necessary factual determinations.

4. That said, I will need to touch on some of the key facts that underline the present advisory proceedings. I do so without prejudice to our respectful submission, that the Court is in no position to reach such conclusions in these advisory proceedings.

5. At the outset, let me say that the United Kingdom reiterates that, as stated in its Written Statement[1] and in its Written Comments[2], it fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was

[1] Written Statement of the United Kingdom (StGB), paras. 1.5, 4.3.

[2] Written Comments of the United Kingdom (CoGB), para. 1.13.

shameful and wrong, and it deeply regrets that fact. Like everyone present, I found very moving the statement we heard this morning from Mme Elysé, and we pay our deep respects to her and to the other Chagossians present here today. The United Kingdom has sought to give a balanced account, in its Written Statement[3], of the treatment of the Chagossians by reference to the in-depth (and indeed very critical) consideration of this issue in the English courts, which we have made available to your Court[4].

6. Over the years the United Kingdom has sought to make amends for the treatment of the Chagossians, in whichever country they now live and whatever their present nationality (and many, may I say, live in the United Kingdom). In particular, in addition to an initial payment agreed with Mauritius in 1972[5], in 1982 the United Kingdom and Mauritius concluded a treaty providing for the payment by the United Kingdom, through the Mauritian authorities, of compensation to each Chagossian in full and final settlement of their claims[6]. The European Court of Human Rights found that the Chagossians' legal claims had been settled definitively through the implementation of the 1982 Agreement[7].

7. Most recently, as we have described in detail in writing, the United Kingdom has given further and intense consideration to resettlement, including by commissioning a further study, conducting extensive consultations, and then deciding to introduce a very significant package — of around £40 million — to support improvements in the livelihoods of Chagossians in the communities where they now live[8].

8. Mr. President, Members of the Court, having indicated what an honour it is to appear before you, at the risk of sounding churlish, I cannot concede that these proceedings are the right way to deal with this issue. The United Kingdom has participated in contentious and advisory proceedings before the Court several times over the years and will always settle its disputes in

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[3] StGB, Chap. IV.

[4] StGB, Judges' folders,

[5] StGB, paras. 4.4 *(e)* and *(f)*.

[6] StGB, paras. 4.9-4.13 and Ann. 50 (Agreement between the Government of Mauritius and the Government of the United Kingdom concerning the Ilois, Port Louis, 7 July 1982, 1316 UN, *Treaty Series 128*); StGB, paras. 5.20-5.21.

[7] StGB, paras. 4.16-4.18 and judges' folders, tab 6 (Chagos Islanders *v.* United Kingdom (2012) 56 EHRR).

[8] StGB, paras. 4.31-4.39.

international courts and tribunals where it has consented to do so. In short, the United Kingdom is always happy to be a party to proceedings before the Court, where appropriate.

9. But these are advisory proceedings that look, sound and feel like a contentious case. That is why the United Kingdom submits to you, as, indeed, do several other States in their written submissions, that the Court should exercise its discretion so as to decline the request for an advisory opinion.

10. The case you heard developed this morning is precisely the case that Mauritius has presented in bilateral contentious proceedings. It is only having failed in other fora that Mauritius now places before the Court its bilateral dispute with the United Kingdom over the Chagos Archipelago, in particular as to sovereignty. This is the real dispute that motivates this Request.

11. If the Court were to give an opinion, it would be breaching a principle that all the participants in these proceedings accept — that the Court should not 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"[9].

12. Regretfully, that is exactly the position here. Mauritius tried in 2004 to bring a contentious case in this Court against the United Kingdom concerning sovereignty over the Chagos Archipelago and it failed. It tried to have its sovereignty dispute decided by an Annex VII arbitral tribunal under the Law of the Sea Convention, and it failed, albeit after the issues had been fully argued. It is now resorting to the advisory procedure of the Court. Mauritius' submissions — including those you have just heard — demonstrate that the Court is in reality being asked to adjudicate a sovereignty dispute, not to provide "advice" to the General Assembly on an issue of broader concern to the international community.

13. Our presentation this afternoon will be arranged as follows. My statement will focus on central facts regarding consent and its regular reaffirmation post-independence.

14. Mr. Sam Wordsworth, Q.C., will then address the fundamental issue of the exercise of the Court's discretion.

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[9] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.

15. After him, and entirely without prejudice to our main submission on discretion, Dr. Philippa Webb will make some remarks on Question *(a)* and explain why, despite what you have heard this morning, the process of decolonization of Mauritius was in any event lawfully completed.

16. That being the case, we argue that there is also no need for the Court to proceed to Question *(b)*, as there are no legal consequences following on from Question *(a)*. Nevertheless, Sir Michael Wood will then make some remarks on that issue, again without prejudice, noting that any legal consequences in terms of the United Kingdom's continued administration ***of the Chagos Archipelago*** have been largely determined in the 2015 Chagos Arbitration Award. And those will be the submissions of the United Kingdom.

17. I now turn to some key facts, again, without prejudice to our fundamental position. But before doing so, I should point out that Mauritius seeks to rely essentially on internal British documents. It has not referred the Court at all to internal Mauritian documents, which surely exist at least for the period following independence. And I take the point that was made this morning about the pre-independence situation, which is why I couch my remarks specifically about documents that might have been available after Mauritius' obtaining of that independence. The Court is being asked to decide a key factual issue on the existence of consent — now *that* requires an assessment of the position of Mauritius from 1965 onwards — and without the benefit of *any* documentation from Mauritius' own archives which would presumably indicate what their real thinking was at the relevant times.

18. I shall focus on three issues:

— *Firstly*, I would like to make some observations as to the geographical location of the Chagos Islands (now known as the British Indian Ocean Territory), which for many years were administered as a Dependency of Mauritius, not as an integral part of its territory.

— *Second*, I will turn to the events surrounding the Agreement of 1965 on the detachment of the Islands in return for specific benefits for Mauritius and I will address the issue of duress that has been raised which, we say, is without merit.

— And, *third*, I will show that, from March 1968 onward, for many years, the authorities of the independent State of Mauritius reaffirmed the 1965 Agreement. It was only years later that

politicians in Mauritius sought to question the United Kingdom's continuing sovereignty over the British Indian Ocean Territory. And it was only in 2012 that Mauritius' lawyers first presented the argument that the consent of Mauritius had been vitiated by duress.

II. The Chagos Archipelago is distant from Mauritius, and was administered as a Dependency of Mauritius as a matter of administrative convenience

19. [Map on screen] Mr. President, Members of the Court, it should be recalled that the Chagos Archipelago lies approximately 1,150 nautical miles (that is 2,150 km) from the island of Mauritius. As can be seen from the map on the screen, and in your folders at tab 3, the Chagos Islands have no geographical connection with Mauritius. The Islands were described by the Mauritian Prime Minister Seewoosagur Ramgoolam in the 1980s as "islands that were very remote from Mauritius and virtually unknown to most"[10].

20. As we have explained in our written pleadings[11], the Chagos Islands were administered — for reasons of administrative convenience — as a Dependency of Mauritius, following the French practice before 1810. From time to time there were administrative rearrangements, the most important of which (before the establishment of the British Indian Ocean Territory) was the detachment of the Seychelles from Mauritius to form a separate territory in 1903. As a Dependency, the Chagos Archipelago was very loosely administered from Mauritius. Contact between the two territories was minimal, no doubt largely due to the great distance separating them[12]. The Archipelago was not administered as an integral part of Mauritius, but rather it was "attached" to Mauritius.

21. It was indeed common practice, and not only by the United Kingdom, to attach one territory to another for administrative purposes only[13]. In British law the concept of a dependency was well understood. And thus, Sir Kenneth Roberts-Wray discusses the terms "dependency" and "dependent territory" in his 1966 book, and he writes "it should perhaps be mentioned that one dependent territory may be placed under the authority of another of which it does not form part,

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[10] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 10 (Written Comments of the United Kingdom of Great Britain and Northern Ireland (CoGB), Ann. 90).

[11] Written Statement of the United Kingdom of Great Britain and Northern Ireland (StGB), paras. 2.12-2.29.

[12] StMU, para. 2.15; StGB, para. 2.13.

[13] StGB, paras. 8.55-8.58; CoGB, para. 209.

and that the former is then usually called a Dependency of the latter"[14] — and he gives the example of Ascension Island, Tristan da Cunha and other Islands which were Dependencies of St. Helena. [Map off screen]

III. The 1965 Agreement did not result from duress

22. I turn now to the events of 1965, and I note that, as one would expect when the crux of the case is a purely bilateral dispute, no other State or organization apart from Mauritius has been able to make meaningful submissions on these key facts.

23. Mauritius has presented to this Court an inaccurate picture that contradicts its own official position of many years as to the events in question and contradicts the account of its own leaders who were present and participated actively in the relevant events.

24. Though we consider that this is not the appropriate place and time, for the reasons that I outlined earlier, we feel compelled to set the record straight. In 1965, Mauritian leaders and elected representatives agreed to the detachment of the remote Chagos Archipelago from the then Colony of Mauritius in exchange for specific benefits and commitments. Thus, when Mauritius became independent in 1968, the Chagos Archipelago was not part of its territory. This was Mauritius' own position in the years following independence, reaffirming as a sovereign State the Agreement entered into by its representatives in 1965.

25. It was only from the early 1980s that the dispute arose in the bilateral relations of the United Kingdom and Mauritius. Before then, there was no challenge to United Kingdom sovereignty over the Chagos Archipelago. And it was only in the recent Chagos Arbitration, some 50 years after the events, that Mauritius first asserted to the United Kingdom that its Ministers' agreement to detachment in 1965 was procured "in a situation of duress".

26. Before I turn to the details, let me make two introductory points on the facts.

27. Firstly, central to Mauritius' position — if not the entirety of its arguments on "consent" — is the meeting between the British Prime Minister Harold Wilson and the then Mauritian Premier Seewoosagur Ramgoolam on the morning of 23 September 1965. Mauritius focuses on a short internal minute prepared for the British Prime Minister ahead of the meeting that

[14] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 61; Counter-Memorial of the United Kingdom in the Chagos Arbitration, appendix to Chap. II, available at https://pcacases.com/web/sendAttach/1798.

noted that the Prime Minister should "frighten" the Premier "with hope", and also on one small part of the United Kingdom's very own summary of the meeting.

28. In its Written Comments, Mauritius further asserts that the United Kingdom has not produced "a single document to directly contradict the contention that the British Prime Minister threatened the Premier with non-independence if the detachment of the Chagos Archipelago was not 'agreed'"[15].

29. That is not correct, but it is anyway for Mauritius, claiming decades after the event that consent was given under "duress", to meet its burden of proof and make good its factual assertions. It has not done so.

30. To ascertain the facts, the most obvious and relevant place to look is at what those present had to say about what actually took place, in particular, of course, the Mauritian Premier and then its Prime Minister Seewoosagur Ramgoolam as he is the only person who could speak to the issue of whether Mauritius considered itself to be under any duress. And here, and at tab 4 in your folders, is what he had to say [on screen]:

> "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 . . . 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."[16]

31. These were the words of the Mauritian Prime Minister in the Mauritius Legislative Assembly on 26 June 1974. And notably, he said this as people in the opposition were accusing him of giving away the Islands[17]. It would have been easy, natural almost, for the Mauritian Prime Minister to shift the blame from himself and say he had in some sense been or felt forced to agree to detachment, if that had been the case, but he did not. [Screen off]

32. As late as November 1979, in response to a question in the Legislative Assembly on when the Islands will be returned, the Mauritian Prime Minister made no suggestion that the

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[15] CoMU, para. 1.23.

[16] StMU, Ann. 102; emphasis added, tab 4.

[17] See, *ibid*., Ann. 101.

1965 Agreement was invalid but stated the accepted legal position, at tab 5 [on screen]: "The islands will be returned to Mauritius if the need for the facilities there disappeared. How soon this will be done, I cannot say . . ."[18] [Off screen]

33. When later asked directly in the Legislative Assembly, in November 1980, if detachment was a precondition for independence, the Mauritian Prime Minister answered unequivocally in the negative, and you will see at tab 6 [on screen]: "It was a matter that was negotiated, we got some advantage out of this and we agreed."[19] [Off screen]

34. And even in 1982, when Mauritius had shifted its position and was now openly disputing sovereignty, former Prime Minister Ramgoolam was consistent in his attitude towards the events of 1965. In his memoirs published in that year, he described his "triumphant" victory in the Constitutional Conference and says nothing whatsoever about pressure, coercion, duress or blackmail. He speaks only of the complete success Mauritius had achieved at the 1965 Constitutional Conference[20].

35. Sir Seewoosagur, therefore, was always clear that Mauritius consented to detachment and that he himself expressed his consent to that detachment. He — the key person at the meeting who alone would have known if there was coercion that had an impacted on his consent — did not suggest that this was the case.

36. The second introductory remark is that Mauritius' assertions that there was opposition to detachment expressed by their representatives during and after the 1965 Constitutional Conference are entirely inaccurate. Mauritius claims that at a Cabinet meeting a few hours after the Premier's meeting with the British Prime Minister, the Colonial Secretary informed his Cabinet colleagues that "the Parti Mauricien had informed him that since they were opposed to independence they could not agree to the detachment of the islands"[21].

37. Mauritius neglects to mention, however, why the Parti Mauricien opposed detachment, and how, in the very next sentence, the Colonial Secretary detailed the proposed agreement and

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[18] StMU, Ann. 116 (tab 5).

[19] StGB, Ann. 48 (tab 6).

[20] Seewoosagur Ramgoolam, *Our Struggle* (1982), p. 109 (CoGB, Ann. 94).

[21] CoMU, para. 1.27, Ann. 209.

said that "the leaders of the other parties [including the Premier] . . . had agreed to the proposal in principle"[22]. So what he in fact said is that a minority of five ministers — out of a delegation of 28 — objected to the agreement.

38. Mauritius likewise claims that "[i]mmediately after the 1965 Constitutional Conference, Governor Rennie informed the Colonial Secretary of the 'strong belief' that there had been 'a deal between the British Government and the Mauritius Labour Party in which independence has been granted for the sake of Diego Garcia'"[23].

39. In this respect also, aside from basing itself on rumours, Mauritius neglects to share with the Court the crux of the issue to which the Governor was alluding. In fact, the issue was about the adequacy of the compensation for detachment. What Governor Rennie in fact wrote is at tab 7 and on the screen. And it was the following [on screen]: "The Parti Mauricien Ministers were unable to accept this majority decision and resigned on the grounds that compensation to Mauritius and assurances given were inadequate . . . As regards the resignation of the PMSD Ministers", he adds, "they all said they were agreeable in principle to detachment for defence purposes but found the terms unsatisfactory"[24]. The Governor noted that "the public and I should say, all Ministers think the compensation inadequate. In particular, they are gravely disappointed that nothing could be done about sugar"[25].

40. This theme, namely, that compensation was too low, was the only issue taken by the Parti Mauricien against detachment. This formed part of the real bone of contention during the constitutional conference. It was an internal Mauritian debate between the majority of ministers who were for independence and wanted the question decided at a general election, and the minority of ministers who sought association with the United Kingdom (that is, the Parti Mauricien) and were seeking a plebiscite. Had the Parti Mauricien believed that independence was being given in exchange for the Archipelago, they would have said so loud and clear, as they were in opposition to the majority's position on the need for independence. But they made no such statements. They only

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[22] CoMU, para. 1.27, Ann. 209.

[23] *Ibid*., para. 1.27.

[24] *Ibid*., Annex 213; tab 7.

[25] *Ibid*.

questioned the amount of compensation for detachment, and in no way portrayed this as part of a package on independence. And this is consistent with the general attitude of all the parties in Mauritius, which was that the two issues of independence and detachment were not intertwined.

[Screen off]

41. Mr. President, Members of the Court, I now turn to the chronology of the key facts and you may wish to look at the chronology document that we provided at tab 8 in your folders and on the screen. Going through the evidence, I shall make three fundamental points:

(a) that Mauritian ministers were inclined to agree to detachment soon after it was first raised by the United Kingdom, and tried to negotiate the best possible terms, both before, during and after the Constitutional Conference;

(b) that the chronology of the events negates any claim that "duress" was exerted on 23 September 1965; indeed, official consent to detachment was given by the Mauritian ministers on 5 November, some six weeks later; and

(c) that Mauritius reaffirmed the 1965 Agreement time and time again post-independence.

42. I start in mid-1965. Mauritius contends that all agree that "[w]hen enquiries were made by the administering power, Mauritian ministers expressed opposition to detachment"[26]. That is not correct. Mauritius also goes on to claim in their written comments:

> "From the earliest approaches in April and July 1965, Mauritian Ministers were steadfast and resolute in their opposition to the detachment of the Chagos Archipelago. This opposition continued throughout the Constitutional Conference."[27]

43. This is, again, incorrect. In fact, the Mauritian leaders indicated their agreement to the idea of an agreement on detachment almost immediately. The plans for a military facility in the Chagos Archipelago were raised with the Mauritian leaders in July 1965, well before the September Constitutional Conference[28]. At no stage did they reject the plan and their initial hesitation lasted for just one week. The Mauritian leaders then advised the Governor that they were "sympathetically disposed to the request" and turned to negotiating the terms of an agreement[29].

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[26] CoMU, para. 1.10.

[27] *Ibid*., para. 1.20.

[28] Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965; StGB, Ann. 25.

[29] Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965; StGB, Ann. 26.

44. As the terms of the deal were being brokered, it was Mauritian ministers who suggested that the matter be discussed in London at the forthcoming Constitutional Conference[30]. This was done, despite the fact that British officials repeatedly expressed the preference to keep the matters of independence and negotiations over detachment separate[31]. For example, on 3 September 1965, the Colonial Secretary said to the Mauritian Premier, at tab 9 in your judges' folders [on screen]:

> "that it was unfortunate that discussions on the UK/US defence proposals came at the same time as the conference; he said that it would be necessary to discuss these separately and in parallel and not let them get mixed up with the conference. Sir Seewoosagur Ramgoolam agreed."[32]

[Screen off]

45. Turning to the Constitutional Conference of September of that year, Mauritius asserts that the refusal to consider detachment by its representatives "continued throughout the Constitutional Conference up to and including the second meeting on 'defence matters' on 20 September 1965"[33]. And, it says that, only on 23 September, after the Wilson-Ramgoolam meeting, did "three Mauritian Ministers express for the first time their 'agreement' in principle to the detachment of the Chagos Archipelago"[34].

46. However, the Court has the benefit of the account of the events in the *Chagos Arbitration* Award, which was made following detailed argument. The Award gives a very different account so far as concerns the meetings of 13, 20 and 23 September 1965. And you will see at tab 10 the following: [on screen]:

> "Over the course of three meetings, the Mauritian leaders pressed the United Kingdom with respect to the compensation offered for Mauritian agreement to the detachment of the Archipelago, noting the involvement of the United States in the establishment of the defence facility and Mauritius' need for continuing economic support."[35]

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[30] As recorded in Mauritius Telegram No. 188 to the Colonial Office, 13 Aug. 1965; StGB, Ann. 27.

[31] United Kingdom record of Colonial Secretary meeting with Lord Taylor, Sir S. Ramgoolam and Mr. A.J. Fairclough, 10.00 a.m., 3 Sept. 1965; Ann. 28; United Kingdom record of the meeting on "Mauritius - Defence Matters", 9.00 a.m., 20 Sept. 1965; StGB, Ann. 29.

[32] United Kingdom record of Colonial Secretary meeting with Lord Taylor, Sir S. Ramgoolam and Mr. A.J. Fairclough, 10:00 am, 3 Sept. 1965; StGB, Ann. 28; tab 9.

[33] CoMU, para. 1.20.

[34] *Ibid*., para. 3.90.

[35] *Chagos Arbitration Award*, para. 73 (UN dossier No. 409); emphasis added; tab 10.

The Mauritian ministers were negotiating from the beginning to get what they considered a good deal for the detachment of a distant Archipelago.

[Screen off]

47. And, consistent with the factual determination of the Tribunal in the *Chagos Arbitration*, it is impossible to reconcile the assertion that the Mauritius ministers were steadfast against detachment when reading the records of the meetings. For example, at the meeting of 13 September, Mr. Mohamed, who was the then leader of the Muslim Committee of Action party, [on screen] "said he recognised that Mauritius must in her own interests make facilities available". At this meeting, Mr Paturau (an Independent) "also said he recognised the necessity for defence facilities of this sort and felt that Mauritius should agree; they could not remain in a void in the Indian Ocean"[36]. [Screen off]

48. To similar effect, the Mauritian Premier stated in the 20 September meeting about detachment, and you will see that at tab 12 that he [on screen] "fully understood the desirability of this, not only in the interests of Mauritius, but in those of the whole Commonwealth", a view endorsed by other Ministers"[37].

49. In the 20 September 1965 meeting, the Mauritian Premier further expressed his agreement with the following statement made by Mr. Mohamed:

> "If only the U.K. were involved then they would be willing to hand back Diego Garcia to the U.K. without any compensation; Mauritius was already under many obligations to the U.K. But when the United States was involved as well they wanted something substantial by way of continuing benefit."[38]

50. The correct position is thus that Mauritian ministers, not the United Kingdom, wanted to discuss detachment during the Constitutional Conference, and they came ready to negotiate and to reach a deal on detachment on the best possible terms. This was clearly expressed prior to the meeting between the British Prime Minister and the Mauritian Premier and it forms the real backdrop to that meeting.

[Screen off]

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[36] United Kingdom record of the meeting on "Mauritius - Defence Matters", 13 Sept. 1965; StGB, Ann. 30; tab 11.

[37] United Kingdom record of the meeting on "Mauritius - Defence Matters", 9.00 a.m., 20 Sept. 1965, p. 8; StGB, Ann. 29; tab 12.

[38] *Ibid*.

51. The terms were provisionally agreed on 23 September and thereafter amended at the request of the Mauritian ministers on 1 October[39]. They are before you at tab 13. On 23 September, the Mauritian Premier [on screen] "said that the terms were acceptable to him and Mr Bissondoyal and Mr Mohamed in principle but he expressed the wish to discuss it with his other ministerial colleagues"[40]. The condition that the Islands would be returned to Mauritius when no longer needed for defence purposes, was the idea of the Mauritian Premier himself[41]. Mauritius received various benefits in return, including monetary compensation and commitments on external defence and internal security, in addition to the commitment to cede the Islands to Mauritius when no longer needed for defence purposes.

[Screen off]

52. Mauritius, as I mentioned earlier, places much weight on the briefing note prepared for the Prime Minister ahead of the meeting with the Premier and some vague words in the summary of the meeting.

53. Independence and detachment were treated as separate issues in the briefing note, as is clear from the Colonial Secretary's minute to the Prime Minister of 22 September 1965 that appears at tab 14. The briefing note prepared for the Prime Minister by the Colonial Secretary also makes it clear that the Colonial Secretary was in fact in favour of moving directly to independence. The Colonial Secretary's minute stated that [on screen]

> "I hope we shall be as generous as possible and I am sure we should not seem to be trading independence for detachment of the Islands . . . Agreement is therefore desirable . . . the ideal would be for us to be able to announce that the Mauritius Government had agreed".

[Screen off]

54. The summary record of the meeting shows that the Premier was positively inclined to reaching an agreement on detachment. "Sir Seewoosagur reaffirmed that he and his colleagues were very ready to play their part." Like his fellow ministers, he was of the view that the benefits

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[39] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30 p.m., 23 Sept. 1965; Ann. 33; tab 13. The list includes points that were added to the record in the days following the meeting, at the request of the Premier. See also Sir S. Ramgoolam manuscript letter, 1 Oct. 1965; StGB, Ann. 34.

[40] *Ibid.*

[41] Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965; StGB, Ann. 25; United Kingdom record of the meeting on "Mauritius - Defence Matters", 9.00 a.m., 20 Sept. 1965, p. 8; StGB, Ann. 29.

offered and terms negotiated with the United Kingdom in exchange for the Chagos Archipelago were more valuable to Mauritius than the remote islands themselves.

55. Despite the serious allegation of duress made in Mauritius' Written Statement, there is a notable absence of any evidence produced by them to support an allegation that it considered that any untoward pressure, let alone duress, was imposed.

56. And the outcome was that both leaders could come out of this conference with success; or "triumphant", which was how the then former Mauritian Prime Minister described the result of the Constitutional Conference in his 1982 memoirs.

57. The Mauritius' Ministers agreement at the Conference was subject to the consent of the full Council of Ministers being secured on the return of the Premier to Mauritius, and a list of principal conditions, which were drawn up at the meeting. This consent was given on 5 November 1965.

58. Mr. President, let me at this point clarify a misconception that Mauritius insists upon. At the Constitutional Conference, agreement was reached on independence for Mauritius. The United Kingdom policy in favour of independence was publicly announced on 24 September 1965. As is clear from the time line that you have at tab 8, consent to detachment was not given at this meeting but rather six weeks later, in Port Louis, on 5 November 1965. It was on that day, that the Council of Ministers gave its agreement after debate, and subject to certain further understandings recorded in the Minutes of Proceedings of the Meeting[42], and in a telegram from the Governor to the Secretary of State for the Colonies of the same date[43]. Now that is wholly inconsistent with Mauritius' position that the Mauritian Premier was put into a situation amounting to "duress" which resulted in consent granted at the conclusion of the meeting of 23 September.

59. There are two points to add.

60. Firstly, for the United Kingdom it would have been politically impossible to step back from its publicly-stated commitment to Mauritius' independence. The clear policy of Britain from the late 1950s was to promote the independence for those of its dependent territories that wanted it.

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[42] Report of the Mauritius Select Committee on the Excision of the Chagos Archipelago, App. P (Extract from Minutes of Proceedings of the Meeting of the Council of Ministers held on 5 Nov. 1965), 1 June 1983, p. 63; StGB, Ann. 36.

[43] United Kingdom Telegram No. 247 to the Colonial Office, 5 Nov. 1965; StGB, Ann. 37.

I need only recall Prime Minister Macmillan's celebrated "Winds of Change" speech. It would have been inconceivable, we say, for a British Government, having announced its commitment to independence for its possessions in Africa, to reverse its decision[44]. That was the clear line of policy of governments of both political parties, from the late 1950s onwards.

61. Second, such opposition as there was in Mauritius to detachment of the Chagos Archipelago focused on one issue — the amount of compensation given to Mauritius[45].

62. The chronology shows that there was a period of six weeks, where consent to the detachment was "conditional", a period in which the United Kingdom was already publicly committed to Mauritius' independence. The representatives of Mauritius provisionally approved the detachment at Lancaster House, but ***the*** ministers then returned home and the Parti Mauricien let it be known immediately that they did not agree to the detachment because the compensation was too low in their view[46]. The representatives of the people of Mauritius publicly expressed their views and they had disagreements over the issue and eventually, the majority of the ministers including the Premier, gave their consent to detachment in the Council of Ministers, six weeks after agreement in principle was given.

63. With consent given conditionally by the representatives of the people, and then agreed by those representatives after the public had had their opportunity to express its views on the matter, through their representatives, then, Mr. President, Members of the Court, detachment was in accordance with the will of the people of Mauritius[47]. And nowhere, may I add, has Mauritius argued that its Premier and the other ministers were not the representatives of the people of Mauritius.

64. The general election of 1967 (the "independence election") was a further opportunity for politicians and the public to raise concerns as to the issue of detachment, but this did not happen. Mauritius' explanation for this is that, since detachment was already agreed at the time of the election, it was a fait accompli and thus the public showed no interest in it[48].

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[44] See for example, CoMU, Ann. 215,

[45] See for example, CoMU, Anns. 201, 202.

[46] CoMU, para. 1.27.

[47] CoMU, para. 3.91.

[48] CoMU, para. 3.96.

65. That, we say, is unconvincing. The important point is that the Independence Party, which had agreed to the detachment of the Chagos Archipelago, was then freely elected by the majority of the popular vote; the public, despite Mauritius' assertions to the contrary, voiced no criticism towards its representatives for agreeing to detachment. The people of Mauritius, both directly and through their representatives, both before and after the Agreement, had no issue with detaching the Archipelago, which after all lay more than 2,000 km away.

IV. The 1965 Agreement was reaffirmed following independence in 1968

66. Mauritius also now claims that it consistently took the position that consent to detachment was "obtained under conditions amounting to duress, and [that Mauritius] challenged its validity, soon after the events took place and consistently thereafter"[49]. But that is not correct. Following independence in March 1968, Mauritius reaffirmed the agreement in its relations with the United Kingdom time and time again.

67. The fact that the 1965 Agreement was freely negotiated was an undisputed fact until Mauritius later saw an opportunity to base a sovereignty claim by undermining the consent that it had given. It is correct that, in 1971, a Mauritian government lawyer told his counterpart at the United Kingdom Foreign and Commonwealth Office [screen on] that "his Government had it in mind to revoke the Agreement which had been reached in the pre-independence era in regard to BIOT"[50].

68. But all this does is to reinforce the fact that the Agreement was regarded by all as binding, otherwise, what is there to revoke? And further, that official based his position on the doctrine of *rebus sic stantibus* and not on the question of lack of valid consent. [Screen off]

69. The United Kingdom's Written Statement gives many examples of reaffirmation of the 1965 Agreement[51]. In your folders at tab 16 and on your screens, you have an example, from 1973, where the Mauritian Prime Minister confirms the receipt of payment from the United Kingdom under the 1965 Agreement, stating plainly that, at tab 16, [screen on] "[t]he payment does not in any way affect the verbal agreement on minerals, fishing and prospecting rights reached at the

[49] CoMU, para. 1.27.

[50] *Ibid*., Ann. 218 (tab 15).

[51] StGB, paras. 3.38-3.50.

meeting at Lancaster House on the 23rd September, 1965, and is in particular subject to . . .”[52]. And here the Mauritian Prime Minister goes on to summarize the terms of the 1965 Agreement, including the last term “the return of the islands to Mauritius without compensation, if the need for use by Great Britain of the islands disappeared”[53]. [Screen off]

70. At a press conference on 24 September 1975, the Mauritian Prime Minister publicly stated that the British had paid for sovereignty over the Chagos Archipelago and now could do what they liked with it[54]. This is at tab 17. An excerpt in which the Prime Minister of Mauritius reaffirms his country’s consent to detachment is now on your screens: [screen on]

> “it seemed clear that the retention of the Chagos was not an issue for Sir S. Ramgoolam, the Mauritian Prime Minister: during his talks on 24 September with Mr. Ennals, the Minister of State at the Foreign and Commonwealth Office, he had been given every chance to raise the Diego Garcia issue but had not done so. Moreover, at his press conference later the same day, he had said that the British has paid for sovereignty over the Chagos Archipelago and now could do what they liked with it”[55]. [Screen off]

71. It is also to be noted that in June 1980, Tromelin, which was disputed between Mauritius and France, was added to the territory of Mauritius by the Legislative Assembly via the Interpretation and General Clauses Act. At the time, the Assembly made a deliberate decision not to add the Chagos Archipelago to that Act[56], thus reflecting the validity of Mauritius’ agreement to detachment.

72. On the following day, the Mauritian Prime Minister made a statement to the press, and you have that at tab 18, saying as follows [screen on]

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

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[52] Mauritius letter from Prime Minister Sir S. Ramgoolam to British High Commission, Port Louis, 24 March 1973 (StGB, Ann. 43) (tab 16).

[53] *Ibid.*

[54] StGB, para. 3.46 (tab 17).

[55] United Kingdom record of Anglo-US Talks on Indian Ocean (Extracts), 7 Nov. 1975, emphasis added; StGB, Ann. 45.

[56] Debate in Mauritius Legislative Assembly (extracts), 26 June 1980; StGB, Ann. 46.

> And the day Great Britain doesn't need Diego Garcia, Diego Garcia will be returned to us without compensation. . . .
>
> Last night, a request was made in the Assembly that we should include Diego Garcia as a territory of the State of Mauritius. If we had done that we would have looked ridiculous in the eyes of the world, because after excision, Diego Garcia doesn't belong to us . . ."[57]. [Screen off]

73. Mauritius cannot sidestep this statement by the Head of Government of Mauritius back in 1980. It seeks to rely on the 1983 Report of the Legislative Assembly Select Committee[58], that was set up to look into the circumstances that had led to the detachment of the Chagos Archipelago. In fact, that report was so one-sided that Mauritius itself accepts that its whole purpose was acting "in furtherance" of a policy that had already been decided[59].

74. But the evidence gathered by the Select Committee, evidence that the Committee seems largely to have ignored in its conclusions, contains testimonies of participants in the 1965 Constitutional Conference that point to the real position. I refer you to our Written Comments on this[60] but you also have some of these quotations at tab 19. On your screen are some examples.

75. Sir Harold Walter, of the MLP, the party of Premier Ramgoolam "further stressed that no Mauritian delegate present at Lancaster House had expressed any dissent on the principle of excision"[61].

76. Sir Veerasamy Ringadoo, also of the MLP, said the following:

> "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."[62] [Screen off]

This does not indicate duress. In fact, it is yet further evidence of consent. The detachment of the Chagos Archipelago was agreed upon between the United Kingdom and the Ministers from Mauritius in principle on 23 September 1965. Mauritius then gave its consent on 5 November of

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[57] United Kingdom Telegram No. 124 from British High Commission, Port Louis to Foreign and Commonwealth Office, 28 June 1980; StGB, Ann. 47, tab 18.

[58] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983; CoGB, Ann. 90.

[59] StMU, paras. 4.09-4.10.

[60] CoGB, paras. 2.56-2.64.

[61] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 12; CoGB, Ann. 90, tab 19.

[62] *Ibid*., p. 11.

that year through a decision by the Council of Ministers. This is why the Select Committee decided [screen on] "to denounce the then Council of Ministers which did not hesitate to agree to the detachment of the islands"[63]. Mauritius reaffirmed the 1965 Agreement time and time again until the 1980s. These are the facts.

77. Mauritius refers to various documents from the 1980s onwards, conveying the change in its position, and initiating the sovereignty dispute over the Chagos Archipelago. But, and this is the key point, prior to that, Mauritius did not challenge the United Kingdom's sovereignty over the Chagos Archipelago, nor did it, or could it, challenge the 1965 Agreement.

78. Before I turn to my conclusion, I should address the point made by Professor Sands about the United Kingdom parliament All-Party Parliamentary Group on the Chagos Islands. Such groups, known as APPGs for short, are a familiar feature of the parliamentary landscape. They number into the hundreds and they reflect the interests and expertise of a wide number of parliamentarians. APPGs should not be confused with select committees of parliament, which are a formal part of the parliamentary official committee structure. The Attorney General of England and Wales is no longer a member of that APPG and he played no part in the preparation or submission of the statement. He stands fully behind the position of the United Kingdom in these proceedings.

V. Conclusion

79. Mr. President, Members of the Court, to summarize:

— The Chagos Islands were administered as a Dependency of Mauritius for reasons of administrative convenience; they were not considered an integral part of Mauritius, from which they are very distant.

— Mauritius and the people of Mauritius, through their representatives, consented to the detachment of the Chagos Archipelago, in return for important commitments by the United Kingdom, including the commitment to cede the Islands to Mauritius once they were no longer needed for defence purposes.

— Mauritius' assertion that its consent, which it does not deny, was vitiated by duress is without merit.

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[63] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 35; CoGB, Ann. 90, tab 19.

— The consent that was initially given in September 1965 at Lancaster House was confirmed by the Mauritius Council of Ministers in November of that year, and was later reconfirmed on many occasions by Mauritius as a sovereign State.

80. Mr. Reichler referred to the immortal Oscar Wilde in his submissions to you, Mr. President, Members of the Court. But Oscar Wilde also wrote this, "the truth is rarely pure and never simple".

Mr. President, Members of the Court, that concludes my presentation. I thank you for your attention, and request that you now invite Mr. Wordsworth to the podium.

The PRESIDENT: I thank Mr. Buckland and I shall now give the floor to Mr. Wordsworth. You have the floor, Sir.

Mr. WORDSWORTH:

2. EXERCISE OF THE COURT'S DISCRETION

1. Mr. President, Members of the Court, it is a privilege to appear before you, and to have been asked by the United Kingdom to set out its case on why the Court should exercise its discretion so as not to give the advisory opinion requested.

2. As you can see from paragraph 1 of my outline, at tab 21 of the judges' folders, I wish to begin by identifying three areas of important common ground — not just between Mauritius and the United Kingdom, but also amongst most, if not all, of the States that have submitted written statements.

(a) First, it is well established that, as a matter of judicial propriety, the Court should not answer a request for an advisory opinion 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"[64]. And that, of course, is the principle recognized in *Western Sahara*, which is at the heart of the issue of discretion now before the Court.

[64] *Western Sahara, Advisory Opinion, 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.

(b) Second, and consistent with the above, consent is the required basis for the adjudication of bilateral disputes. As Mauritius has said in terms, "it stands opposed to the use of the Court's advisory jurisdiction to circumvent that solemn principle"[65].

(c) Third, as is again Mauritius' expressed position in these proceedings, a "purely bilateral dispute over territory" does *not* fall within the advisory function of the Court[66].

3. And it follows that, although the key principle coming out of *Western Sahara* has been analysed in slightly different ways in the different written statements, the central issue on discretion is whether the Court is being asked impermissibly to opine on a bilateral dispute. Mauritius says not. It says that "the matter referred to the Court by the General Assembly is not a bilateral dispute"[67], that the Request concerns decolonization, and that the obligation owed in this respect to the international community dominates any bilateral aspect[68].

4. Now, the United Kingdom is well aware of the three basic points on the Court's jurisprudence that Professor Klein emphasized this morning:

(a) that it is common for there to be some form of dispute in the background to a request made under Article 65 (1)[69];

(b) that the Court has said that compelling reasons would be needed to lead it to decline to give an opinion in response to a request falling within its jurisdiction[70];

(c) and that thus far the Court has not declined to answer a request on the basis that this would have the effect of circumvention.

These points, however, do not detract from the United Kingdom's position, which is that this Request concerns a bilateral dispute with the principle of non-circumvention brought firmly into play. And to make that point good, I wish to focus on five unique factors that set this case apart

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[65] See e.g. CoMU, para. 4.72.

[66] See CoMU, para. 2.28.

[67] See e.g. CoMU, para. 4.72.

[68] See e.g. CoMU, para. 2.31.

[69] See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* p.158, para. 48, referring to *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 24, para. 34.

[70] See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports 201 (II)0,* p. 416, para. 31. Although cf. diss. op. of Judge Bennouna, *I.C.J. Reports 2010 (II),* p. 501, para. 5, and sep. op. of Judge Keith, *I.C.J. Reports 2010 (II),* p. 483, para. 5.

from all the requests that have come before. Mauritius *wishes* this was all a broken record, but it is *not*.

5. I turn to the first unique factor at paragraph 3 of my outline. Mauritius has not merely sought to establish this Court's contentious jurisdiction with respect to the matters now at issue[71]; it has actually litigated the same matters in contentious proceedings brought against the United Kingdom — in the *Chagos Arbitration* that concluded in 2015. And Professor Klein said notably *little* about that, this morning.

(a) For ease of reference, we have included at tabs 22 and 23 of your judges' folders, the tables of contents to both Mauritius' 2012 Memorial in the *Chagos Arbitration* and its 2018 Written Statement in these proceedings. And if you turn to the respective headings under Chapter 3 in each pleading — and we have put this up on your screens [slide on] — you can see that precisely the same case on the facts is being outlined. And, if in due course you are able to turn to the text of the earlier pleading, available on the PCA website, you will see that the substance of the case on the facts is precisely the same as the case now being put by Mauritius in these proceedings[72]. [Slide off]

(b) And this point applies equally to the legal submissions, which have been set out in Chapter 6 of the two pleadings of Mauritius (again on your screens – slide on). And when one turns to the text, one sees that there is the same case on self-determination, the same case on the meaning and effect of General Assembly resolutions 1514 (XV), 2066 (XX), 2232 (XXI) and so on, and the same case on the absence of consent to detachment despite the 1965 Agreement. [Slide off]

6. Yet, it is now being said by Mauritius that what *it* considered in 2012 to be a bilateral dispute suitable for determination in contentious proceedings is *not* a bilateral dispute at all[73]. And that makes little sense. The issues of substance that are disputed have not changed in any way, and the substantive overlap between the two cases is not in doubt. Indeed, it is made all the more clear by the unique fact that, after the current Request was made in 2017, two of the then Members of the

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[71] See StGB, para. 7.13 *(d)*.

[72] See e.g. *Chagos Arbitration*; Mauritius' Memorial, Chap. 3, particularly sects. I, II, III and IV *(c)*, IV *(d)*, IV *(f)* and V. (https://pcacases.com/web/sendAttach/1796). Cf. StMU, Chap. 3, in particular sects. III-VIII.

[73] See e.g. CoMU, para. 4.72.

Court elected not to sit on the Bench for this case — because they had been involved either as counsel or as arbitrator in the *Chagos Arbitration*.

7. Of course, Mauritius is saying that the Chagos issue has now come before the General Assembly, and the General Assembly has considered that the issue is one of broader concern to the international community. So, Mauritius would presumably ask, why does it *matter* that the same issue was previously pursued by Mauritius as a purely bilateral dispute.

8. Well, it matters for three reasons.

(a) First, Mauritius' claim in the *Chagos Arbitration* is the plainest indication possible that Mauritius itself has considered — until very recently — that the issues now before the Court were the subject of a bilateral dispute over territory that could and should be resolved in bilateral contentious proceedings, without suggesting that third States or international organizations had an interest that had to be heard. Mauritius was saying to the Arbitral Tribunal in very strong terms — you *must* determine this issue on decolonization to see that Mauritius is sovereign and is the coastal State for the purposes of the exercise of jurisdiction under United Nations Convention on the Law of the Sea (UNCLOS). And so the two States engaged in protracted written and oral argument on the substance of the sovereignty issue[74]. This, by way of example, is paragraph 1.6 of the Mauritian Memorial in the arbitration [slide on], where Mauritius claimed:

> "The UK considers that the establishment of the 'MPA' [that is the marine protected area] achieves other objectives which it regards as beneficial, namely continued control of the Chagos Archipelago and the permanent banishment of the Mauritian citizens who were former residents of the Archipelago. [And the United Kingdom, of course did not, and would not, accept that characterization. But Mauritius continues:] These objectives are in plain violation of the UK's obligations under the Convention and the rules of general international law that are applicable under the Convention, including *ius cogens* principles concerning decolonisation and the right to self-determination. These fundamental rules of international law are applicable here, given that the Convention requires the Tribunal to 'apply . . . other rules of international law not incompatible with this Convention'."[75]

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

[75] Memorial of Mauritius dated 1 Aug. 2012, para. 1.6. (https://pcacases.com/web/sendAttach/1796); judges' folder, tab 24.

And one then sees pleaded the same basic argument on decolonization and the right to self-determination as you have heard this morning from Ms Macdonald. [Slide off] And it is also to be recalled that previously, in 2001 and 2004, Mauritius had sought the United Kingdom's agreement or threatened to bring the sovereignty dispute before this Court in contentious proceedings while, in 2011, Mauritius claimed that a dispute existed between it and the United Kingdom under the CERD — comprising the issues of sovereignty, the right of return of the Chagossians and the right of entry of other Mauritian nationals[76].

(b) I turn to the second reason on why it matters that the same issue was previously pursued by Mauritius as a bilateral dispute, which is that the fundamentals that previously established a bilateral dispute have not somehow changed now that the dispute is framed in a General Assembly request. Mauritius says one thing — for example that it did not consent to detachment; the United Kingdom says another — there was an agreement on detachment that was, moreover, reaffirmed on and post-independence. That remains a matter of bilateral dispute that would *have* to be resolved in order for the two questions to be answered in the way Mauritius now seeks. And I emphasize bilateral: no other States were party to the 1965 Agreement; no other States can submit evidence or any meaningful view on what was said in 1965, or what was meant in post-independence reaffirmations by Mauritius[77].

(i) I note that it has been suggested by one State that "where one entity's independence is essentially, if implicitly, conditioned upon its simultaneous consent to whatever requirements the administering power establishes, [the consent] is unlikely to be 'free', and at any rate is not a bilateral question"[78]. But that is just to assume in the favour of Mauritius a key, if not *the* key issue of fact, which was one of the disputed issues in the *Chagos Arbitration*, and which only Mauritius and the United Kingdom can speak to — that is, of course, whether independence was indeed conditioned on consent to detachment as Mauritius alleges, and as the United Kingdom denies.

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[76] See StGB paras. 5.12 and 5.19 and the documents referred to there.

[77] ***See also Written Statement of South Africa, para. 77.***

[78] See Written Comments of Cyprus, para. 6.

(ii) Moreover, any suggestion that consent is not a bilateral matter can be tested very easily as follows. Suppose Mauritius was saying that it *did* validly consent in 1965, plainly no third State could contest that. And, as to the reaffirmations of consent by Mauritius post-independence, these were likewise a matter in which no third State could possibly have an interest in. It was for Mauritius, a sovereign State, to do precisely as it wished.

(c) As to the third reason on why it matters that the same issue was previously pursued by Mauritius as a bilateral dispute, the Court is not approaching this case as if it were on a blank sheet of paper. While it is correct that the tribunal in the *Chagos Arbitration* did not decide the disputed issue of validity of the 1965 Agreement, it did determine that this Agreement, on independence, became a matter of international law between the parties, finding [on screen, slide on][79]: "The independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement."[80]

It appeared to be suggested this morning that this elevation to the international plane concerned only the undertakings of the United Kingdom contained in the 1965 Agreement. But that is not so. There is no basis for that whatsoever in the Award. The Award continues:

> "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* [plural] fulfilled the conditions necessary to give effect to the 1965 Agreement and, by *their* conduct [plural] reaffirmed its application between *them* [plural]."

No suggestion that the 1965 Agreement was raised to the international plane in so far as concerns one party only in this key passage of the Award. Mauritius now wishes to persuade you that there was no valid consent to detachment given in the 1965 Agreement. But Mauritius cannot discard the binding determinations for which it has argued in prior bilateral proceedings. It would have to show that what has been found to be a bilateral international law agreement is not valid, due to duress, and Mauritius would have to address the fact of its reaffirmation of the 1965 Agreement as a sovereign State, and its claims in this respect have always been and remain matters of purely

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[79] *Chagos Arbitration, Award*, para. 428.

[80] *Ibid.*, para. 425, emphasis added. Judges' folders, tab 25.

bilateral dispute that are at the core of Mauritius' claim to sovereignty over the Chagos Archipelago. [Slide off]

9. I move to the second unique factor that distinguishes the current Request from all that has gone before, and I refer you to paragraph 4 of my outline. In this case, there are two bilateral agreements that are centrally relevant to the matters at issue. There is the 1965 Agreement, but also the 1982 Agreement between Mauritius and the United Kingdom on payment of compensation to the Chagossians in Mauritius, establishing the full and final settlement of claims against the United Kingdom by or on behalf of the Chagossians. That is a treaty which inevitably has implications for international law proceedings concerning the Chagossians, as indeed follows from the December 2011 Decision of the European Court of Human Rights [on screen, slide on]. There, it was held that the Chagossians' claims for compensation, and for a declaration of their entitlement to return, were inadmissible because the claims had been settled through implementation of the 1982 Agreement, as the United Kingdom domestic courts had found[81]. And this is what the European Court of Human Rights held:

> "The heart of the applicants' claims under the Convention is the callous and shameful treatment which they or their antecedents suffered from 1967 to 1973, when being expelled from, or barred from return to, their homes on the islands and the hardships which immediately flowed from that. [The United Kingdom does not shy from these very regrettable facts, and nor of course did the European Court of Human Rights. But, as to the legal position following the multiple settlements in implementation of the 1982 Agreement, the Court continues.] These claims were raised in the domestic courts and settled, definitively. The applicants' attempts to pursue matters further in more recent years must be regarded, as held by the House of Lords, to be part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention."[82]

10. [Slide off] Pausing there, in the *Wall* case, about which the Court has heard much this morning, the Court was not of course faced with the existence of any bilateral agreements consenting to the construction of the Wall or dealing with matters of compensation to the Palestinians impacted by the construction of the Wall, and likewise there had been no international litigation in bilateral proceedings on the precise matters on which the Court was being asked to

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[81] *Chagos Islanders* v. *United Kingdom* (2012) 56 EHRR, at paras. 77-87; StGB, Judgments, Vol., tab 6.

[82] *Ibid*, at para. 83. See also the finding at para. 81 with respect to those applicants who had not been party to the UK proceedings but who could at the relevant time have brought their claims before the domestic courts. The ECtHR found that such applicants had failed to exhaust domestic remedies as required by Art. 35 (1) ECHR. Judges' folders, tab 26.

opine. The same basic point applies to all the other advisory opinion cases that concern this aspect of discretion.

11. I move to the third unique factor, paragraph 5 of my outline. This is not a case where the matter of decolonization is one on which the General Assembly or the United Nations has been actively engaged, and a request is then sought to assist the Assembly with the proper exercise of its functions[83]. In *Western Sahara*, the issue was "one which arose during the proceedings of the General Assembly and in relation to matters with which [the General Assembly] was dealing"[84]. The Court found [slide on]:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."[85]

12. Here, the order of events is what the Court in *Western Sahara* considered impermissible: the object of the General Assembly, notably supported by less than 50 per cent of its Members, *has* been to bring before the Court, by way of a request for advisory opinion, a dispute, presumably in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of the dispute[86].

13. And not withstanding what you heard this morning from Professor Klein, the dossier for this case makes plain that the General Assembly had not, for almost five decades prior to 2016, been exercising any functions concerning the "decolonization of the territory", that is, of Mauritius or the Chagos Archipelago. Mauritius was removed from the list of territories monitored by the United Nations Special Committee on Decolonization after it became independent in March 1968. The Chagos Archipelago, known from 1965 as the British Indian Overseas Territory, was not

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[83] Cf. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39. Judges' folders, tab 27.

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

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

[86] See e.g. 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."

added to that list. And while the General Assembly has of course continued to be engaged in decolonization in general terms, that is not what this Request is concerned with[87]. [Slide off]

14. As to Professor Klein's point that, since the 1980s, Mauritius has raised the issue of the Chagos Archipelago on more than 30 occasions in annual statements to the General Assembly, that, if anything, is a point against Mauritius. The point is and remains that the General Assembly did not engage with an issue of self-determination, whether through the Special Committee on Decolonization or otherwise. We also invite the Court to look very carefully at the list of references, about which you heard a lot this morning, at paragraph 4.40 of the Mauritian written statement. The examples there concern the military use of the Chagos Archipelago or the Seychelles or a handful of views expressed at disparate times by State representatives or certain questions asked by the Human Rights Committee. They do not show a continued or consistent focus by the General Assembly, or any other United Nations body, on the decolonization of Mauritius. So, the current position is in stark contrast to *Western Sahara*, and also to the *Wall* case, where the Court considered that the opinion had been requested on a question of particularly acute concern to the United Nations, as well as one located in a much broader frame of reference than a bilateral dispute[88]. Here, by contrast, neither the relationship between Mauritius and the UK, nor any issue of self-determination regarding Mauritius, has been a matter in which the General Assembly has been in any way actively engaged since the independence of Mauritius. Moreover, unlike in the *Wall* case, the subject-matter of the current Request does not comprise a limited aspect of a much broader dispute with which the United Nations has been continually involved, but rather it is focused solely on what has, since the 1980s, been the defining dispute in UK-Mauritius bilateral relations.

15. The Court has before it a dispute that arose independently in bilateral relations a dozen or so years after the independence of Mauritius. That appeared to be accepted this morning. All Professor Klein did was to take you to the General Assembly resolutions of 1965 and 1966-1967, showing, before that is, the General Assembly interest in decolonization ceased, with Mauritius'

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[87] See CoGB, paras. 3.21 *(c)* and *(d)*.

[88] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, paras. 49-50.

independence in 1968. Mauritius also says in its written pleadings that the issues giving rise to the request originated in the mid-1960s[89]. But that is merely to ignore the well-established distinction between the date when a dispute arises and the date of relevant facts that give rise to the dispute. It is also to ignore the existence of relevant facts that post-date independence, notably the reaffirmations by Mauritius of the 1965 Agreement. From 1968 to the early 1980s, there was no dispute between the two States over sovereignty over the Chagos Archipelago while, for the next 35 years or so, from 1980, this was a matter of exclusively bilateral dispute.

16. It is only now that the dispute has been re-presented as a matter suitable for an advisory opinion, with Mauritius responsible for drafting the Request that was adopted unchanged by the General Assembly. It follows that this is the opposite of a case where a recalcitrant State raises, in some opportunistic way, a supposed bilateral dispute as an attempt to avoid the giving of an advisory opinion. The United Kingdom is simply reflecting what, until 2016, had been Mauritius' own position.

17. And, Mauritius was not guilty of any muddle-headed thinking in its past position that this is all a matter for bilateral contentious proceedings. Its position prior to 2016 merely reflected certain inevitable and bilateral features of the dispute including, most obviously, the key factual issues of consent and reaffirmation of consent.

18. This leads to the fourth unique factor as to the current Request, paragraph 6 of my outline. The Court could only answer the questions in the way sought by Mauritius if, amongst various other matters, it decided that Mauritius had not validly consented to the detachment of the Chagos Archipelago. Yet, consent is not an abstract matter, or a matter that could somehow arise in the Court's consideration of the Request *sua sponte*. It is only through Mauritius making a challenge to the validity of the 1965 Agreement *in these very proceedings* that the key issue of validity of consent can come before this Court.

(a) The Request comes from the General Assembly, but it could only be through the two States now joining issue before the Court on their bilateral dispute as to this 1965 bilateral Agreement,

[89] See CoMU, para. 2.48.

and through the Court determining that dispute, that the Court could be in a position to begin to answer the questions put.

(b) The argument before the Court that obligations in respect of self-determination are owed *erga omnes* does not impact on this point. Even if it could appropriately be assumed in considering the Court's discretion that such obligations existed at the relevant time, the argument goes nowhere: there is no rule of self-determination that says that Mauritius could not consent to detachment, and it is precisely the issue of whether Mauritius did or did not consent that *only* Mauritius could meaningfully put into dispute in the current proceedings. And I would add that, in any event, the Court has long since established that, where consent is required for adjudication, the *erga omnes* nature of an obligation does not negate that requirement[90].

(c) Thus, the issue that is being put before the Court *is* truly bilateral in nature, and cannot be seen as originating separately in the General Assembly. The UK, as is its right, has not consented to Mauritius' various prior attempts to have this issue determined in judicial or arbitral proceedings, and it follows that for the Court to give a reply to the Request would indeed 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.

19. I would add here that Mauritius is quite wrong to suggest that the facts are straightforward and that [on screen]: "It is the conclusion to be drawn from those facts, not the establishment of the facts themselves, that requires the attention of the Court."[91]

(a) The Court is being asked to find as a fact that the United Kingdom conditioned independence on consent to detachment, and as a fact that Mauritius did not reaffirm the 1965 Agreement on and post-independence. It is, moreover, being asked to do so in the absence of the witnesses to the key meetings, as these have long since died, and in the absence of any contemporaneous internal documents from the Mauritian side. Unlike, for example, in the *Wall* case, there are no United Nations reports that can assist on these points, despite what was suggested to you this

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[90] CoGB, para. 3.23; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29. Cf. CoMU, para. 2.30.

[91] CoMU, para. 2.65. Judges' folders, tab 28.

morning by Professor Klein. The United Nations dossier, extensive as it is, does not contain any documents that go to the key facts[92]. [Slide off]

(b) And, critically, the Court is being asked to determine the key issues of consent and reaffirmation in the absence of all the due process protections that would apply in contentious proceedings, including even a right to have a considered response to the submissions that were made this morning[93]. Indeed, far from the United Kingdom having a right of reply, a brief look down the schedule for this hearing shows that the last word will be in the form of not one but three presentations from those supporting the position of Mauritius, the *de facto* claimant in this case.

The PRESIDENT: It is 4.30 p.m. now and therefore, before you turn to your fifth factor, it might be an appropriate moment for the Court to mark a coffee break. I therefore declare the sitting suspended for 15 minutes.

The Court adjourned from 4.30 to 4.45 p.m.

The PRESIDENT: Please be seated. The sitting is resumed and I now invite Mr. Wordsworth to continue his presentation.

Mr. WORDSWORTH:

20. Mr. President, thank you very much. Mr. President, Members of the Court, before the break I was identifying four out of five unique factors that set this case apart from all that have gone before. First, the fact of the past litigation in the *Chagos Arbitration* case; second, the existence of not one but two bilateral agreements that are centrally on point; third, the fact that this is not a matter on which the General Assembly or the United Nations has been actively engaged; and, fourth, the fact that it is only through Mauritius putting before you in these proceedings the key bilateral dispute over consent and your resolving that bilateral dispute that the Court could even begin to answer the questions put.

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[92] CoMU, paras. 2.53, 2.64.

[93] CoGB, paras. 3.24-3.25.

21. I turn to the fifth and final unique factor in this case. Despite its protestations, Mauritius is indeed seeking resolution in its favour of a dispute over territorial sovereignty, its desired result being a declaration of sovereignty in its favour. Hence, it seeks in its written pleadings what amounts to a detailed *dispositif*, including a declaration from the Court that [on screen] "international law requires that . . . Mauritius is able to exercise sovereignty over the totality of its territory"[94]. Thus, in a none too subtle way, the Court is asked to find that the Chagos Archipelago is "its [i.e. Mauritius'] territory". The Court is likewise asked to make a declaration on the current and ongoing entitlement to enjoy title to the territory — to say that Mauritius is able to exercise sovereignty over *its* territory. Thus Mauritius is seeking again what it had sought — unsuccessfully — in the bilateral arbitral proceedings in the *Chagos Arbitration*[95].

22. The Court has nonetheless heard this morning that it is not being asked to assess competing claims to sovereign title over territory, but merely to opine on whether decolonization was lawfully completed[96]. But that is not correct. Just as in the *Pedra Branca* case, where the issue of territorial sovereignty turned on tacit consent, here disputed title turns fundamentally on an issue of express consent. The issue in this case can only be determined by deciding a challenge to the 1965 Agreement and the subsequent reaffirmations by Mauritius. And the bold statements that you heard this morning, that the case does not come down to competing claims to title, cannot change that. Likewise, it is not by asserting that this is all a matter of decolonization that Mauritius can bypass the fact that, as a sovereign State, it reaffirmed the 1965 Agreement — with the effect that the Court is plainly being asked to do more than opine on whether decolonization was lawfully completed.

23. And it is equally plain that the Court is being asked to take the very step that it considered was not open to it in the *Western Sahara* case. There, the Court found in considering the exercise of discretion that [on screen]:

> "42. . . . The issue between Morocco and Spain regarding Western Sahara *is not one as to the legal status of the territory today*, but one as to the rights of Morocco over it at the time of colonization. *The settlement of this issue will not affect the rights*

[94] StMU, p. 285, para. 3 *(a)*; judges' folders, tab 29.

[95] See StGB, Chap. VI, in particular at para. 6.5 (referring to Mauritius Memorial, p. 155 and paras. 6.8-6.30) and CoGB, paras. 3.14-3.15. See also the *dispositif* in the Award in the *Chagos Arbitration*, para. 547A (1).

[96] See CoMU, para. 2.51.

> *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)." (Emphasis added)

24. And in its Written Statement, Mauritius simply ignored this important passage from the Advisory Opinion in the *Western Sahara* case. Yet the current Request — drafted by Mauritius[97] — plainly seeks an opinion *"as to the legal status of the territory today"*, and *"to affect the rights of [the United Kingdom] today"*. That appears clear from the focus in Question *(b)* on the legal consequences "arising from the continued administration of the United Kingdom . . . of the Chagos Archipelago", and likewise from the declarations that Mauritius seeks as to its entitlement — as of today — to exercise sovereignty over "its" territory and for the "immediate" termination of the administration by the United Kingdom. [Off screen] The Court then continued in *Western Sahara* [on screen]:

> "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 present position as the administering Power of the territory in issue before the Court . . .*"[98]

25. Again, in sharp contrast, the current Request does put the United Kingdom's *"present position as the administering Power of the territory in issue before the Court"*.

26. In its second round Written Comments, Mauritius says that the United Kingdom and other States are wrong to rely on this passage from the Opinion and they say that ***~~what~~ the opinion*** the Court did give in *Western Sahara* anyway had critical consequences for present day rights[99]. And there are two answers to that.

(a) First, Mauritius is still failing to grapple with what the Court said in *Western Sahara*. Regardless of the so-called critical consequences for present day rights, the Court was reasoning that it could answer the question precisely because it did *not* require the Court to

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[97] StGB, para. 7.16.

[98] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 27-28, para. 43; emphasis added.

[99] See e.g. CoMU, para. 2.49.

opine on current legal status and current rights. That was not a question, as was suggested this morning, that turned on how Spain had pleaded its case. It was the Court's appreciation of what it could and could not do as a matter of its discretion. By contrast, in the answer it is seeking to the Request now before the Court, Mauritius most certainly *is* seeking an opinion as to its current territorial sovereignty and as to current rights.

(b) Second, Mauritius says that:

> "if it is determined by the Court that the decolonization of Mauritius has not been lawfully completed because the UK failed to comply with its obligation not to dismember the territory of Mauritius without the freely expressed consent of its people *in 1965*, the UK must, as a legal consequence, proceed to complete the decolonization process *at the present time*"[100].

But that is just to ignore the issue of principle stated in *Western Sahara* and also to pretend that the clock stopped in 1965, when it plainly did not. It could only be if the Court "determined" — to use Mauritius' terminology — that there was no consent in 1965 *and* that, contrary to the United Kingdom's case and to what the tribunal in the *Chagos Arbitration* has found, there was no subsequent reaffirmation by Mauritius of the 1965 Agreement, that the Court could even begin to address the multiple other issues, including the complex questions of legal consequences as of today. [Slide off]

27. And *Western Sahara* also provides an apt illustration of how — even in a case where there was no equivalent to the 1965 Agreement and its subsequent reaffirmations — it is not an answer to say that, once looked at through the prism of decolonization, an ongoing dispute over sovereignty between a former colony and a former administering Power is not to be regarded as bilateral in nature, and thus does not engage the principle on non-circumvention. If that had been correct, the Court in *Western Sahara* would not have had any concern about stating its view on the ongoing sovereign rights of Spain. But evidently that was not the Court's position[101].

28. So, uniquely, the Court is being asked to exercise its advisory function to opine directly on a long-standing dispute over territorial sovereignty between two sovereign States[102].

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[100] CoMU, para. 2.49; emphasis added.

[101] Cf. StMU, para. 5.37, referring to and taking out of context *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 24, para. 30. See C**o**GB, para. 3.20.

[102] Cf. StMU, para. 5.20, referring to and taking out of context a statement of the United Kingdom in the *Wall* case: see CoGB, para. 3.21 *(a)*.

29. In its Written Comments, the United Kingdom stated in terms that 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[103].

(a) Nothing Mauritius has said this morning has been able to challenge that point.

(b) The *Wall* is not an analogous case. As the Court noted, Israel had argued that the Wall's sole purpose was to enable it effectively to combat terrorist attacks from the West Bank and that it was only a temporary measure that did not challenge the legal status of territory in any way. Israel's argument was not that it was sovereign over the relevant territory such that it could therefore construct the Wall[104]. As Judge Higgins noted in her separate opinion, the Court simply did not have to engage with permanent status issues in its Opinion[105].

30. It follows from these five unique factors that the current Request is very different from any request that has previously come before the Court. The question is whether this is, then, the exceptional case where judicial propriety is engaged, and where the Court should not answer the Request because "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". There are three elements to this test.

(a) First, the test is engaged only where there is a dispute, and here there is a dispute. Mauritius says that the obligation owed to the international community dominates any bilateral aspect[106], but this is to seek to bypass the fact that the dispute ultimately turns on the existence and reaffirmation of a bilateral agreement, not the law of self-determination[107]. Indeed I recall there are two centrally relevant bilateral agreements in this case.

(b) Second, consent to judicial settlement must be lacking; and it is.

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[103] CoGB, para. 3.22.

[104] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 182, para. 116. Cf. CoMU, para. 2.33.

[105] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, sep. op. of Judge Higgins, p. 211, para. 17.

[106] CoMU, para. 2.31.

[107] See also CoGB, para. 3.23; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

(c) Third, there must be the effect of circumvention, which in turn requires an analysis of what is required of the Court to answer the Request. If the Request could be answered without *de facto* determining the long-standing bilateral dispute over sovereignty, there would be no circumvention, and the United Kingdom could and would have no objection. However, this simply does not appear to be possible, and is certainly not what is intended by Mauritius.

31. The United Kingdom is well aware that it would be exceptional for the Court not to answer a request from the General Assembly, but this is a truly exceptional case, centred on a long-standing but post-independence bilateral dispute over territorial sovereignty that has already been the subject of international litigation and turns fundamentally on the bilateral issues of consent and reaffirmation of consent. If the current Request were to be answered in the way that Mauritius seeks, then it appears that the principle of circumvention or non-circumvention may be taken as abandoned altogether, which would be inconsistent with the Court's role under the Charter and the Statute, with its well-established jurisprudence, and with the recognition of that key principle by all the States that have participated in these proceedings.

32. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention, and I ask you to invite Dr. Philippa Webb to the podium.

The PRESIDENT: I thank Mr. Wordsworth and I now invite to the podium Ms Webb, you have the floor Madam.

Ms WEBB:

3. QUESTION *(a)* OF THE REQUEST FOR AN ADVISORY OPINION

I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the United Kingdom. The United Kingdom's position is that the Court should exercise its discretion so as *not* to give an advisory opinion. What I shall say is in the alternative and without prejudice to that position. If the Court, nevertheless, decides to respond to Question *(a)*, then the answer would be that the process of decolonization was lawfully completed when Mauritius gained its independence in 1968.

2. Mauritius seeks to obscure its long-standing bilateral dispute with the United Kingdom by proposing questions to the General Assembly that recast the sovereignty dispute as one concerning decolonization.

3. But its response to Question *(a)* is all about the law on self-determination. It makes two linked arguments: (i) first, that a right to self-determination existed in 1965 (or 1968), and (ii) and second that this right included, at that time, a so-called "associated right" to the territorial integrity of a non-self-governing territory prior to independence. The two arguments of Mauritius are both incorrect as a matter of law; but in any event, they would not lead to the conclusion that Mauritius advocates when applied to the facts of this dispute.

4. I will make three points. First, acting through their representatives, the people of Mauritius consented to the detachment of the Chagos Archipelago in 1965. And, as the Solicitor General has explained, they reaffirmed their consent upon and after independence. The fact of this consent provides the short answer to Question *(a)*.

5. Second, there was no legal right to self-determination binding on the United Kingdom in 1965 or in 1968. But even if there had been such a right, it was satisfied by the freely expressed will of the people of Mauritius through the consent of their representatives and a general election.

6. Third, as at 1965 (or 1968), there was no "associated right" under general international law to the totality of the territory of a non-self-governing territory prior to independence.

7. This Court has already pronounced on territorial integrity in a colonial context. In *Burkina Faso/Mali*, the Court held that the principle of *uti possidetis* "secur[es] respect for the territorial boundaries *at the moment when independence is achieved*"[108]. The principle, according to the Court:

> "applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the 'photograph' of the territorial situation then existing . . . [It] freezes the territorial title; it stops the clock, but does not put back the hands"[109].

[108] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986,* p. 566, para. 23; emphasis added.

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

Mauritius concedes in its Written Statement that the principle of *uti possidetis* is not relevant in this case[110]. But what Mauritius is trying to do is to "put back the hands of the clock" by calling the principle *uti possidetis* by a new name — an "associated right". But to establish such a principle Mauritius has to show a customary right to absolute territorial integrity, separate from *uti possidetis,* emerged before 1965. This it has not done.

II. The people of Mauritius validly consented to the detachment of the Chagos Archipelago in 1965

8. I turn the first point on valid consent. The Solicitor General has set out the facts of Mauritius' consent to the detachment of the Chagos Archipelago. The United Kingdom sought and obtained the consent in multiple steps, with time for reflection and consultation by the people of Mauritius and their representatives. The detachment was made in exchange for concrete benefits and substantial compensation [Slide 1: Chronology][111]. There was no question of duress.

As you see on your screen,

(a) On 19 July 1965, Mauritius was first approached on proposals for the detachment. On 30 July[112] (and then on 13 and 20 September)[113], its ministers informed the Governor that they were "sympathetically disposed to the request".

(b) On 23 September, the Premier of Mauritius and senior politicians reached in-principle agreement in exchange for a series of undertakings by the United Kingdom[114].

(c) In early October, representatives of Mauritius requested and obtained further undertakings[115].

(d) On 6 October, the United Kingdom asked the Council of Ministers whether they agreed to detachment[116], and on 5 November, six weeks after their in-principle agreement, the Council of Ministers expressly consented to the detachment[117].

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[110] StMU, para. 6.58 and fn. 699; CoGB, para. 4.32.

[111] Judges' folders, tab 32.

[112] Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965 (StGB, Ann. 26).

[113] United Kingdom record of the meeting on "Mauritius - Defence Matters", 13 Sep. 1965 and United Kingdom record of the meeting on "Mauritius - Defence Matters", 9 a.m., 20 Sept. 1965, p. 8 (StGB, Anns. 30 and 29).

[114] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30 p.m., 23 Sep. 1965 (StGB, Ann. 33).

[115] Sir S. Ramgoolam manuscript letter, 1 Oct. 1965 (StGB, Ann. 34).

[116] Colonial Office Telegram, No. 423 to the Governor of Mauritius, 6 Oct. 1965 (StGB, Ann. 35).

(e) Through this process, the detachment of the Chagos Archipelago was a matter of public record. In August 1967, the General Election was won by those in favour of independence and who had agreed to the detachment. The new independence constitution did not include the Chagos Archipelago[118].

(f) From the date of its independence, Mauritius did not question the legal validity of consent to the detachment, not even in its interventions in the General Assembly, which began in 1980[119]. Between 1969 and 1980 it reaffirmed its consent to the detachment, including the conditions for return, on multiple occasions[120]. [End slide 1]

9. Mauritius first made the claim to the United Kingdom that the 1965 Agreement was "extracted in circumstances of duress" some 47 years after the event, in 2012, in its Memorial in the *Chagos Arbitration*[121]. In those arbitral proceedings, and in its Written Statement in these proceedings, Mauritius asserted that independence was made "conditional" on the agreement to detachment by the Council of Ministers[122]. The Solicitor General has already explained that the United Kingdom publicly announced the decision on Mauritius' independence on 24 September 1965, several weeks before the 1965 Agreement was confirmed. So, the question, "do you wish to be independent?" was answered on 24 September. And the question, "do you agree to the detachment of the Chagos Archipelago?", was answered on 5 November and reaffirmed multiple times after that.

10. The vitiating effect of duress on an agreement is not to be found lightly. The United Kingdom has explained in its written pleadings that there are two relevant legal standards. From 1965 until independence in 1968, the governing law was British constitutional law[123]. The

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[117] Report of the Mauritius Select Committee on the Excision of the Chagos Archipelago, App. P (Extract from Minutes of Proceedings of the Meeting of the Council of Ministers held on 5 Nov. 1965), 1 June 1983, p. 63 (StGB, Ann. 36); United Kingdom Telegram No. 247 to the Colonial Office, 5 Nov. 1965 (StGB, Ann. 37).

[118] Schedule to the Mauritius Independence Order 1968 (StGB, Ann. 39).

[119] UNGA, verbatim record, 35th Session, 30th Plenary Meeting, Thursday 9 Oct. 1980, 11 a.m. (A/35/PV.30, para. 40) (UN dossier No. 269).

[120] StGB, paras. 3.38-3.50.

[121] StMU, para. 6.96 and CoGB, para. 4.12.

[122] StMU, paras. 3.73-3.81; CoMU, paras. 1.24-1.31 and 3.89-3.92.

[123] StGB, para. 8.16; *Chagos Arbitration Award*, para. 425 (UN Dossier No. 409).

1965 Agreement was akin to a contract binding upon the parties under domestic law[124]. There is no basis for concluding that the United Kingdom's conduct came anywhere close to meeting the standard for duress under the law at the time[125]. Mauritius has made no attempt to argue the contrary. Instead, in a brief paragraph of its Written Comments, it asserts that the applicable legal framework is that of self-determination[126]. And today we heard that coercion and duress are interpreted within the "everyday meaning" of those words. It is a reality that an imbalance between negotiating parties is unavoidable. If the standard for duress is set so low as the "everyday meaning", if an agreement could be set aside because one party was powerful and one was not, then very few treaties would be left standing.

11. Moreover, Mauritius has ignored the fact that after 12 March 1968, as found by the Chagos Arbitral Tribunal, the 1965 Agreement took effect on the international plane and the governing law between the Parties was international law[127]. The Law of Treaties thus applies and Mauritius has this morning admitted that the alleged behaviour of the United Kingdom did not meet the tests under Articles 51 and 52 of the Vienna Convention.

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

12. I turn now to the legal arguments on self-determination: Mauritius has spent a substantial amount of time attempting to show that the right to self-determination existed before 1965. In the United Kingdom's view, even if such a right existed at the time, it would not help the Court to answer Question *(a)*. Not only is the right to self-determination not mentioned anywhere in the question, but as I will explain shortly, the content of the right does not include the territorial status quo of a pre-independence territory.

13. Two points are common ground between Mauritius and the United Kingdom. First, according to the inter-temporal rule, the applicable law is the law of the relevant time[128]. Second,

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[124] I. Hendry and S. Dickson, *British Overseas Territories Law*, p. 261 (now second edition, identically worded), cited in the *Chagos Arbitration Award*, para. 424 (UN dossier No. 409).

[125] StGB, para. 8.16.

[126] ***CoMU, para. 3.88.***

[127] *Chagos Arbitration Award*, para. 425 (UN dossier No. 409).

[128] See *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 79; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 23, para. 16 (citing *Rights of United States Nationals in Morocco, I.C.J. Reports 1952*, p. 189).

proof of a rule of customary international law requires a "settled practice", "extensive and virtually uniform", accompanied by *opinio juris*[129]. The burden of proof is on Mauritius.

14. The right to self-determination crystallized in customary international law after the 1960s. The Friendly Relations Declaration, adopted in October 1970, was the first consensus resolution on the right, with the United Kingdom joining the consensus. During the six years of negotiations, the divided views of States on the meaning and status of self-determination were obvious. Consensus was only reached after extensive and in-depth deliberation.

15. The first codification of the right in a binding instrument occurred on 3 January 1976, with the entry into force of the International Covenant on Economic, Social and Cultural Rights.

16. Throughout the 1950s and 1960s, the United Kingdom and other States consistently objected to the references to a "right" to self-determination in United Nations instruments[130]. Mauritius claims that the United Kingdom's explanation of vote for resolution 1514 (XV) (1960) expressed support for a "right" to self-determination[131]. But not only did the United Kingdom abstain from the vote, but, as you see on your screen, its representative clearly stated [start slide 2: Verbatim Report of 14 December 1960] "to our regret, we came to the conclusion that its wording in certain respects was not such that we could support it". He referred to the "difficulties which have arisen in connexion with the discussion of the draft International Covenants on Human Rights and in defining the right to self-determination in a universally acceptable form"[132]. [End slide 2]

17. In its Written Comments, the United Kingdom has already pointed out how the resolutions and academic commentary relied on by Mauritius are inconclusive and divided[133], and we cite, among others, Professors Schwarzenberger, Jennings, ***Brownlie*** and Fitzmaurice, saying that self-determination was not a legal right in the 1960s[134].

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[129] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77; *Jurisdictional Immunities of the State (Germany* v. *Italy), I.C.J. Reports 2012*, para. 55.

[130] StGB, paras. 8.70-8.74.

[131] CoMU, para. 3.35.

[132] UNGA, verbatim record, 15th Session, 947th Plenary Meeting, Wednesday 14 Dec. 1960, 3 p.m. (A/PV.947), p. 1275, paras. 48, 53 (UN dossier No. 74), judges' folder, tab 33.

[133] CoGB, paras. 4.18-4.28.

[134] ***CoGB, para. 4.26.***

18. The Court itself has not found that a right to self-determination existed in international law prior to 1970, though it has had several opportunities to do so[135].

IV. Even if there was a right to self-determination under international law in 1965/1968, it was satisfied by the free expression of will by the people of Mauritius

19. But even if there was a right to self-determination in 1965 or 1968, the "freely expressed will" of the people of Mauritius did not require the United Kingdom to hold a United Nations-supervised plebiscite or referendum[136]. Mauritius accepts that a people can exercise the right to self-determination through representatives[137] and elections[138]. And as I have explained, this is exactly what the people of Mauritius did with the 1965 Agreement and the 1967 general election[139]. Ms Macdonald this morning speculated that a vote against detachment would not have changed anything. But there is no basis for that assumption. The reality is that detachment was not a controversial election issue. Indeed, it was not an issue at all until 1980.

V. There was no "associated right" to the integrity of the territory of a non-self-governing territory prior to independence

20. I now turn to the issue of an "associated right" to the territorial integrity of a pre-independence territory. Mauritius argues that such a right existed in 1965 in international law and prohibited the detachment of the Chagos Archipelago. But the "unit of self-determination" is not, as Mauritius claims, the *entire* territory of the non-self-governing territory[140]. There is no equivalent right to the territorial status quo that exists at the moment of independence according to the principle of *uti possidetis*.

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[135] *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. 36, para. 70; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, paras. 87-88, 118, 122, 149, 155-156; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 436, para. 79.

[136] Cf. StMU, paras. 6.58-6.60.

[137] CoMU, para. 3.93.

[138] StMU, paras. 6.3 (3), 6.44.

[139] See also I. Hendry and S. Dickson, *British Overseas Territory Law* (2nd ed., 2018), p. 305.

[140] StMU, paras. 6.62-6.66; CoMU, paras. 3.69-3.75.

21. Territory is relevant to self-determination in that it defines and allows a "people" meaningfully to exercise their right to self-determination. There should be a coherent and identifiable territorial base to which the exercise of self-determination can relate. This would suggest natural territorial units should be maintained. But it does not require that the boundaries of the territory remain wholly unchanged during some unspecified period prior to independence.

22. Mauritius relies heavily on paragraph 6 of resolution 1514 (XV) for evidence of this "associated right". Under the United Nations Charter, Assembly resolutions are not legally binding except in very limited circumstances, largely related to the United Nations budget[141].

23. The Court has explained that Assembly resolutions may "in certain circumstances" provide "evidence important for establishing the existence of a rule or the emergence of an *opinion juris*"[142]. It is necessary to look at the content of the resolution and the circumstances of its adoption. And the Court has warned that such an exercise must be carried out with "all due caution"[143]. Even if there is *opinio juris*, it must be accompanied by settled State practice to establish a customary rule.

24. The United Kingdom examined the content and circumstances of adoption of resolution 1514 (XV) at length in its written pleadings[144]. I draw the Court***'s attention*** to some of the following factors: [Start slide 3: Content and circumstances of adoption of resolution 1514 (XV)]

(a) The effect of a General Assembly resolution is not just measured by a vote count, but by the underlying evidence of what States thought at the time. Negotiations over the resolution were hastily conducted between September and December 1960; paragraph 6 was not added until the end of November. States had divided views as to its meaning and they were not resolved by the time of adoption[145]. The United Kingdom itself expressed concerns several times, observing

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[141] Articles 10 and 17 of the Charter.

[142] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 254-255, para. 70.

[143] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 99, para. 188.

[144] StGB, paras. 8.27-8.46 and CoGB, paras. 4.35-4.41.

[145] StGB, paras. 8.40-8.44 (referring to Indonesia, Iran, Pakistan, Tunisia, Guatemala, the Netherlands).

that it was difficult to improve on Chapter XI of the Charter and that resolution 1514 (XV) was going further than international law required[146].

(b) All nine colonial powers, including the United Kingdom, abstained from the vote. The choice of a State to abstain rather than to vote against a resolution is essentially political. In the practice of the General Assembly, abstentions are often evidence of a non-acceptance as law of the content of a resolution[147].

(c) Some States that voted in favour expressed misgivings or emphasized the aspirational nature of the resolution[148]. Voting in favour is therefore not a sufficient indication that a State considered the resolution to reflect international law.

(d) And the disagreement about the meaning of paragraph 6 persisted after its adoption. It was primarily invoked to deny a right to secession of parts of a territory at or after independence, not to support a right to the integrity of a territory in the years leading up to independence[149].

(e) The Court has acknowledged that resolution 1514 marked an important "stage" in the development of international law on self-determination[150]. It was a key step in the evolution of the right to self-determination, but it did not reflect States' acceptance of a new right to territorial integrity of a pre-independence territory.

(f) And, for its part, the United Kingdom has consistently voted against or abstained from resolutions on the implementation of resolution 1514 (XV). [End slide 3]

25. It is striking that when it came to drafting the Friendly Relations Declaration, States deliberately omitted reference to resolution 1514 (XV) and the content of that declaration differed from paragraph 6[151]. [Slide 4: side by side comparison of resolutions 1514 and 2625] The slide

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[146] StGB, para. 8.45.

[147] ILC Draft Conclusions on the Identification of Customary International Law, para. 5 of the commentary to Conclusion 12, available at p. 180 of http://legal.un.org/docs/?path=../ilc/reports/2018/english/a_73_10_-advance.pdf&lang=E; see for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 255, para. 71.

[148] UN doc. A/PV.947 (14 Dec. 1960), para. 60 (The Netherlands) (UN dossier No. 74); UN doc. A/PV.946 (14 Dec. 1960), para. 12 (Sweden) (UN dossier No. 73); UN doc. A/PV.945 (13 Dec. 1960), para. 188 (Austria) (UN dossier No. 72).

[149] StGB, para. 4.39.

[150] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 56 (quoting *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52).

[151] UNGA res. 1514 (XV) (1960) and UNGA res. 2625 (XXV) (1970), are at tabs 34 and 35 of the judges' folders in both English and French.

shows the differences between the two resolutions. The Friendly Relations Declaration was drafted with more time for reflection over a six-year period. Rosenstock, the Legal Adviser to the United States Mission to the United Nations, who played a prominent role in the negotiations, wrote that resolution 1514 (XV) was a "source of difficulty" for the negotiators, with States continuing to debate its meaning. Paragraph 7 of the Friendly Relations Declaration refers to "the territorial integrity or political unity of *sovereign and independent States*" — according to Rosenstock, this was "an affirmation of the applicability of the principle to peoples within *existing* states". 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 different point of the problem of the use of force to deny peoples the right to self-determination[152]. [End slide 4]

26. Apart from resolution 1514, Mauritius also relies on General Assembly and Security Council resolutions to attempt to show that paragraph 6 reflected a customary rule in the 1960s. The United Kingdom has rebutted the relevance of each of these resolutions in its Written Comments[153]. The vast majority post-date the detachment of the Chagos Archipelago in 1965, most do not even mention "territorial integrity" and they address different situations, such as *apartheid* in South Africa or the violence surrounding Algerian independence.

27. In this period, there was only one resolution concerning Mauritius itself, resolution 2066 (XX) (1965). Mauritius claims that it shows the right to territorial integrity "had crystallised years beforehand"[154]. But the resolution contained no condemnation of the United Kingdom or any statement that it had acted in breach of binding international law. The resolution was adopted with 18 abstentions, including the United Kingdom. After 1967[155], questions concerning the Chagos Archipelago were not addressed by the General Assembly for the next five decades, indeed, not until Mauritius proposed the present request for an advisory opinion.

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[152] CoGB, para. 4.41. Robert Rosenstock "The Declaration of Principles of International Law concerning Friendly Relations: A Survey" (1971) 65 *American Journal of International Law* 713.

[153] CoGB, paras. 4-42-4.43.

[154] CoMU, para. 3.109.

[155] Resolution 2232 (XXI) (1966) by a vote of 93-0-24 (UK); resolution 2357 (XXII) (1967) by a vote of 86-0-27 (UK).

28. Finally, Mauritius cannot point to any extensive and virtually uniform practice at the relevant time to support this claimed "associated right". The process of decolonization in the 1950s and 1960s featured detachment, partition, merger and other arrangements prior to independence. Such practice involved not only the United Kingdom, but many other administering Powers, including Australia, Belgium, France, the Netherlands, New Zealand and the United States. The United Nations itself was often involved or acquiesced in these arrangements[156].

29. Mauritius does not deny this practice contradicts its claimed "associated right", but it seeks to distinguish it by arguing that territorial change was permissible with the full and free consent of the population concerned[157]. It is the United Kingdom's position that the detachment of the Chagos Archipelago was in fact undertaken with the full and free consent of Mauritius. But, in any event, the State practice does not support a requirement of consent by referendum or plebiscite. For example, Ruanda-Urundi was divided into two separate sovereign States without a referendum[158]. And four years before Jamaican independence, the United Kingdom separated the colony of Jamaica from the Cayman Islands and Turks and Caicos. Jamaica withdrew from the West Indies Federation after holding a referendum in 1961. But Turks and Caicos and the Cayman Islands did not hold referenda; instead their Legislative Assemblies opted to remain under British Administration.

30. The Cocos (Keeling) islands and Christmas Island were attached to various colonies including Singapore. In 1955 and 1958, respectively, the islands were detached and transferred to Australia. This was prior to the independence of Singapore. This detachment was carried out without a referendum and was tacitly accepted by the United Nations.

VI. Conclusion

31. Mr. President, Members of the Court, the basic fact is that the representatives of Mauritius validly consented to the detachment of the Chagos Archipelago, this was accepted by the electorate, endorsed by the Legislative Assembly, and reaffirmed in the years post-independence. The claim of duress was raised many decades later and is not supported by facts or law.

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[156] StGB, paras. 8.55-8.58; StUS, paras. 4.65-4.72.

[157] CoMU, para. 3.63.

[158] UNGA res. 1746 (XVI) (1962).

32. Territorial integrity is a fundamental principle of international law, but it does not operate in the way that Mauritius claims. As this Court explained in the *Kosovo* Advisory Opinion, the "scope of the principle of territorial integrity is confined to the sphere of relations between States"[159]. Mauritius seeks to extend the scope of that principle to a people entitled to self-determination, and to put back the hands of the clock to the pre-independence period. It is unable to show the requisite State practice and *opinion~~n~~ juris* to establish the equivalent of *uti possidetis* for non-self-governing territories prior to independence. It is specifically unable to show that in customary law there is a right to maintain a very distant archipelago~~[160]~~. No such absolute rule existed.

33. Two serious risks emerge from the response to Question *(a)* proposed by Mauritius. First, although Mauritius theoretically accepts the test for determining customary international law, its evidence of State practice and *opinion~~n~~ juris* is selective and flawed. Resolution 1514 (XV) cannot support the weight that Mauritius places on it. Second, in international law, boundaries existing *prior to* independence have not been considered immutable. The arrangements that have resulted from alterations to the boundaries of colonial and other dependent territories have long been accepted by the international community. The wrong answer to Question *(a)* would throw many such existing boundaries into doubt.

34. Mr. President, Members of the Court, I now ask that you invite Sir Michael Wood to the podium.

The PRESIDENT: I thank Ms Webb and I now call upon Sir Michael Wood to take the floor. You have the floor, Sir.

Sir Michael WOOD:

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[159] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403, para. 80.

~~[160] *Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983, p. 10; CoGB, Ann. 90.*~~

4. QUESTION *(b)* AND CONCLUDING REMARKS

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is an honour to appear before you, on behalf of the United Kingdom, in these advisory proceedings. My task is to address Question *(b)*, which asks "What are the consequences under international law . . . arising from the continued administration by the United Kingdom . . . of the Chagos Archipelago . . ."

2. As the Court is well aware, our principal contention is that the Court should exercise its discretion so as not to respond to the present Request. A Request that incidentally was adopted with less than half of the Members of the United Nations. The answer to Question *(b)* would inevitably involve a determination about sovereignty. To introduce into Question *(b)* a possible resettlement of Chagossians from Mauritius (and of other Mauritian nationals) is the route Mauritius has now chosen to secure from the Court a finding on sovereignty. The Court heard much this morning about the Chagossians, but when it comes down to it, the question Mauritius wishes the Court to determine is not about them. It is about Mauritius and its claim to sovereignty over the Chagos Archipelago.

3. I shall not repeat all that we said about Question *(b)* in our written pleadings[161]. We maintain that in full. Instead, I shall make four points:

— First, the Court cannot answer Question *(b)*, because to do so would necessarily involve a determination on sovereignty over the Chagos Archipelago, and a consideration of the bilateral relationship from 1965 right up to the present.

— Second, the arbitration Award of 2015 has already given answers to those issues raised by Mauritius that might be suitable for a judicial decision in contentious proceedings.

— Third, the timing of decolonization is not a matter for the Court in these proceedings.

— And fourth, raising the question of the settlement of Mauritian nationals (including Chagossians) is simply an attempt by Mauritius to secure a ruling on sovereignty over the Chagos Archipelago, in the guise of concern for the Chagossians.

[161] StGB, Chap. IX; StGB, Chap. 5.

II. The real aim of Question *(b)*

4. Unlike Question *(a)*, which concerns the position as it stood 50 years ago, in March 1968, Question *(b)*, as Mr. Wordsworth emphasized, addresses the present. It asks "What *are* the consequences under international law of the *continued* administration" of the Chagos Archipelago; that is the administration of the Islands today.

5. [On screen] Mauritius argues that Questions *(a)* and *(b)* are inextricably linked, so much so that it says in its Written Comments that "[t]he Court's answer to the first question, and its determination of whether decolonisation has been lawfully completed, in and of itself determines *whether the administering power or Mauritius is lawfully entitled to act as the sovereign over the Chagos Archipelago, and to exercise sovereignty*"[162]. (I would note in passing that, if that were right, then the inappropriateness of the Court answering either question would be manifest.)

6. Mauritius misstates the questions which it itself drafted. The two questions are distinct. As I have said: Question *(a)* concerns the position as of 12 March 1968; Mauritius tended to ignore that this morning, Question *(b)* concerns the position as of 2018. To form a view on the position in 2018 it would be necessary for the Court to inquire in depth into all the many relevant events and transactions that have transpired in bilateral relations over the 50 years since Mauritius' independence. Such an inquiry would have to include the status (in 2018) of the Lancaster House Agreement, including Mauritius' reaffirmation thereof over the years; the effect of the 1982 Agreement between Mauritius and the United Kingdom concerning compensation for the Chagossians (a matter already considered by the English courts and the European Court of Human Rights); and the interpretation and application of the 2015 Arbitral Award, which is the binding law between the Parties[163]. Which again Mr. Reichler scarcely mentioned this morning. Whatever the position may have been in 1965/1968, the sovereign independent State of Mauritius, by its words and by its actions, has repeatedly reaffirmed its consent to detachment. Thus, even if there were a defect in its consent in 1965 as it claims, but we strenuously deny, Mauritius itself has rectified that defect, undermining the claim that it has put before this Court. In addition to its reaffirmations, Mauritius has insisted on the binding nature of the United Kingdom's undertaking to return the

[162] StMU, para. 4.73, tab 38.

[163] StMU, para. 5.8.

Islands once they are no longer needed for defence purposes, as well as other undertakings given in 1965[164]. As established by the Award of the Arbitration Tribunal, this now forms part of the binding international law between the Parties.

7. In any event, Question *(b)* does not fall to be answered since Mauritius' claim that the United Kingdom's continued administration of the British Indian Ocean Territory is in violation of international law has no legal or factual basis. On the contrary, the United Kingdom is the State which has current sovereignty over the Islands; they did not become part of the sovereign independent State of Mauritius upon independence, but remained under British sovereignty[165]. As a consequence, the United Kingdom is fully entitled, under international law, to administer them, until such time as they are ceded to Mauritius, in accordance with the terms of the undertaking given at Lancaster House (an undertaking which, I repeat, the UNCLOS Arbitral Tribunal, in its 2015 Award, found to be legally binding as between the United Kingdom and Mauritius[166]).

[Screen on – same slide as before]

8. Mauritius' contentions to the contrary can only be based on its sovereignty claim, as it admits in the passage I have just cited. That claim lies at the heart of the request for an advisory opinion that it has procured from the General Assembly. As I said, supported by less than half of its Members. That claim to sovereignty was contradicted by the findings of the UNCLOS Arbitral Tribunal[167] and is not a matter for determination by this Court in advisory proceedings.

[Screen off]

III. Consequences of the continued administration of the Chagos Archipelago are set out in the 2015 Arbitral Award

9. Mr. President, Members of the Court, in its written pleadings, and again this morning, Mauritius proposes a response to Question *(b)* founded upon the law of State responsibility[168]. It does so on two assumptions, first, that the detachment of the Chagos Archipelago in 1965 was an

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[164] See, for example Mauritius' Memorial in the Chagos Arbitration, Chap. 6.II.

[165] See STGB, paras. 3.38-3.40; CoGB, para. 2.88.

[166] *Chagos Arbitration Award*, para. 547 (*dispositif*) (UN dossier No. 409).

[167] See, for example, Thomas D. Grant, "The Once and Future King: Sovereignty Over Territory and the Annex VII Tribunal's Award in *Mauritius* v. *United Kingdom*", S. Allen, C Monaghan (eds., Springer, 2018), *Fifty Years of the British Indian Ocean Territory. Legal Perspectives*, pp. 215-230.

[168] CoMU, Chap. 4.

internationally wrongful act and, second, that the United Kingdom's continued administration of the Chagos Archipelago in 2018 is a continuing wrongful act. But Mauritius has not established that, even if the decolonization of Mauritius was not completed in 1968, that would have amounted to an internationally wrongful act at the time; or that it remains so today. International law does not prescribe a particular date for decolonization**.** ***I***ncomplete decolonization would not in itself have been internationally wrongful. It would simply mean that decolonization still had to be completed at an appropriate time, which in the present case is when the Islands ***are*** no longer needed for defence purposes. Without establishing an internationally wrongful act committed in 1965, which continues through to today, Mauritius's whole State responsibility argument does not get off the ground. And Mauritius simply did not, this morning, address the post-independence period, which is vital for determining what the position is today.

10. To return to Question *(b)*, the consequences under international law of the continued administration of the Islands by the United Kingdom may be stated briefly. They reflect the rights and obligations that flow from any State's sovereignty over territory, together with such additional rights and obligations as flow from international agreements to which the United Kingdom is a party and judgments or arbitral awards that are binding on it. Of particular relevance in this connection are the undertakings that were given as part of the 1965 Agreement, which was interpreted with binding force as between Mauritius and the United Kingdom by the UNCLOS Arbitral Tribunal in its 2015 Award.

11. If the Court were to respond to Question *(b)* — which of course we say it should not do — it would need to base any response upon the Arbitral Tribunal's Award. Yet, Mr. Reichler scarcely mentioned the Award this morning. I note in passing that Mauritius repeatedly invokes the dissenting opinion. But it is, of course, the Tribunal's Award, not the dissenting opinion, that binds the Parties to the case. Whatever views this Court might express in an advisory opinion, the Award will remain the binding law between the Parties.

12. Thus, any response to Question *(b)* would have to be based on the 1965 Agreement as interpreted and applied by the Arbitral Tribunal[169], as well as the 1982 Agreement between

[169] StGB, para. 9.20.

Mauritius and the United Kingdom on the settlement of claims by the Chagossians in Mauritius[170], and it could emphasize the following:

(a) The United Kingdom is under an international legal obligation to cede the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes[171].

(b) While it continues to administer the Archipelago, the United Kingdom is under an obligation to recognize Mauritius' interest in the condition in which the Archipelago will be returned.

(c) The United Kingdom is under no legal obligation to resettle Chagossians living in Mauritius. The European Court of Human Rights has recognized that the 1982 Agreement led to the renunciation of claims by the very great majority of the Chagossians in Mauritius[172].

13. Mauritius, for its part, seeks to argue that the Tribunal found that only the United Kingdom is bound by the 1965 Agreement since the United Kingdom had subsequently reaffirmed its undertakings given therein, and that the Tribunal expressed no view on the validity of the agreement itself[173].

14. That, Members of the Court, is both inaccurate and disingenuous. It is inaccurate because, while the Tribunal found it did not have jurisdiction to consider Mauritius' argument on consent, and did not decide the matter, [on screen] nevertheless it found that — as Mr. Wordsworth has already indicated — the

> "independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming commitments made in 1965 into an international agreement. In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, the Parties fulfilled the conditions necessary to give effect to the 1965 Agreement and, by their conduct, reaffirmed its application between them."[174] [Screen off]

15. This and the following excerpts from the Award are at tab 39 in your folders. [Screen on] The Tribunal also said, as you will see, that the

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[170] StGB, paras. 4.9-4.13 and Ann. 50 (Agreement between the Government of Mauritius and the Government of the United Kingdom concerning the Ilois, Port Louis, 7 July 1982, United Nations, *Treaty Series (UNTS)*, Vol. 1316, p. 128)

[171] See *Chagos Arbitration* Award, (UN dossier No. 409), paras. 424-425, 434, 547.

[172] *Chagos Islanders* v. *United Kingdom* (2012), European Human Rights Reports (EHRR), Vol. 56, paras. 77-87 (StGB, Judgments Volume, tab 6).

[173] CoMU, paras. 3.81-3.83.

[174] *Chagos Arbitration Award* (UN dossier No. 409), para. 425 (tab 39).

> "undertakings [were] given as part of an agreement concluded in 1965 between the United Kingdom and one of its colonies, that became a matter of international law upon the independence of Mauritius, and that were reaffirmed in correspondence between the Parties in the decades since independence"[175]. [Screen off]

[Screen on] And finally, that "that both Parties were committed to honouring the 1965 Agreement in their post-independence relations"[176].

16. Thus, any defect that might have existed in 1965 (and we for our part are clear that there was none) would have been cured by the reaffirmation of the 1965 Agreement by the Parties as sovereign States. It is evident that the Tribunal was referring to the reaffirmation under international law of the 1965 Agreement, which contained commitments and concessions by both Parties, and which was further reaffirmed over the years by the United Kingdom and Mauritius. It is for Mauritius to show that those reaffirmations were void of legal consequences, but it could only do that by showing that its commitments to the 1965 Agreement on each subsequent occasion that consent was reaffirmed, including the period after independence, once Mauritius had become a sovereign State were void. It has not even attempted to do this. [Screen off]

17. It should also be noted that when the Tribunal reached these conclusions on the binding nature under international law of the 1965 Agreement and the undertakings, it actually did so in support of Mauritius' position in the arbitration, not the United Kingdom's. Nevertheless, the United Kingdom accepts that the Award is binding, and that the 1965 Agreement is binding between the Parties. Mauritius is being disingenuous, since it claims, on the one hand, that the reaffirmations by the United Kingdom of its part of the Agreement are binding, but, on the other hand, its own reaffirmations of the Agreement are, somehow, without legal effect.

18. Even the dissenting opinion in the Arbitral Tribunal, on which Mauritius has relied so heavily, concurred, referring to the 1965 Agreement, [on screen] that the "package binding under national law which upon the independence of Mauritius devolved upon the international law level"[177]. This is at tab 40. If the United Kingdom, as Mauritius continues to assert, is bound by its part of the "package deal", Mauritius is bound by its part too. And even if the Court were to find it appropriate to address the issue of consent to detachment and find that it was deficient, the arbitral

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[175] *Ibid*., para. 434.

[176] *Ibid*., para. 424.

[177] *The Chagos Marine Protected Area Arbitration* (UN dossier No. 409), dissenting and concurring opinion (18 Mar. 2015), para. 84 , quoted in the CoMU, para. 3.81, fn. 366 (tab 40).

Award that would remain binding between the Parties, including what is says about the reaffirmation by the Parties of the 1965 Agreement. [Screen off]

IV. The timing of return is not to be decided by the Court

19. Mr. President, I now turn to the issue of the timing of the return, which I said is not a matter for decision by this Court. The "immediate" return of the Chagos Archipelago is a central and, we would say, wholly inappropriate demand of Mauritius in these advisory proceedings[178]. Yet it could not be for the Court, a judicial body, even in contentious proceedings, to tell the Parties when the Islands should be returned. That is a matter of policy, not law, as Mauritius itself seems to be aware. In its Written Comments, Mauritius refers to what it claims is "the well-established principle of international law that where decolonization has not been lawfully completed, it must be completed immediately"[179]. For this proposition it can cite no practice, no *opinio juris* and no authority. All it refers to are "the Written Statements [in this case] which address the issue" and case law that, as I shall explain, is simply not on point.

20. Moreover, Mauritius' demand is in clear contradiction of the terms of the 1965 Agreement. The timing of return was conclusively determined by the terms of the undertaking given in 1965, which, as I have said, was reaffirmed on many occasions since, and which was found to be binding in the 2015 Award. The terms of the undertaking you are well aware of: "if the need for the facilities on the islands disappeared the islands would be returned to Mauritius"[180]. It was, moreover, clear to all concerned that the decision when the Islands were no longer needed for defence purposes was exclusively for the United Kingdom to take.

21. In its written pleadings, Mauritius has sought to pray in aid the Court's case law to show that unlawful situations are to be remedied "immediately". In our Written Comments we have shown that the cases cited by Mauritius are off point[181]. The *Namibia* case, for example, which was referred to extensively this morning in various contexts, referred to as the *South West Africa* case

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[178] CoMU, paras. 4.3, 4.89-4.110, and Conclusions (3) *(a)*.

[179] CoMU, para. 4.3.

[180] Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30 p.m., 23 Sep. 1965, para. 23 (vii) (StGB, Annex 33).

[181] CoGB, paras. 5.

mostly, but the *Namibia* case concerned a former mandate and was wholly different from the present situation. *Namibia* was exceptional: South West Africa had been a territory under mandate, the Court found that the mandate had been lawfully terminated by decision of the General Assembly[182], and the Court noted that the Security Council, in a series of binding resolutions, had imposed the obligation upon South Africa to terminate its administration of South West Africa "immediately"[183]. This explains the Court's reply in that case that "South Africa is under obligation to withdraw its administration from Namibia immediately". The word "immediately" came from binding Security Council resolutions. As for the other cases cited by Mauritius, they are likewise irrelevant, we would say; they relate to wholly different situations, such as the obligation to extradite or prosecute in *Belgium* v. *Senegal*.

22. Even if the question of timing had not been already dealt with in the undertaking to cede, timing would be for political appreciation, not for decision by a court of law or even by the political organs of the United Nations. Many non-legal factors need to be taken into account when determining the timing of decolonization. Administering Powers have never been legally bound by recommendations of the General Assembly in this regard; still less would it be appropriate for a judicial body to set deadlines, and certainly not in advisory proceedings.

23. While on the subject of duration, I should recall the continuing importance of the defence facilities on Diego Garcia. As we stated in our Written Comments, the joint defence facility operated by the United Kingdom and the 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 twenty-first century, including terrorism, piracy, transnational crime and instability in many forms, as well as responding to humanitarian crises[184].

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[182] General Assembly resolution 2145 (XXI); *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. 51, para. 106.

[183] Security Council resolutions 264 (1979), 269 (1979) and 276 (1970); *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. 51, para. 108.

[184] CoGB, para. 5.13.

V. The question of resettlement

24. Mr. President, Question *(b)* makes specific reference 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". As I have already said, the introduction of resettlement (including but not limited to the Chagossians) seems to be a way to obtain the Court's views on sovereignty. Mauritius wants a declaration on sovereignty, and is using the Chagossians' desire to be resettled as a way of persuading this Court to make findings on that matter. The United Kingdom's continued administration does of course mean that Mauritius, for the time being, would be unable to implement any programme for resettlement that it might be able to devise; there are no consequences under international law so far as concerns Mauritius. Mauritius has no right under international law to "resettle" its citizens on territory under the sovereignty of another State.

25. In our written pleadings we have explained in detail the United Kingdom's recent efforts to see if resettlement would be feasible, and the conclusion that it would not be[185]. That decision is, however, the subject of ongoing judicial review proceedings in the English courts; following extensive document production, a hearing is scheduled for December and judgment could well come in the spring of next year. As the Court is aware, in light of the decision on resettlement, the United Kingdom has renewed its commitment to work with all Chagossians in Mauritius, Seychelles and the United Kingdom, establishing in 2016 a new fund of approximately £40 million to improve their lives and present greater opportunities for their families in the places where they now live. Mauritius, in contrast, has not informed the Court of the situation of Chagossians in Mauritius, and has given no details of any resettlement programme that it might wish or consider feasible to implement. Further, it would seem from Question *(b)*, which was of course drafted by Mauritius, that any such programme would be confined to nationals of Mauritius, but not limited to those "of Chagossian origin". So, it would appear from the question that Mauritius has in mind to settle its nationals generally, but only its nationals. In other words, "resettlement" would both extend beyond Chagossians yet not cover all Chagossians (those who do not have Mauritian nationality).

[185] CoGB, paras. 4.35-4.39.

VI. Other issues raised by Mauritius

26. Mr. President, Members of the Court, Mauritius has devoted sections of its Written Comments to what it terms "the legal consequences while decolonization is being completed"[186] and Mr. Reichler addressed this briefly this morning. We have dealt with most of these points in our Written Comments, since they essentially repeated arguments from Mauritius' Written Statement[187]. I would respectfully refer the Court to what we said there about Article 73 of the Charter and the Arbitral Award[188]; and about a series of other demands that Mauritius urges the Court to impose on the United Kingdom[189].

27. I would only add that Mauritius' conclusion (submission) on page 197 of its Written Comments reads like the *dispositif* of a judgment in a contentious case; that is simply another indication that a judgment is effectively what Mauritius seeks to obtain through the present advisory opinion. A clearer indication of the inappropriateness of the Court acceding to Mauritius' demands it would be hard to find.

VII. Concluding remarks

28. Mr. President, Members of the Court, in conclusion let me recall that the United Kingdom is participating in these proceedings, both in writing and orally, in order to assist the Court in the exercise of its advisory function.

29. It remains our firm conviction that the proper course would be for the Court to exercise its discretion not to respond to either of the questions. It is clear from the written and oral pleadings of the Republic of Mauritius that the matters that Mauritius wishes the Court to address go to the heart of the bilateral sovereignty dispute between Mauritius and the United Kingdom. The United Kingdom has not consented to that dispute coming before the Court. Nor, as a practical matter is the Court in a position to answer these questions, as Mauritius would wish you to do, on the basis of the information before the Court. To the extent that the United Kingdom has addressed some of the factual context, it has done so to correct a misleading account by Mauritius, and to

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[186] CoMU, paras. 4.111-4.134.

[187] StMU, paras. 7.42-7.61.

[188] StGB, paras. 5.15-5.17.

[189] *Ibid*., paras. 5.17-5.27.

illustrate that the facts are indeed complex and vigorously contested. The facts before the Court remain far from complete, and above all, they have not been subjected to the forensic probing that would have occurred had this been a contentious case. For example**,** the United Kingdom has had no opportunity to reply in detail to Mauritius' lengthy written comments, which refer to numerous additional documents. Nor indeed is it the Court's role to determine such factual disputes in advisory proceedings. In all these circumstances, it would not, we respectfully submit, be consistent with the Court's judicial role, its role as a ***C***ourt of ***J***ustice, to seek to answer the questions, as Mauritius has urged you to do.

30. Mr. President, Members of the Court, that concludes the United Kingdom's oral statements. On behalf of all the members of the United Kingdom delegation we wish to thank you for your attention, we wish to thank the Registrar and his staff and especially, of course, the interpreters for their assistance. I thank you, Mr. President.

The PRESIDENT: I thank Sir Michael Wood for his statement, which concludes the oral statement of the United Kingdom of Great Britain and Northern Ireland, and brings to a close today's hearings. The Court will meet again tomorrow, at 10 a.m., when it will hear South Africa, Germany, Argentina and Australia. The sitting is adjourned.

The Court rose at 5.55 p.m.

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