Sovereignty and Security in the Indian Ocean

Why the UK should not cede the Chagos Islands to Mauritius

Dr Yuan Yi Zhu, Dr Tom Grant

and Professor Richard Ekins KC (Hon)

Foreword by Admiral the Lord West of Spithead GCB DSC PC

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Contents

Foreword

Admiral the Lord West of Spithead GCB DSC PC

When looking at strategic options for military action in the Indian Ocean – and unimpeded access by sea and air to the bordering countries of the Indian Ocean, from South Africa past Somalia, Yemen, Iran, the Arabian Gulf, Indian sub-continent, Indonesia and Australasia – Diego Garcia is a strategic jewel, possession of which is crucial for security in the region and hence our national security. It allows coverage of the choke points south of the Cape of Good Hope, the Bab-el-Mandeb, Straits of Hormuz and Malacca Straits through which a huge quantity of global trade passes. It is no exaggeration to say that Diego Garcia – the largest of the Chagos Islands – hosts the most strategically important US air and logistics base in the Indian Ocean and is vital to the defence of the UK and our allies.

Having visited Diego Garcia twice and utilised it in op-plans and routine deployments of carriers and SSNs, I was delighted to read this paper by Policy Exchange which calls on the Government to cease negotiations with Mauritius about cession of the Chagos Islands.

The paper makes out an irrefutable case that ceding the Chagos Islands to Mauritius would be an irresponsible act, which would put our strategic interests – and the interests of our closest allies – in danger, while also recklessly undermining fundamental principles of international law.

It would drive a coach and horses through the vision set out in the Integrated Review in 2021 (*Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy*, 2021).

How on earth can the Government explain a decision to negotiate with Chinese-aligned Mauritius to hand over sovereignty of the strategically vital island of Diego Garcia, an island which is located some 2152 kilometres from Mauritius itself. It would be a colossal mistake and one which opposition parties in Parliament would also be complicit in, given they are supporting the Government's stance.

There can be little doubt that the Chinese are pushing Mauritius to claim Diego Garcia and that China wants access to and control of the port and airfield facilities. The depth of the Sino-Mauritius relationship is evident in the 47 official Chinese development finance projects on the island.

The Integrated Review Refresh 2023 was sub-titled "Responding to a more contested and volatile world". Is this how the Government wishes to respond? An agreement with Mauritius to surrender sovereignty over the Chagos Islands threatens to undermine core British security interests, and those of key allies, most notably the United States. By agreeing the very principle of a Mauritian claim over Diego Garcia they are also putting at risk other British Overseas Territories such as the Falkland Islands.

As the paper explains, the claim by Mauritius to sovereignty over the Chagos Islands is dubious at best. The report begins by reviewing the historical record, which reveals the artificial nature of the claim that Mauritius is now making. The link between Mauritius and the Chagos Islands amounts to little more than an accident of colonial history. Thousands of kilometres apart, the Chagos Archipelago was simply attached to the British colony of Mauritius for administrative convenience. If there is any legitimate grievance it is on the part of the descendants of those who were living on Diego Garcia at the time the joint UK/US air base was established between 1968 and 1973 and who were forcibly expelled.

The historical record makes clear that the Mauritian claim to the Chagos Islands is scarcely a campaign for justice for the Chagossians. The Chagossians have not been consulted in advance of these negotiations and indeed have been excluded from them. They have been cynically weaponised by Mauritius in order to press its territorial claims. Mauritian officials have even claimed that Chagossians who seek to be represented in the negotiations are no more than British pawns, merely for wanting to have their voices heard over the future of the Islands. Ceding the Chagos Islands to Mauritius will not address the plight of the Chagossians, who Mauritius has consistently ignored. Indeed, Mauritian treatment of the Chagossians has led many thousands of them to settle in the UK.

Should these negotiations proceed and result in effectively allowing the Chinese military to prevail we will have perpetuated the Chagossians' long and unhappy impasse and needlessly put ourselves, our allies and the region at risk.

I strongly support the recommendations of the paper.

Executive summary

On 3 November 2022, in the course of the short-lived Liz Truss premiership, the Foreign Secretary announced that the UK was entering into negotiations with Mauritius about the exercise of sovereignty over the British Indian Ocean Territory (BIOT), one of the United Kingdom's fourteen overseas territories. Whatever terms the UK may agree with Mauritius, cession of the BIOT would be a major, self-inflicted blow to the UK's security and strategic interests, which seems to be premised on the Government's misunderstanding of the UK's international legal position. In fact, the UK is under no moral or legal obligation to cede the BIOT to Mauritius.

The BIOT is situated in the middle of the Indian Ocean and is made up of more than a thousand islands in the Chagos Archipelago, most of which are very small. The largest island, Diego Garcia, is the site of a US/UK joint military facility, which is vital to the defence of the UK and our allies. The strategic importance of the Indo-Pacific region is only increasing. With the return of great power competition, and an increasingly aggressive Chinese regime active throughout the region, the BIOT is of fundamental importance to UK security and foreign policy.

Successive British governments have consistently maintained that UK sovereignty over the Chagos Islands, which dates from 1814, was beyond question. The Government's announcement of its decision to enter into negotiations with Mauritius refers to "relevant legal proceedings", which must mean an advisory, non-binding opinion of the International Court of Justice (ICJ) in 2019 and a decision of a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS Special Chamber) in 2021, in a dispute between Mauritius and the Maldives.

In 2017, the United Nations General Assembly requested an advisory opinion on the initiative of Mauritius and over the objection of the UK, United States, Australia, and others.[1] The proceedings concluded in 2019 with an advisory opinion in which the ICJ said that the decolonization of Mauritius had not been completed in 1968, notwithstanding the accession of Mauritius to independence that year, and that the UK is under an international legal obligation to terminate its administration of the BIOT.[2]

In 2021, in a dispute concerning maritime boundary delimitation in the Indian Ocean, the ITLOS Special Chamber adopted a judgment rejecting preliminary objections that the Maldives had advanced against its exercise of jurisdiction over the matter. This included the objection that the sovereignty dispute in respect of the Chagos prevents the adjudication of a maritime boundary between the Chagos and the Maldives. According to the ITLOS Special Chamber:

1. GA res. 71/292, 22 June 2017.
2. *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 Feb. 2019, ICJ Rep. 2019, p. 95 at 140 (para. 183).

> *Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations [set out in the 2019 Advisory Opinion].*[3]

The Maldives, in October 2022, suggested that it now supports General Assembly action recognizing the Chagos to form part of the territory of Mauritius.[4] This reflects a shift from the Maldives' earlier position.[5]

Up until 3 November 2022, the Government consistently maintained that the ICJ's advisory opinion had no legal force and did not require, or warrant, a change in the UK's long-standing position that it enjoyed sovereignty over the Chagos Islands. The Foreign Secretary's November announcement does not formally abandon this position, but may do so in effect. The same is true for subsequent ministerial statements in the House of Commons, including in answering parliamentary questions about the progress of the negotiations. There are thus strong reasons to fear that the Government is acting under the misapprehension that the 2019 ICJ advisory opinion and the 2021 ITLOS decision between Mauritius and the Maldives require a change in the UK's legal position.

The aim of this report is to contest this misapprehension. We show that many parliamentarians have misunderstood the legal significance of the 2019 ICJ advisory opinion, the legal significance of which is plainly misrepresented in the 2021 decision of the ITLOS Special Chamber. The Government's initial response to the advisory opinion was entirely correct. The ICJ's advisory opinion does not and cannot place the UK under an obligation to cede the Chagos Islands to Mauritius. Neither does the opinion empower the General Assembly to determine the matter. Putting the point at its lowest, even if one overstated the legal significance of the advisory opinion, which would be a mistake, it would nonetheless still be open to the UK to consider options other than cession to Mauritius, including arranging some form of free association of the Chagos Islands with the UK.

Further, it would be a mistake for the Government to think that the UK's legal position is likely to worsen, such that it should negotiate now to cede the BIOT on favourable terms, which might help assure the future of the joint military facility at Diego Garcia. As this report argues, the principle of state consent is fundamental to international law. Without UK consent, no tribunal, no court, including the ICJ, can exercise jurisdiction over the UK to require – to order – cession of the BIOT to Mauritius. The UK is entirely free to stand its legal ground, as previous governments have done. It is possible, of course, that a future British government might cede the BIOT to Mauritius without assurances (which in any case are of very little value) in relation to Diego Garcia, especially if such a government took the view that the international rule of law required immediate and unconditional cession. For all the reasons set out in this paper, this would be a gross failure of statesmanship. However, the risk that a future government might act irresponsibly is no reason for the present government to abandon the UK's legal rights and thus compromise our national security and the strategic interests of our allies.

This report begins by reviewing the historical record, which reveals

3. *Dispute concerning delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, Preliminary Objections, Judgment, 28 Jan. 2021, para. 246.
4. "Attorney General defences stand to recognise Chagos as part of Mauritius", *The Times of Addu*, 23 October 2022, https://timesofaddu.com/2022/10/23/ag-defends-stand-to-recognize-chagos-as-part-of-mauritius/
5. Philip Loft, *British Indian Ocean Territory: UK to negotiate sovereignty 2022/23* (Research Briefing No. 9673, 22 Nov. 2022), https://researchbriefings.files.parliament.uk/documents/CBP-9673/CBP-9673.pdf at p. 22, sec. 5.1.

the artificial nature of the claim that Mauritius is now making. The link between Mauritius and the Chagos Islands amounts to little more than an accident of colonial history. Mauritius agreed to sell the Islands and to renounce its rights over them for £3m in 1965 and Mauritius' first post-independence leader, who negotiated both his country's independence and the cession of the Chagos Islands to the UK, described the islands as "a portion of our territory of which very few people knew… which is very far from here, and which we had never visited". It was only in 1982, many years after independence, that Mauritius decided to claim sovereignty over the Islands. It has waged an effective political campaign through various international institutions, including the General Assembly, with the ICJ advisory opinion one important milestone in this campaign. The UK should not yield to this form of pressure, especially not when buckling under pressure would also put our vital strategic interests in danger.

The historical record also makes clear that the Mauritian claim to the Chagos Islands is scarcely a campaign for justice for the Chagossians. Many parliamentarians are rightly concerned about their plight, with legislation enacted in 2022 to extend British citizenship to them. The Chagossians have not been consulted in advance of these negotiations and indeed have been excluded from them. In effect, their expulsion from the Chagos Islands by British authorities (with Mauritian consent) – for which they have received compensation several times, and now British citizenship – has been cynically weaponised by Mauritius in order to press its territorial claims. Mauritian officials have even claimed that Chagossians who seek to be represented in the negotiations are no more than British pawns, merely for wanting to have their voices heard over the future of the Islands.

Ceding the Chagos Islands to Mauritius will not address the plight of the Chagossians, whose interests and voice Mauritius has consistently ignored and whose treatment of the Chagossians has led to many thousands of them to settle in the UK. Cession would, however, put the strategic position of the United Kingdom and its allies in the Indo-Pacific region in jeopardy, paving the way for China to fill the strategic void. If the UK does not enjoy sovereignty over the BIOT, the joint military facility is at risk. Whatever assurances Mauritius may give in relation to the future of the base at Diego Garcia, there is absolutely no guarantee that a future Mauritian government, under Chinese economic and political pressure, will not resile from these assurances or allow a Chinese military or intelligence presence on other islands in the archipelago, which would constitute a serious threat to our security interests.

For the Government to accept, even implicitly, that the ICJ's advisory opinion was binding will undermine the principle of state consent, which underpins international law. The consequences of the Government's apparent position do not end here. Accepting the maximalist Mauritian case threatens to encourage territorial irredentism around the world, and may even put into jeopardy the statehood of post-colonial sovereign states which were created as the result of the split of larger colonial territories.

Ceding BIOT will also threaten the UK's sovereignty over other overseas

territories, notably the Falkland Islands, Gibraltar and the Sovereign Base Areas in Cyprus, the last of which were also detached from a then-colony for defence purposes. Argentinian officials have already repeatedly used the UK's willingness to negotiate with Mauritius on the basis of the ICJ advisory opinion to push for negotiations over the sovereignty of the Falklands.

The Government should revert to the longstanding, cross-party position that the UK enjoys sovereignty over the Chagos Islands. It should explicitly reject the assertion that the ICJ's advisory opinion was legally binding and should make clear that the Chagos Islands will not be ceded to Mauritius. Other parliamentarians, from all parties and none, should make clear that they oppose cession and should refuse to ratify any treaty of cession. In particular, the Opposition should abandon its apparent (confused) policy of support for cession and, in company with past Labour governments, defend UK sovereignty over the BIOT. The Government should recognise that ceding the Chagos Islands, especially on mistaken legal premises, would be an irresponsible act, which would put our strategic interests – and the interests of our closest allies – in danger, while also recklessly undermining fundamental principles of international law.

Recommendations

The central argument of this report is simple. International law does not require the UK to cede the Chagos Islands to Mauritius. For the Government to misunderstand the ICJ's advisory opinion to require cession would be a serious mistake which would harm the UK's strategic interests, not only in the Indian Ocean but in relation to its other overseas territories and military installations abroad. For the Government to act on the basis of a fear that the UK's legal position will somehow worsen in the future, such that the choice is between cession with conditions now or unconditional cession later, would be wholly irrational. As long as the British government refuses to give its consent to the dispute between it and Mauritius to be heard by an international court—which it has every right to do under international law—its sovereignty over the Chagos islands cannot be threatened.

This argument supports the following recommendations.

- The Government should not cede the Chagos Island to Mauritius and should discontinue negotiations to the extent that their aim is to conclude a treaty of cession.
- The Government should maintain British sovereignty over the entirety of the BIOT for as long as they are required for defence purposes. It should not relinquish sovereignty over the islands in return for an unenforceable promise by a third country that the military base at Diego Garcia will be allowed to continue to operate in the future.
- The Government should make a statement in the House of Commons affirming the long-standing position that the UK enjoys sovereignty over the BIOT and that the Government does not accept that the ICJ's advisory opinion, or resolutions of the General Assembly, requires the UK to cede the Islands to Mauritius.
- The Government should make clear that under no circumstances will it cede the Chagos Islands to Mauritius without first consulting the Chagossians, which may include making provision for continuing free association with the UK.
- The Government should consult with the Chagossians about the possibility of facilitating returns to the Chagos Islands, provided that this does not constitute a risk to the UK-US joint facility at Diego Garcia.
- Parliamentarians of all parties and none, in both Houses of Parliament, should ask the Government why it has abandoned the

UK's long-standing position in relation to the Chagos Islands and should remind the Government that the ICJ's advisory opinion cannot impose a legal duty on the UK to cede the Islands to Mauritius.

- Parliamentarians should put pressure on the Government to make the commitments noted above and, in accordance with the statement made by the minister on 7 December 2022, to undertake not to attempt to evade section 20 of the Constitutional Reform and Governance Act 2010 (say by use of the Colonial Boundaries Act 1895 or some other means). That is, the Government should lay a treaty of cession before the Houses of Parliament, which should have the opportunity to consider and reject it.
- Parliamentarians should also make clear to the Government that they will resolve not to ratify a treaty of cession that is laid before Parliament.
- The Opposition should clarify (and should be asked by journalists and other parliamentarians to clarify) whether a future Labour government would treat the ICJ's advisory opinion, with or without the subsequent ITLOS preliminary ruling and General Assembly resolution, as imposing a legal obligation on the UK to cede the BIOT to Mauritius.
- The Opposition should return to the UK's and successive Labour governments' long-standing position in relation to these matters and should demand that the Government do likewise, making clear that cession of the Chagos Islands to Mauritius would not enjoy cross-party support.

Chronology

- Antiquity: the existence of Chagos attested to in the Maldivian oral tradition.
- c. 1512: first European mention of the Chagos on a map.
- 1774: France claims Peros Banhos, the first territorial claim in the Chagos Islands.
- c. 1783: first permanent settlement by the French in the Chagos Islands.
- 1786: the British East India Company attempts to create a settlement in the islands, only to discover the French settlement.
- 1814: by the Treaty of Paris, France cedes to the UK Mauritius and its dependencies, including the Seychelles and the Chagos Islands, the latter of which was not specifically named.
- 1885–1888: a small force of policemen from Mauritius are stationed in the Chagos Islands, the only time a permanent official Mauritian presence existed in the islands. Mauritian administrative control over the Chagos remained minimal, except a yearly visit by magistrates from Mauritius.
- 1903: the Seychelles are detached from Mauritius to be constituted into a separate crown colony.
- 1908: Coëtivy Island is detached from Mauritius and transferred to the Seychelles.
- 1921: Farquhar Atoll is detached from Mauritius and transferred to the Seychelles.
- 1958: a ministerial system (partially responsible government) is introduced in Mauritius.
- 1959: first election on the basis of universal adult suffrage in Mauritius, won by the pro-independence Labour Party led by (Sir) Seewoosagur Ramgoolam.
- 1964: beginning of discussions between the UK and the United States about the use of the Chagos Islands for defence purposes.
- 1965 (8 November): with the agreement of the elected government of Mauritius, the Chagos Islands are detached from Mauritius to form the British Indian Ocean Territory (BIOT). Mauritius receives £3m in compensation, as well as other concessions and UK agreement to fund future resettlement of Mauritian Chagos Islanders in Mauritius.
  The anti-independence Parti Mauricien leaves the coalition government in protest against the agreement to detach the Chagos Islands: in its view, the size of the compensation package was inadequate.

The UK government agrees on a plan and timetable toward granting independence to Mauritius.

- 1965 (16 December): UN General Assembly Resolution 2066(XX) "invites the administering Power [the UK] to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".
- 1967–1973: residents of the Chagos Islands are forcibly removed in stages from the Islands to the Seychelles and Mauritius, at all stages with the agreement of the governments of the Seychelles and of Mauritius, both before and after independence, pursuant to resettlement scheme agreed in principle in 1965 and in detail in 1971,
- 1968 (12 March): Mauritius becomes an independent country. Its constitution does not claim the Chagos Islands as being part of its territory.

  (12 March) A defence treaty between the UK and Mauritius, one of the preconditions for the detachment of the Chagos Islands required by the Mauritian government, is concluded.
- 1974: Sir Seewoosagur Ramgoolam, Prime Minister of Mauritius, tells the Mauritius legislative assembly that the 1965 detachment of the Chagos Islands had been with the consent of Mauritius. He adds that "from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper" even in the absence of Mauritian agreement.
- 1975: Prime Minster Ramgoolam tells the press that the UK having paid for the Chagos Islands, she could do whatever she liked with it.
- 1976: the Seychelles becomes independent.
- 1980: Prime Minister Ramgoolam tells the press that "a request was made in the [Mauritius Legislative] 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."
- 1982: the Mauritian Militant Movement–Mauritian Socialist Party alliance defeats Ramgoolam's Labour Party at the Mauritian general elections.

  For the first time since its independence in 1968, Mauritius lays claim to the Chagos Islands through the enactment of the Interpretation and General Clauses (Amendment) Act.
- 1982–1983: the Mauritian Legislative Assembly establishes a select committee to investigate the detachment of the Chagos Islands from the crown colony of Mauritius in 1965. Its final report claims that Mauritian consent was secured through UK blackmail.
- 1992: the Constitution of Mauritius is amended to claim the Chagos Islands as part of Mauritius.
- 2000–2016: litigation in English courts about the legality of the expulsion of the Chagossians from the BIOT. The question of

sovereignty is not raised.

- 2015: an arbitral tribunal constituted under the United Nations Convention on the Law of the Sea declares that the UK government could not lawfully establish a Chagos Marine Protected Area because the UK had promised Mauritius in 1965, as part of the agreement to cede the Chagos Islands, that it would preserve the latter's fishing and mineral rights in the Chagos. The tribunal declines to rule on the question of the sovereignty of the islands.
- 2017: the UN General Assembly refers the question of the separation of the Chagos Islands from Mauritius to the International Court of Justice.
- 2019 (25 February): the International Court of Justice issues its advisory opinion.
- 2019 (22 May): the United Nations General Assembly adopts a non-binding resolution supporting the ICJ's advisory opinion.
- 2021: the Special Chamber of the International Tribunal for the Law of the Sea rules that the 2019 ICJ opinion had settled the sovereignty of the Chagos Islands, despite the fact that the ICJ opinion was explicitly not legally binding.

The historical record and its significance

The ICJ's 2019 advisory opinion, the subsequent General Assembly resolution, and the ITLOS Special Chamber's preliminary ruling do not provide any legal reason for the Government to abandon the UK's long-settled position in relation to sovereignty over the BIOT. That long-settled position is entirely consistent with a close reading of the historical record, which makes clear the artificial and opportunistic nature of the claim by Mauritius, which has achieved some success in international institutions – the ICJ, the General Assembly and the ITLOS Special Chamber – but which should be firmly rejected by the UK.

Since it began its diplomatic and legal offensive against the United Kingdom for the sovereignty of the Chagos Islands, Mauritius has offered a simple, yet attractive story. The Chagos Islands are an integral part of Mauritius. In 1965, the United Kingdom government blackmailed the leaders of the island into agreeing to cede them to the United Kingdom, threatening to sabotage its road to independence otherwise. Under duress, Mauritius agreed to cede the islands, which it is now reclaiming as a rightful part of its territory.

But saying it does not make it so, and the Mauritian account does not withstand the most basic scrutiny. The historical record shows clearly that the Mauritian government consented to the detachment of the Chagos Islands from Mauritius in 1965, in exchange for considerable payment and non-monetary concessions. The record shows that Mauritius consistently affirmed the validity of the agreement for a generation after its independence from the UK.

Far from being an integral part of Mauritius, the linkage of the Chagos Islands to Mauritius, more than 2,000 kilometres away, arose purely as an accident of colonial history, which was then perpetuated for reasons of convenience. As even Sir Seewoosagur Ramgoolam, Mauritius' first post-independence leader and the man who agreed to the detachment of the Chagos in return for cash, acknowledged, the Chagos were "a portion of our territory of which very few people knew… which is very far from here, and which we had never visited".[6] The post-1982 assertion that the Chagos Islands were in 1965, and have long been, an integral part of Mauritius is simply false.

Even more cynically, Mauritius has sought to conflate the plight of the displaced Chagos islanders, which have rightly attracted widespread international sympathy, with its claim to sovereignty over the Islands,

6. Mauritius Legislative Assembly, *Report of the Select Committee on the Excision of the Chagos Archipelago* (No. 2 of 1983), June 1983, p. 22 (hereinafter "Mauritius Select Committee"). Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180301-WRI-05-03-EN.pdf (Annex 129).

viz. its attempt to renege on the 1965 agreement to detach the islands from the bounds of the crown colony. In the years after detachment, the Mauritian government treated the Chagossians with little consideration, viewing them as interlopers to the country. As a result, many Chagossians are today opposed to the Chagos becoming part of Mauritius, and seek to have a say in the future of the islands, which Mauritius has refused to allow. Far from being the simple morality tale in Mauritius' telling, the sorry saga reveals the degree to which the historical truth has been subverted for political ends.

Early history

Although its existence was attested to in Maldivian oral tradition, it appears that the Chagos Islands, whose existence was first noted cartographically around 1512, remained uninhabited until the 18th century, when French planters established coconut oil plantations in the Chagos Islands, using enslaved Africans as labour.

Mauritius was acquired by the United Kingdom under the terms Article VIII of the Treaty of Paris of 1814, at the end of the War of the Sixth Coalition. The Treaty stipulated, in its material portion, that:

> *His Britannic majesty… engages to restore to his most Christian majesty, within the term which shall be hereafter fixed, the colonies, fisheries, factories, and establishments of every kind, which were possessed by France on the 1st of January 1792, in the seas and on the continents of America, Africa, and Asia,* ***with the exception however of… the Isle of France [Mauritius] and its dependencies, especially Rodrigues and Les Sechelles, which several colonies and possessions his most Christian majesty cedes in full right and sovereignty to his Britannic majesty*** *[emphasis added]*

The Chagos Islands were not specifically enumerated, but were treated as a dependency of Mauritius for the purposes of the Treaty, and were therefore ceded to the United Kingdom. Though their geographical position would have suggested that a linkage with India or Ceylon, the path dependent nature of colonial administration meant that the Chagos Islands continued to be nominally administered from Mauritius, despite the distance and the general lack of links between the two territories.

Thus, until the Chagos Islands (also known as the Oil Islands) were transformed into the British Indian Ocean Territory (BIOT) in 1965, they remained a dependency of Mauritius, and were usually grouped as one of the 'lesser dependencies'. In practice, the administrative links between the Chagos and Mauritius were minimal throughout the colonial era. Some 2,150 kilometres away from Port Louis, the capital of Mauritius (some several days' sailing by steam), it could hardly be otherwise.

Mauritius law did not apply to the Chagos Islands unless they were specifically extended to the Chagos Islands either by proclamation or necessary implication, a reflection of the very different conditions which prevailed in both places. Mauritius' partially elected Legislative Council contained no representative for the Chagos Islands, nor was any unofficial

member (meaning a member who did not hold office under the Crown) of the Executive Council from the Chagos Islands.

The Chagos Islands were administered by officers specially appointed for that purpose by the Governor of Mauritius, essentially two non-resident magistrates. A small Mauritian police force was present on the islands from 1885 to 1888, when they were withdrawn and never reintroduced. In practice, Mauritian oversight over the Chagos Islands was minimal, the islands being almost exclusively run by plantation managers. As Mr Justice Ouseley wrote in 2003:

> *The [plantation] companies ran the islands in a somewhat feudal manner. The vast distance from Mauritius left the plantation managers in day-to-day charge; visits by Mauritian officials were rare and the Magistrate was at best an annual visitor. Plantation managers had powers as Peace Officers to imprison insubordinate labourers for short periods, or to detain those threatening to breach the peace.*[7]

In any case, although the magistrates operated out of Port Louis in Mauritius, it was not uncommon for British administrative officials to operate out of a remote headquarters for reasons of administrative convenience, particularly as dependencies often did not offer the possibility of adequate administrative facilities. For instance, the High Commissioner for Southern Africa, responsible for Basutoland, Bechuanaland, and Swaziland, was based in the Dominion of South Africa. A similar arrangement exists today whereby the Governor of Pitcairn is based out of Wellington, New Zealand (Pitcairn is a British Overseas Territory, and is not a part of New Zealand). Thus, little can be made of the fact that the magistrates operated out of Mauritius.

Contemporary colonial administrative reports underscore the minimal connection that existed between Mauritius and the Chagos Islands. For example, the 1933 annual Colonial Office report for Mauritius did not contain a single mention of the Chagos, and only had a general mention of "the dependencies [which] comprise a large number of small islands between 230 and 1,200 miles away".[8] The 1946 Colonial Office List contained two short paragraphs about Diego Garcia under the "Dependencies" sub-heading for Mauritius; but otherwise all of the report's substantive sections, covering subjects ranging from education to posts and telegraphs to health, focused on Mauritius only.[9]

Economically, links between the Chagos and Mauritius were limited. The Chagos provided some coconut by-products to Mauritius for domestic consumption, and supplies were probably transported from Mauritius to the Chagos Islands by return boat. Labourers were recruited from Mauritius for the Chagos plantations; but labourers were also recruited from places such as the Seychelles, and there is evidence that after the Second World War Seychellois contract labourers outnumbered Mauritian ones.

7. *Chagos Islanders v Attorney General Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB), at [4].
8. "Annual Report on the Social and Economic Progress of the People of Mauritius, 1933", Colonial Reports—Annual No. 1685 (London: HMSO, 1934), at 2.
9. *The Colonial Office List, 1946. Comprising historical and statistical information reflecting the Colonial Empire, lists of officers serving in the colonies, etc., and other information* (London: HMSO, 1946), p. 160.

The nature of the colony-dependency relationship

At the core of the loose relationship between Mauritius and the Chagos Islands is the relationship of a dependency to a colony, which international actors have repeatedly failed to grapple with, though, as we will see in the next section, several judges of the ICJ, writing separately in the *Chagos* advisory proceedings in 2019, suggested that the ICJ's treatment of the Islands as fully integral to Mauritius is unconvincing.

In simple terms, a dependency, in British imperial usage, was a separate colonial territory which, for the ease of administration, was attached to a larger colony. As Sir Kenneth Roberts-Wray, the undisputed authority in Commonwealth and colonial law wrote in his famous treatise:

> *one dependent territory may be placed under the authority of another* ***of which it does not form part,*** *and… the former is then usually called a Dependency of the latter.*[10] *[Emphasis added].*

During the British colonial era, dependencies were frequently attached, detached, re-attached from their parent territories, sometimes to be attached to another parent territory, sometimes to be given the status of a colony of its own right, and sometimes as part of the road to independence. In fact, the Chagos Islands were not the first dependency of Mauritius to be detached from it. The Seychelles, which were acquired by the British Crown at the same time as the Chagos Islands as a dependency of Mauritius under the Treaty of Paris, were detached from the Crown Colony of Mauritius in 1903 and turned into a separate crown colony. Two further islands were detached from Mauritius to be attached to the Seychelles in 1908 and 1921. The Seychelles achieved independence in 1976.

There was, of course, no suggestion that the detachment of the Seychelles, a former Mauritian dependency, implied any right at international law for Mauritius over the Seychelles under the doctrine of *uti possidetis juris*, the principle that newly-independent post-colonial states should generally gain independence within the existing colonial boundaries (except on one occasion in 1980, when a Mauritian government minister introduced a legislative amendment to claim the Seychelles as part of Mauritius, in order to mock opposition MPs who were seeking to introduce such an amendment claiming the Chagos Islands as part of Mauritius).

Examples of dependencies detached and attached to other colonial territories abounded elsewhere within the British colonial empire. Dominica was governed as a part of the Leeward Islands until 1940 and as a part of the Windward Islands from 1940 to 1958: it is now an independent republic within the Commonwealth. More extraordinarily, Anguilla was administered from Antigua until 1825, from Saint Kitts from 1825 to 1882, federated with St Kitts and Nevis from 1882, a part of the West Indies Federation from 1958 to 1962, a part of Saint Christopher-Nevis-Anguilla from 1967, and finally a separate crown colony (then British overseas territory) from 1980 to the present day following a pro-British, anti-St Kitts rebellion.

Another extreme case was that of British India: British colonial territories

10. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), p. 61.

(and protectorates) which fell under the political and administrative control of British India at one point or another include Aden, Somaliland, the Straits Settlements (today Malaysia, Singapore, and one Australian territory), and Burma, all of which became independent as separate entities from India. One British East India Company possession, St Helena, is located in the Atlantic Ocean, thousands of kilometres from the Indian sub-continent. It has never been suggested that any of these territories ought to have become independent as part of India and Pakistan in 1947 under the principle of *uti possidetis juris*.

Similarly, the seven Trucial States in the Gulf (now the United Arab Emirates), territories under British protection, were controlled by political agents appointed by the colonial government of India until 1947 when, in anticipation to Indian independence, oversight over the Trucial States was transferred to the Foreign Office in London. At no point was it ever suggested that they should have become a part of India as part of the decolonization process (like the Indian princely states, who were similarly controlled by political agents appointed by the Government of India), despite the extensive links which existed between the two.[11]

The detachment of the Chagos Islands from Mauritius: was it blackmail?

The loose linkage between Mauritius and the Chagos Islands undoubtedly explains why in 1965, three years before its independence, Mauritius' government agreed to the detachment of the Chagos Islands from Mauritius in exchange for £3m and other considerations, chiefly of an economic nature. The United Kingdom also promised to cede back the islands to Mauritius when they were no longer required for defence purposes.

Mauritian ministers who were members of the Parti Mauricien opposed the agreement and left the government, but only because they viewed the compensation package as inadequate, instead of objecting to the deal in principle.[12] Similarly, ministers belonging to the Parti Mauricien Social Démocrate also resigned, but only because although "they all said they were agreeable in principle to detachment for defence purposes but found the terms unsatisfactory". At a press conference following their resignation, the three PMSD ministers stressed that they would have liked to obtain a larger sugar quota for export to the United States, as well as preferential UK immigration arrangements for unemployed Mauritians.[13]

In the words of Professor Stephen Allen, a leading authority on the issue, "[t]he available evidence suggests that *none* of the Mauritian political parties were deeply troubled by the prospective detachment of the Chagos Islands from the colony of Mauritius."[14]

In the current official Mauritian version of the story, which was crystallised in 1982 through the report of a Mauritian parliamentary committee and which has been uncritically accepted by many international commentators since, the agreement of the-then premier (Sir) Seewoosagur Ramgoolam and of his government to the detachment of the Chagos Islands

11. As Crawford notes, "Although the British Government repeatedly qualified them as 'independent States under the protection of Her Majesty's Government', commentators tended to deny their independence, and even that they had any separate personality at all", though he argued for a position closer to the former view. James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Oxford University Press, 2007), p. 292.

12. Stephen Allen, *The Chagos Islanders and International Law* (Oxford and Portland, OR: Hart Publishing, 2014), p. 93. See also Mauritius Select Committee, p. 33 ("On no less than three occasions, documentary evidence will establish without the least possible doubt that the P.M.S.D. was indeed agreeable, in principle, to the excision of the Chagos Archipelago but objected to the terms thereof.")

13. Mauritius Select Committee, p. 13.. Sir Gaëtan Duval of the PMSD claimed to the Select Committee that he had been in favour of allowing the Chagos to be used for UK-US defences purposes but against the cession of Mauritian sovereignty over them. The Select Committee rejected his claims, based on contemporaneous documentation.

14. Allen, *The Chagos Islanders and International Law*, p. 93.

was obtained through a "blackmail element", as the United Kingdom would not otherwise have agreed to the independence of Mauritius (it is interesting that not even the partisan Mauritian select committee could, on the exhaustive evidence available to it, claim that the Chagos were detached from Mauritius as a result of British blackmail, hence the far more equivocal formula of "blackmail element").[15] According to that story, Ramgoolam was placed in an impossible position, as the British would have refused to support Mauritian independence without a referendum if he did not agree to the detachment of the Chagos Islands.

However, the Mauritian version does not survive even cursory scrutiny. Firstly, by 1965, the United Kingdom was in the process of divesting itself from the vast majority of its overseas possessions. Outside of Mauritius, in Africa after 1965 the United Kingdom only retained Bechuanaland and Basutoland (who became independent in 1966), Swaziland (which became independent in 1968), the Seychelles (1976), and Southern Rhodesia (whose delayed independence, in 1980, was the result of a local rebellion against the Crown). The British policy of colonial divestment, by then well-known and mostly completed, was underscored by the merger of the Colonial Office into the Foreign Office in 1966.

The fact that Mauritius took so long to achieve independence was the result of domestic divisions within the territory. A significant minority of the Mauritian population was opposed to independence and sought some form of association (or even integration with) the United Kingdom. The Parti Mauricien, whose reaction was referred to at the beginning of this section, was opposed to independence and sought a referendum on independence or association with the United Kingdom. In fact, the British government consistently rejected proposals for integration of Mauritius with the United Kingdom, as it saw no tangible benefit for the United Kingdom to such an association between the two.

Furthermore, the Mauritian ministers only publicly committed to supporting the detachment of the Chagos *after* the United Kingdom publicly stated its support for Mauritian independence, underlining the separate nature of the two matters. The UK announced its commitment to Mauritian independence on 24 September 1965, while the Mauritian ministers gave their agreement on 5 November 1965. Simple chronology, therefore, fatally undermines Mauritius' current claim that UK support for independence was conditioned on Mauritius agreeing to the detachment of the Chagos Islands.

Secondly, as even Mauritian participants later acknowledged, the Chagos could have been detached unilaterally by the United Kingdom government with or without Mauritian agreement—and it is plainly obvious that the Mauritian government would have found it far easier to protest an unilateral act on the part of the United Kingdom than to protest a *quid pro quo* agreement to which they gave consent and legitimacy.

More crucially, this version of history rests on the unstated assumption that a majority of the Mauritian population would have voted democratically in favour of continued association with the United Kingdom in a

15. Mauritius Select Committee, p. 37.

referendum, for if a pro-independence referendum result had been the outcome the pro-independence Mauritian ministers' hand would have been immeasurably strengthened. If the Mauritian public voted in favour of free association with the UK, this would have fulfilled the requirement for decolonization under United Nations General Assembly Resolution 1541 (XV), which provides for "free association with an independent State" as one of the three possible paths to "a full measure of self-government".

Thus, the Mauritian government freely and knowingly agreed to the detachment of the Chagos Islands from Mauritius. Put at its highest, the most that can be said for the 'coercion' or 'blackmail' account is that the United Kingdom might have ordered a referendum on free association, through which the Mauritian people would have had the choice between independence and free association, both of which are legal outcomes to decolonization under international law. To call this 'blackmail' is to do violence to the English language and to reject the right of Mauritians to determine their own future.

In fact, not only did Mauritian ministers agree to the detachment, they energetically negotiated for enhanced compensation from the United Kingdom for the move. In private, the Mauritian ministers were blunt about their negotiation strategy. (Sir) Abdool Razack Mohamed, later the first deputy prime minister of independent Mauritius, told the British government that:

> *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.*[16]

Contrary to later claims from Mauritian participants, Mauritius' main interest in the detachment of the Chagos Islands was economic, and Mauritius energetically bargained for an enhanced compensation package, which led to the cash payment from the United Kingdom to be increased from £1m to £3m. Indeed, the financial windfall was recorded in the Mauritian financial reports under the heading of "Sale of the Chagos Islands".[17] The faraway Chagos were, after all, only "a portion of our territory of which very few people knew".[18] But the prospective economic benefits were by no means limited to cash. Nor were the substantial benefits to Mauritius (as perceived by Mauritius politicians) only economic.

The 1965 agreement between Mauritius and the UK, negotiated between 23 September early October 1965 included the following benefits to Mauritius:

> *(i) negotiations for a defence agreement between Britain and Mauritius;*
>
> *(ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;*
>
> *(iii) compensation totalling up to £3m. should be paid to the Mauritius*

16. United Kingdom record of the meeting on "Mauritius - Defence Matters", 9:00am, 20 September 1965, p. 8. Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180215-WRI-01-02-EN.pdf (Annex 29).
17. Allen, *The Chagos Islanders and International Law*, p. 95.
18. Mauritius Select Committee, p. 22.

Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;

(iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;

(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;

(vi) the British Government would use their good offices with the U.S Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:

(a) Navigational and Meteorological facilities;

(b) Fishing Rights;

(c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers.

(vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.

(viii) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.[19]

Between then and 5 November 1965, the agreements in relation to several of these matters, and to reversion of the Islands to Mauritius on cessation of UK defence use, were somewhat firmed up in Mauritius' favour.

Mauritian attitudes toward the Chagos Islands after independence

After it gained independence, Mauritius did not contest the United Kingdom's sovereignty over the Chagos Islands for the next fourteen years. In fact, the government of the newly-independent country reaffirmed on multiple occasions that it had voluntarily agreed to cede the islands to the United Kingdom, that sovereignty over the Chagos Islands was vested in the United Kingdom, and did not wish to make any further claims to the islands. Mauritius did not raise the issue of the Chagos in the United Nations or other multilateral forums until well into the 1980s.

Mauritius' acceptance of the detachment of the Chagos stood in stark contrast with neighbouring Comoros' persistent protests against France's detachment of the island of Mayotte from its territory in the run-up to Comoran independence a decade later, which have continued uninterrupted into the present day. Clearly, if its government thought that consent to the detachment of the Chaos had been obtained under duress,

19. "Record of a meeting held at Lancaster House on "Mauritius Defence Matters", 2.30pm, 23 September 1965. Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180215-WRI-01-02-EN.pdf (Annex 33).

it could have followed Coromos' lead: the fact that it chose not to speaks volumes as to Mauritius' view of the binding nature of the agreement. As a matter of fact, the premier of Mauritius had been in contact with the Secretary-General of the United Nations before independence on unrelated matters concerning a dispute over the future electoral system of Mauritius, and nothing stopped him from raising the issue of the Chagos Islands with the United Nations had there been the least wish in doing so.[20]

Far from viewing the 1965 agreement as the result of 'blackmail', as the Mauritian government would later claim, post-independence Mauritius political leaders repeatedly reaffirmed the validity of the 1965 agreement, rejected calls to lay claim to the Chagos Islands, and dismissed any notion that their agreement to the detachment of the Chagos had been obtained through British coercion. Opposition figures who were involved in the decision to detach the Chagos Islands also consistently affirmed that there was no blackmail or coercion involved in their decisions.

Mauritian ministers repeatedly made public statements reaffirming the validity of the decision to detach the Chagos. In 1974, prime minister Ramgoolam told his country's legislature that:

> *Even if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper. This in principle was agreed even by the P.M.S.D. who was in Opposition at the time; and we had consultations, and this was done in the interest of the Commonwealth, not of Mauritius only.*[21]

In 1980, some Mauritian MPs tried to amend the General Clauses (Amendment) Bill (No. XIX of 1980) to include the Chagos Islands as part of the definition of Mauritius. Sir Harold Walter, then the Minister of Foreign Affairs, was categorical that the Chagos Islands

> *forms part of Great Britain [sic] and its overseas territories; just as France has les Dom Tom; it is part of British territory there is no getting away from it: this is a fact, and a fact that cannot be denied; no amount of red paint can make it blue!*[22]

Another government minister introduced an amendment to claim the Seychelles, detached from Mauritius in 1903 and independent in 1976, apparently to mock the opposition amendment, which was not passed.[23]

The same year, prime minister Ramgoolam told the press that:

> *a request was made in the [Mauritius Legislative] 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.*[24]

It would be difficult to imagine more categorical recognitions of UK sovereignty over the Chagos Islands, which have special weight coming from the prime minister and the minister of foreign affairs of Mauritius, among others. More important still, the Mauritian ministers who negotiated both independence and the excision of the Chagos Islands were

20. S R Ashton and Wm Roger Louis (eds.), *British Documents on the End of Empire*, Series A, Volume 5 (London: TSO, 2004), p. 184.
21. Mauritius Legislative Assembly, 26 June 1974, cols 1946-1947. Available at https://files.pca-cpa.org//pcadocs/mu-uk/Annexes%20to%20Memorial/MM%20Annexes%201-80.pdf (Annex 71).
22. Mauritius Legislative Assembly, 26 June 1980, col 3415. Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180215-WRI-01-02-EN.pdf (Annex 46).
23. Mauritius Legislative Assembly, 26 June 1980, cols 3392-3405. Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180215-WRI-01-02-EN.pdf (Annex 46).
24. "Port Louis, telno 104 of 28 June 1980". Available at https://files.pca-cpa.org//pcadocs/mu-uk/Annexes%20to%20Counter-Memorial/UKCM%20Annexes%2028-46.pdf (Annex 36).

rightly adamant that they agreed to the latter for the sake of benefits to Mauritius, both general and specific:

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

> *Mr Boodhoo: Was the excision of these islands a precondition for the independence of this country?*
>
> *Prime Minister: Not exactly.*
>
> *Mr Bérenger: Since the Prime Minister says today that his agreement was not necessary for the "excision" to take place, can I ask the Prime Minister why then did he give his agreement which was reported both in Great Britain and in this then – Legislative Council in Mauritius?*
>
> *Prime Minister: It was a matter that was negotiated,* ***we got some advantage out of this and we agreed.***[25] *[Emphasis added].*

The statements of Mauritian ministers, as well as of Mauritian political leaders from different political parties with radically diverging political agendas from the period are particularly important because the ICJ simply ignored these statements in its advisory opinion, declaring baldly and without any further explanation or reasoning that:

> *Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.*[26]

With respect, this unexplained and unsupported statement is simply unsustainable in the face of both the documentary record on the events of 1965, and in light of the later statements of the Mauritians who were involved in the talks.

The Mauritian stance only changed in 1982, when the Mauritian Militant Movement and the Mauritian Socialist Party won a majority at that year's general elections. The new governing coalition, more radical in its politics than its predecessor, sought to claim the Chagos as Mauritian. The same year, it enacted the Interpretation and General Clauses (Amendment) Act 1982, which for the first time since Mauritius' independence claimed the Chagos Islands as part of the territory of Mauritius, with retroactive effect to 13 July 1974. Thus, even Mauritius' own statute books do not claim that the Chagos were part of its territory from 1965 to 1974.

In parallel, the Mauritius Legislative Assembly appointed a select committee to investigate the excision of the Chagos Archipelago. The committee interviewed all key living protagonists who were involved in the 1965 talks, which included former premier minister and Labour Party leader Sir Seewoosagur Ramgoolam, leader of the opposition (later deputy prime minister) and leader of the PMSD Sir Gaëtan Duval, former minister

25. Mauritius Legislative Assembly, 25 November 1980, col 4223. Available at https://www.icj-cij.org/sites/default/files/case-related/169/169-20180215-WRI-01-02-EN.pdf (Annex 48).

26. *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 Feb. 2019, ICJ Rep. 2019, p. 95 at 137 (para. 172).

of foreign affairs Sir Harold Walter, and former minister of commerce Maurice Paturau.

Despite its best efforts, the select committee on excision was unable to produce evidence that the Mauritian agreement to the detachment of the Chagos had been improperly obtained. In fact the witnesses it examined categorically denied that there was coercion involved. Sir Ramgoolam, in the words of the committee, "refused to describe the deal as blackmail", in accordance with his longstanding position that it was *not* blackmail. It was to the committee that Sir Ramgoolam described the Chagos as "a portion of our territory of which very few people knew… which is very far from here, and which we had never visited".[27]

Sir Harold Walter told the committee that none of the delegates at the Lancaster House constitutional talks of 1965 disagreed with the principle of detaching the Chagos Islands. Sir Veerasamy Ringadoo, who later became Mauritius' first president, told the committee that he did not oppose the detachment of the islands at the time either, and that there was no dissent on this point among the delegates.

Nevertheless, in the face of such evidence, the committee insinuated, without any evidence, that there was a "blackmail element" to the agreement, using the aforementioned logic that the British government might have organised a referendum on independence if Mauritian agreement was not forthcoming. But as explained earlier, Mauritian society was deeply divided on the question of independence; and the organisation of a referendum to ascertain the views of the Mauritian population would have been perfectly in accord with the international law and practice surrounding decolonization, and so cannot be said to be "blackmail" in any sense, unless one takes the view that independence was the only legitimate option, a position not supported by international law.

Nor does the record of discussions between the UK and the Government of Mauritius between September and November 1965 give any support to the notion that the threat of a referendum on independence was an element in the agreement of the Council of Ministers to the excision. The statement of the UK Prime Minister, Harold Wilson, at the crucial meeting of 23 September 1965, made crystal clear to the Mauritian ministers two things: grant of independence and excision of the Chagos Islands were entirely distinct. The Mauritians readily agreed to excision, for the sake of a substantial package of benefits, including a defence umbrella after independence, UK representations to the US about Mauritian exports, guarantee of fishing rights, the benefit of any mineral or oil discoveries, financial aid in resettling displaced Chagos Islanders, several other benefits, and above all the agreement to return the Chagos Islands to Mauritius the moment UK/US defence needs permitted.

Although the Mauritian government has since the early 1980s more or less consistently maintained that the agreement to detach the Chagos was obtained under duress and therefore invalid, it has adopted the curious position that only the part of the agreement relating to the relinquishment of the Chagos to the United Kingdom are invalid, while the other parts

27. Mauritius Select Committee, p. 22.

of the agreement, which are to the benefit of Mauritius, are legally valid and enforceable. Instead, it has accepted various payments agreed upon as part of the agreement to cede the islands, and has sought to claim other benefits under the agreement as well.

Indeed, its 2015 case in front of the UNCLOS tribunal was based on the premise that the United Kingdom's promises to Mauritius in relation to mineral and fishing rights in the Chagos are legally valid, but the same is not true for Mauritius' agreement to cede the islands to the United Kingdom. This is, to put it mildly, a hypocritical and self-serving position. Mauritius cannot claim the benefit of the agreement while resiling from its core feature; yet this is exactly what it has done.[28]

The treatment of Chagossians in Mauritius

There are many territorial disputes around the world; but few have acquired such a status of *cause célèbre* as the one over the Chagos Islands. In no small part, this is due to the fact that the inhabitants of the Chagos Islands were required to leave the Islands in the years following the creation of the BIOT, which has provoked moral indignation. The United Kingdom government, which was responsible, has since apologized and paid enhanced compensation to the islanders, as well as granted most of them and their descendants British nationality/British citizenship and residence in the UK.

Mauritius has repeatedly sought to link its campaign for the return of the Chagos Islands to the plight of the displaced Chagossians. It has engaged in symbolic gestures, such as including Chagossians in a recent flag-raising expedition to the Chagos Islands, and the current prime minister has promised that Chagossians and their descendants will be allowed to resettle in the Chagos Islands, though with no details as to how this is to be achieved, in view of the difficulty of sustaining economic activity in the islands.

But the linkage between the two issues, which has no doubt greatly helped Mauritius' case in the eyes of the international community, is deceptive. As Milan Jaya Meetarbhan, formerly Mauritius' representative to the United Nations, has bluntly admitted,

> *Over the years there have been two very different legal battles; those of the Chagossians against the UK government as UK citizens in UK courts to be allowed to resettle on the Chagos, and the international fight of Mauritius which has been about sovereignty.*[29]

This point is especially important given that there is no consensus among the displaced Chagossians and their descendants that they want the Chagos Islands to revert to Mauritian sovereignty. Indeed, many Chagossians reacted to the opening of negotiations between the United Kingdom and Mauritius with dismay. This is hardly surprising. In the words of Stephen Allen, who has acted as a legal consultant to the Chagossians' legal team,

> *The Chagos Islanders are ambivalent about the Mauritian sovereignty claim to*

28. *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, Case No. 2011-03, Permanent Court of Arbitration, paras 390–406 and 417–428.

29. Iqbal Ahmed Khan, "Mauritius: Chagos - Are we seeing an attempt at using the 'falklands option'?" *lexpress.mu*, 16 January 2023, https://lexpress.mu/node/417865.

> *the Chagos Islands… the decision of the elected representatives of the Mauritian colonial government to agree to the detachment of the Chagos Islands from Mauritius in return for Mauritian independence, which was embodied in the 1965 Lancaster House Agreement; continuing British patronage in the form of a defence treaty which protected Mauritius's external and internal security; and the role of the Mauritian State in the maltreatment of Chagossians, both in terms of the Mauritian government's collusion in the involuntary displacement of the Chagos Islanders from the BIOT and their subsequent chronic impoverishment in Mauritius, have compromised Chagossian support for the Mauritian sovereignty claim.*[30]

Or as Chagossian activist Rosy Leveque puts it:

> *The descendants I've spoken to in Mauritius do not support Mauritius sovereignty over the Chagos Islands… Chagossians should be given the same respect as the Falkland Islands – a referendum. We should be given the choice to decide if we want to be governed by either Mauritius or UK. Our right to self-determination is not being respected.*[31]

Laura Jeffery, an anthropologist who has studied the issue, writes that:

> *many Chagos islanders who were relocated to Seychelles opposed Mauritian sovereignty. From their perspective, Mauritian politics and business are controlled by Indo-Mauritians for their own interests to the exclusion of Creoles and other ethnic groups in Mauritius. In this formulation, resettlement of the Chagos Archipelago under Mauritian sovereignty would be controlled by Mauritian business interests, and Chagossians might not be given the opportunity to return to the Chagos Archipelago, or they might be enabled to return only as cheap unskilled manual labour. Furthermore, Chagos islanders in Seychelles suggested to me that if the Chagos Archipelago were Mauritian territory, controlled by Mauritian immigration laws, Seychellois Chagossians might find themselves unable to resettle there since they do not hold Mauritian passports. The solution to both of these problems suggested by Seychellois Chagossians was that the Chagos Archipelago should continue to be administered as a UK Overseas Territory, in which all UK passport-holding Chagossians would be entitled to residency.*[32]

Despite its rhetoric to the contrary, Mauritius has excluded Chagossians from the talks with the United Kingdom. Earlier this year, Bernadette Dugasse, who was removed from the Chagos as a child, issued a pre-action letter against the Foreign, Commonwealth and Development Office, arguing that the bilateral negotiations are unlawful as they "are being held without consulting her and the Chagossian people". While the legal prospects of the claim are poor, it nevertheless illustrates the exclusion of the Chagossians from negotiations about the future of the Chagos.[33]

Another group, the Seychelles Chagossian Committee, has also asked the United Kingdom government to be included as part of the negotiations. It seeks a high degree of autonomy for the Chagos Islands if the islands are returned to Mauritius, and has asked for a referendum on whether the Chagos should remain under the sovereignty of the United Kingdom

30. Allen, *The Chagos Islanders and International Law*, p. 260-261.

31. Daniel Boffey, "Chagos Islanders demand say as UK-Mauritius sovereignty talks begin", *The Guardian*, 2 January 2023. https://www.theguardian.com/world/2023/jan/02/chagos-islanders-demand-say-as-uk-mauritius-sovereignty-talks-begin

32. Laura Jeffery, *Chagos Islanders in Mauritius and the UK: Forced Displacement and Onward Migration* (Manchester: Manchester University Press, 2013), p. 46-47.

33. Daniel Boffey, "Negotiations on Chagos Islands' sovereignty face legal challenge", *The Guardian*, 9 January 2023. https://www.theguardian.com/world/2023/jan/09/negotiations-chagos-islands-sovereignty-legal-challenge-talks-uk-mauritius

if Mauritius does not agree to this demand.[34] Even Chagossian groups which do not oppose Mauritian sovereignty have complained about their exclusion from the talks.[35]

Mauritius has so far not included the Chagossians in the talks, nor has indicated any interest in doing so. In fact, high-ranking Mauritians have claimed, without evidence, that the demands of Chagossian groups to be heard are a British ploy to sabotage the talks. Arvin Boolell, a former Mauritian prime minister and leader of the opposition, has claimed that "this is a ploy to try to delay matters" to "have indefinite discussions".[36] A Mauritian political commentator has claimed that UK-based Chagossians were being used "against Mauritius, and this referendum mostly in Crawley with Chagossians carrying UK passports seems to be the same old trick".[37] The same outlet suggests that this is part of a ploy to use the "Falklands option", i.e. to hold a referendum among the Chagossians about the future of the islands.

Because the issue was framed as a matter relation to decolonisation and not self-determination, Mauritius has steadfastly refused to acknowledge Chagossians as a "people" under international law, which would entitle them to self-determination and to choose the future of the Chagos Islands. As far as Mauritius is concerned, international courts have decreed that the islands are Mauritian, so that Chagossians have no further role to play (though, as will be seen in the next section, the Mauritian view is wrong).

Many Chagossians are suspicious of Mauritius given the way they were treated there after they were relocated to the island, where they encountered systematic discrimination as unwelcome interlopers, particularly as most of them were of African descent, unlike the majority of the Mauritian population who are of Indian descent. According to a 2005 report, "Chagossians have generally been considered to occupy the lowest social strata in the Mauritian and Seychellois social hierarchies.".[38] 50% of first-generation Chagossians in Mauritius reported discrimination in employment, while 66% reported being verbally abused from the Mauritian population.[39] Among second-generation Chagossians, 45% report being verbally abused. So pervasive was the discrimination that in Mauritius, the word "Ilois", used to referred to Chagossians, became a term of abuse. Unsurprisingly, Mauritius-based Chagossians suffer from extreme levels of poverty and social deprivation.

After their displacement, the Mauritian government took little interest in the welfare of Chagossians even though they were unquestionably citizens of Mauritius from the time of excision in 1965 and on and after Mauritian independence in 1968. In fact, some senior Mauritian politicians such as Sir Gaëtan Duval, the leader of the PMSD, took the view that the Chagossians were not entitled to Mauritian citizenship at all, as the islands were detached before Mauritius' independence.[40]

The government accordingly did little to help Chagossians. For instance, in 1972, the United Kingdom government pursuant to the 1965 agreements on excision, paid £650,000 to Mauritius to compensate the displaced Chagos islanders living there. Lamentably, the money was

34. Sedrick Nicette, "Seychelles' Chagossians seek to be part of ongoing negotiations between UK and Mauritius", *Seychelles News Agency*, 19 January 2023, http://www.seychellesnewsagency.com/articles/18063/Seychelles+Chagossians+-seek+to+be+part+of+ongoing+negotiations+between+UK+and+Mauritius

35. Owen Boycott, "The UK expelled the entire population of the Chagos Islands 50 years ago. Reversing that injustice won't be easy", *Prospect Magazine*, 13 Janaury 2023. https://www.prospectmagazine.co.uk/world/60403/the-uk-expelled-the-entire-population-of-the-chagos-islands-50-years-ago.-reversing-that-injustice-wont-be-easy

36. Khan, "Mauritius: Chagos - Are we seeing an attempt at using the 'falklands option'?, https://lexpress.mu/node/417865.

37. Khan, "Mauritius: Chagos - Are we seeing an attempt at using the 'falklands option'?, https://lexpress.mu/node/417865.

38. David Vine, S. Wojciech Sokolowski, and Philip Harvey, "Dérasiné: The Expulsion and Impoverishment of the Chagossian People", 11 April 2005, p. 257-258. https://figshare.com/articles/online_resource/D_RASIN_Draft_THE_EXPULSION_AND_IMPOVERISHMENT_OF_THE_CHAGOSSIAN_PEOPLE/23888868/1.

39. Ibid, at p. 11.

40. Mauritius Select Committee, p. 14.

only disbursed by Mauritius to the Chagossians in 1978, after months of protests by Chagossians, and after inflation had greatly eroded the value of the original sum. In the 1980s, the Mauritian government provided housing to some Chagossians: these houses were located in either a slum district or a brothel district.[41]

Finally, there is mounting concern that history is repeating in Agaléga, an island dependency of Mauritius, which has been developed into an Indian military base with the agreement of the Mauritian government. Although information is difficult to obtain, there are growing concerns that Mauritius is doing to the inhabitants of Agaléga what was done to the inhabitants of the Chagos Islands five decades before. Already, inhabitants of Agaléga have reported restrictions on their movements and on what they are allowed to bring to Agaléga, which are making it harder to live on the islands; whilst the Mauritian and Indian governments have refused to divulge further information about their plans for the islands.[42] Unsurprisingly, many Chagossians view these developments with alarm, and fear for the future of the inhabitants of Agaléga, many of whose inhabitants are of Chagossian descent.

41. Vine, et al. "Dérasiné", p. 152.

42. Yarno Ritzen, "Agaléga, a secret base, and India's claim to power ", *Al Jazeera*, 2021. https://interactive.aljazeera.com/aje/2021/island-of-secrets/index.html

Parliamentary reaction to the ICJ's advisory opinion

The ICJ's advisory opinion was handed down on 25 February 2019. It has been raised repeatedly in the Houses of Parliament since then. The Government's initial response to the advisory opinion was clear and correct, firmly maintaining UK sovereignty over the Chagos Islands. However, in the statement on 3 November 2022 and in subsequent statements in Parliament the Government has struck a very different tone. The Government has not quite conceded that it has an obligation to cede the Islands to Mauritius, but neither has it affirmed the UK's legal rights. These statements raise serious concerns that ministers and their advisors have misunderstood the UK's legal position and that the UK may conclude a treaty of cession with Mauritius on a false premise.

The parliamentary record also reveals that some parliamentarians, including at one stage the Labour shadow minister, have wrongly taken the ICJ's advisory opinion, and other actions of international bodies, to require the UK to cede the Chagos Islands to Mauritius immediately. Some MPs, again including the Labour shadow minister, run together cession of the Chagos Islands to Mauritius with the question of whether the Chagossians should be entitled to return to the Islands. Others reason that it is the Chagossians themselves who should decide who enjoys sovereignty. Some are concerned about the damage that cession would do to the UK's strategic interests and to the environment, although for others these are not reasons against cession as such.

The immediate parliamentary reaction to the ICJ's advisory opinion

On 26 February 2019, in a debate about the Transatlantic Alliance, Helen Goodman MP (Labour) asked:

> *Yesterday, the International Court of Justice found that the UK's control of the Chagos islands is illegal and wrong. This damning verdict deals a huge blow to the UK's global reputation. Will the Government therefore heed the call of the ICJ to hand back the islands to Mauritius, or will they continue to pander to the United States military?*

The response from the minister, Sir Alan Duncan MP, was short and sharp:

> *The hon. Lady is labouring under a serious misapprehension: yesterday's*

> *hearing provided an advisory opinion, not a judgment. We will of course consider the detail of the opinion carefully, but this is a bilateral dispute, and for the General Assembly to seek an advisory opinion by the ICJ was therefore a misuse of powers that sets a dangerous precedent for other bilateral disputes. The defence facilities in the British Indian Ocean Territory help to keep people in Britain and around the world safe, and we will continue to seek a bilateral solution to what is a bilateral dispute with Mauritius.*

On the same day, in the House of Lords, Lord Luce (cross-bench and member of the All-Party Parliamentary Group (APPG) on the Chagos Islands) asked the government what assessment they had made of the ICJ's advisory opinion. The minister, Baroness Goldie, replied:

> *My Lords, this is an advisory opinion, not a judgment ruling. The opinion refers to our administration, not occupation. Of course we will look at the detail of it carefully. The defence facilities in the British Indian Ocean Territory help to protect people in Britain and around the world from terrorist threats, organised crime and piracy. We reiterate our long-standing commitment to cede sovereignty when we no longer need the territory to help keep us and others safe.*

In response to a question from Lord Collins of Highbury (Labour), which noted the number of countries who had supported the referral to the ICJ, she added:

> *As the noble Lord will be aware, there was not unanimous support for the original referral. Concerns were expressed, particularly by the US, Australia and Israel, that this was setting a dangerous precedent for other bilateral disputes. The United Kingdom has a very good record on observing and implementing human rights and supporting other countries in relation to human rights. We are very clear that there is a reason for the history of this matter. It is a long-standing history, and the noble Lord's party was involved at its inception. There is a careful determination to be made on analysis of the judgment, which the United Kingdom Government will undertake. The important thing is to consider what we are doing in relation to the Chagossians, who are currently principally located in Mauritius, the Seychelles and, interestingly, the United Kingdom, particularly in Crawley and Manchester. The noble Lord will be aware that the United Kingdom Government do a lot to support those communities.*

While Baroness Goldie undertook to analyse the opinion carefully (she wrongly terms it a judgment, although her response to Lord Luce was more precise in distinguishing an advisory opinion from a judgment), she rightly pointed out the problems with the original referral to the ICJ, alluded to the complex history of the Islands, and made clear that what is more important than the ICJ's advisory opinion is what the Government is doing for the Chagossians, many of whom live in the UK.

On 28 February 2019, in a debate about the Business of the House, Valerie Vaz MP (Labour) said:

> *There is some good news. The former chair and current president of the Chagos*

> *Islands (British Indian Ocean Territory) all-party group, the Leader of the Opposition, has been an advocate for the rights of the Chagossians for some time. The International Court of Justice said that Britain's acquisition of the Chagos archipelago in the 1960s was "wrongful", and that Britain must*
>
> *"bring to an end its administration of the Chagos Archipelago as rapidly as possible."*
>
> *About 2,000 people were evicted, and they want to go home. That was in our manifesto—that is another point fulfilled—and we want the Chagos islanders to return to their homelands. Given that the Government seem to want to cling on to their colonial powers, may we have a statement from the Foreign Secretary? Will the Government abide by the Court's decision, or are they going to appeal?*

The then Leader of the Opposition, Jeremy Corbyn MP, had been, and remains, a central figure in the All-Party Parliamentary Group (APPG) on the Chagos Islands. But Valerie Vaz is confused in implying that compliance with the ICJ's advisory opinion, which is not a decision about a dispute to which the UK was party (and cannot be appealed to some other tribunal), somehow fulfils the Labour Party's 2017 manifesto. The relevant part of the 2017 manifesto provided that:

> *We will always stand up for the rights, interests and self-determination of Britain's overseas territories and their citizens, whether protecting the sovereignty of the Falkland Islands against anyone who would seek to challenge it, or supporting the right of the Chagos islanders to return to their homelands.*

This falls well short of a commitment to abandon British sovereignty over the BIOT, still less a commitment to cede the Islands to Mauritius. Indeed, it is a back-handed (confused) affirmation of British sovereignty over the Falklands and one cannot stand up for Britain's overseas territories, or their citizens, without firmly maintaining British sovereignty over them. Ceding the Islands to Mauritius would not grant the Chagos Islanders a right to return to their homeland. On the contrary, it would disable the UK from deciding that the Islanders should be able to return. After cession, this would be a matter for Mauritius to decide in the exercise of its new sovereignty.

The Leader of the House, Andrea Leadsom MP, replied to Valerie Vaz thus:

> *Finally, on the Chagos islands, the hon. Lady will be aware that what the UN gave this week was an advisory opinion, not a judgment. Of course, the UK Government will look at the detail carefully, but the defence facilities on the British Indian Ocean Territory help to protect people here in Britain and around the world from terrorist threats, organised crime and piracy.*

Every minister who spoke about the BIOT in Parliament between 26 February 2019 and before 3 November 2022 rightly refused to accept that the UK was under any obligation, by reason of the ICJ's advisory opinion

or otherwise, to cede the Islands to Mauritius. However, a debate on 4 April 2019, about the Foreign Affairs Committee's report, does suggest an alternative undercurrent of thought. Martin Docherty-Hughes MP (SNP) suggested that the UK was in a tight spot:

> *If the UK Government decide to uphold the UN ruling on the Chagos islands, in respecting the international rules-based system, they risk letting China in and upsetting the delicate balance of power in south Asia and the Indian ocean. If the UK Government do not respect the decision, they undermine the rules-based system, allowing China further to erode and undermine the balance of power in the South China sea with its base construction. Which is it to be?*

The Minister for Asia and the Pacific, Mark Field MP, answered thus:

> *Of course our view is that the judgment of the International Court of Justice was advisory, rather than being a judgment that we are necessarily subject to, but there is a risk that in trying to address these issues we could be accused of being mealy mouthed. Fundamentally, I am not quite sure where we will come out. There is a great risk that if the injustice to the Chagos people continues for any great length of time, we will be accused of riding roughshod in the way that has been suggested. I am being very candid with the hon. Gentleman, but I think that it is right to do so.*

This is a revealing answer – candid indeed. It restates the UK's position that the ICJ's advisory opinion is not binding, but discloses the minister's fear that responding to the opinion in this way may not be well received by other states, not least because of the injustice the Chagossians suffered. This reply does not amount to a statement of government policy, but it may help explain the evolution in the Government's position between its reaction to the ICJ's advisory opinion in early 2019 and its decision to enter into negotiations about sovereignty in late 2022.

The Government's statement on the ICJ's advisory opinion

On 30 April 2019, Sir Alan Duncan MP, the Minister of State for Europe and the Americas, made a statement to the House:

> *Further to my written statement of 26 June 2017, on 25 February the International Court of Justice (ICJ) issued an advisory opinion on the legal consequences of the separation of the Chagos archipelago from Mauritius in 1965. We were disappointed that this matter was referred to the International Court of Justice, contrary to the principle that the Court should not consider bilateral disputes without the consent of both states concerned. Nevertheless, the United Kingdom respects the ICJ and participated fully in the ICJ process at every stage and in good faith. An advisory opinion is advice provided to the United Nations General Assembly at its request; it is not a legally binding judgment. The Government have considered the content of the opinion carefully, however we do not share the Court's approach.*

> *As outlined in the previous written ministerial statement, we have no doubt about our sovereignty over the Chagos archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the archipelago and we do not recognise its claim. We have, however, made a long-standing commitment since 1965 to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes. We stand by that commitment.*
>
> *The joint United Kingdom-United States defence facility on Diego Garcia helps to keep people in Britain and around the world safe. For nearly 40 years the facility has helped the United Kingdom, United States, other allies and our regional partners, including Mauritius, combat some of the most challenging threats to international peace and security, including those from terrorism, organised crime and piracy. The facility also remains ready for a rapid and impactful response in times of humanitarian crisis in the region. These functions are only possible under the sovereignty of the United Kingdom.*
>
> *As the Foreign Secretary confirmed to PM Jugnauth on 27 April 2019, Mauritius is a valued friend, trading partner and member of the Commonwealth. We are fully committed to our bilateral relationship and also want to deepen and intensify engagement with Mauritius. With regard to the very important matter of the Chagossians we are continuing our work to design a support package worth approximately £40 million, to improve Chagossian livelihoods in the communities in Mauritius, the Seychelles and the UK where they now live.*

This statement makes the legal position crystal clear, explaining the UK's legal understanding and reminding parliamentarians that the advisory opinion is not a judgment and does not bind the UK in international law. Sir Alan Duncan's statement also rightly stresses the importance of the Chagos Islands for the UK's strategic (defence) interests and the importance of the UK retaining sovereignty over the Islands to this end. The statement keeps separate the important question about how best to act in relation to the Chagossians, noting the funds proposed to be spent on point.

Sovereignty and justice for the Chagossians

On 5 November 2019, in a debate about Human Rights, Henry Smith MP (Conservative, vice-chair of the APPG on the Chagos Islands) sought to affirm (1) UK sovereignty over the BIOT and (2) to defend a right to return and to obtain British citizenship:

> *I am privileged to represent probably the largest number of Chagos islanders anywhere in the world. I have no doubt about UK sovereignty over the British Indian Ocean Territory; however, human rights have been neglected ever since the Wilson Administration forcibly evicted the Chagos islanders from their homeland in the late 1960s. Will the Minister assure me that, as we go forward, Chagos islands human rights will be better respected in terms of a right of return and nationality issues?*

He thus distinguished between justice for the Chagossians (per a right to return and grant of British nationality) and cession of the Islands to Mauritius.

In this context, it bears noting that the Labour Party Manifesto 2019, published on 21 November 2019, included a commitment to "Allow the people of the Chagos Islands and their descendants the right to return to the lands from which they should never have been removed." However, the Manifesto made no mention of the ICJ's Advisory Opinion or cession to Mauritius. The day after the Manifesto was published, the Leader of the Opposition, Jeremy Corbyn MP, was asked "whether he would accept the international court ruling on sovereignty", as the *Guardian* put it,[43] to which he replied:

> *Yes, absolutely. I've been involved in the Chagos campaign for a very long time.*
>
> *What happened to the Chagos islanders was utterly disgraceful. [They were] forcibly removed from their own islands, unfortunately, by this country.*
>
> *The right of return to those islands is absolutely important as a symbol of the way in which we wish to behave in international law. So yes, we will carry that out.*

This is a confused statement, which goes beyond the 2019 Manifesto but is not an express commitment to a policy of cession to Mauritius. The ICJ's advisory opinion does not mandate a right of return to the Chagos Islands. It is unclear how making provision for a right of return would be a *symbol* of how a Labour government would wish to behave in international law. It may be that in answering the reporter's questions on the campaign trail, Jeremy Corbyn misunderstood what the ICJ's advisory opinion had stated and how this related – or did not relate – to the Chagossians. The Guardian's gloss on the remarks, per the headline "Labour would return Chagos Islands", may be inaccurate insofar as the Manifesto made a commitment to a right to return, which would be impossible for the UK to honour if it ceded sovereignty to Mauritius. Alternatively, it may be that the Labour Party of the time was committed to two fundamentally incompatible policies.

In a debate on Britain in the World, on 30 January 2020, Henry Smith MP said of the Chagossians:

> *They were appallingly exiled from their homeland by the Harold Wilson Administration in the late 1960s and early 1970s, and I believe that they should have a right of return. However, it is clear that in February 2019 the International Court of Justice came to a judgment that the islands should be handed to Mauritius, and I think we should reject that. The majority of Chagos islanders—certainly the ones I know and speak of—despite their treatment by this country, cherish the support of British sovereignty, and I do not think we should pay heed to that judgment. It is quite clear to me that the Chagos islanders are British.*

43. Owen Bowcott, "Labour would return Chagos Islands, says Jeremy Corbyn", *The Guardian*, 22 November 2019. https://www.theguardian.com/world/2019/nov/22/uk-set-to-defy-un-deadline-to-return-chagos-islands.

In this speech, Smith sharpens the point he made in the House on 5 November 2019, namely that acting justly towards the Chagos Islanders, who are British, requires the UK not to comply with the ICJ's advisory opinion (which he wrongly terms a judgment). In saying that the islanders are British, Smith perhaps overstated the legal position at the time he was speaking. But then his point was that they were in substance British and that the law should reflect this and indeed the law has since been amended to make provision for the Chagossians to secure British citizenship.

A similar point was made in a debate about the Commonwealth in 2020, on 9 March 2020. Patrick Grady MP (SNP) attacked the UK for failing to cede the Islands to Mauritius (in one of his many questions and speeches on this subject). Andrew Rosindell MP (Conservative, vice-chair of the APPG on the Chagos), chair of the APPG on Overseas Territories, intervened to say:

> *I totally understand and accept the points that the hon. Gentleman is making about the Chagos Islands and Mauritius, but will the Chagossians be consulted on whose sovereignty they wish to fall under? As we have that policy with all our overseas territories, such as Gibraltar and the Falklands, which have had a referendum, surely the Chagossians should be the people who should determine the destiny of their own homeland.*

Rosindell does not spell this out, but in substance he shares Henry Smith's concern that the UK may cede the Islands to Mauritius regardless of what the Chagossians may want.

The Government's November 2022 statement about negotiations on the exercise of sovereignty

On 3 November 2022, the Foreign Secretary, James Cleverly MP, who took office on 6 September, made a statement to the House about the British Indian Ocean Territory / Chagos Archipelago:

> *[T]he UK and Mauritius have decided to begin negotiations on the exercise of sovereignty over the British Indian Ocean Territory (BIOT)/Chagos Archipelago.*
>
> *Through negotiations, taking into account relevant legal proceedings, it is our intention to secure an agreement on the basis of international law to resolve all outstanding issues, including those relating to the former inhabitants of the Chagos Archipelago…*
>
> *The UK and Mauritius have reiterated that any agreement between our two countries will ensure the continued effective operation of the joint UK/US military base on Diego Garcia, which plays a vital role in regional and global security. We recognise the US's and India's interests and will keep them informed of progress.*

This is not the first time the UK has had talks with Mauritius about the BIOT. The statement does not make clear why the Government has decided to enter into the current round of negotiations, but the reference to "relevant legal proceedings" would seem to imply that the ICJ's advisory opinion in 2019 and the ITLOS ruling in 2021 were relevant considerations. The statement falls well short of conceding that the UK is legally obliged to cede the Islands to Mauritius, but is strikingly different in tone to the statements made in the wake of the ICJ's advisory opinion, outlined above. Specifically, the statement does not affirm the UK's continuing sovereignty over the Chagos Islands and does not make clear that the UK rejects the argument that either the ICJ's advisory opinion or the subsequent resolution of the General Assembly require it to cede sovereignty to Mauritius.

The debate about the UK's sovereignty over the Chagos Islands

Parliamentarians have discussed the BIOT, and the ICJ's advisory opinion, a number of times since the Foreign Secretary's statement on 3 November 2022. The most important of these occasions is a debate held in the House of Commons on 7 December 2022, on British Indian Ocean Territory: Sovereignty. Daniel Kawczynski MP (Conservative) opened the debate:

> *I have debated this issue with many colleagues, and the message from some of them is this: we are in negotiations with Mauritius, due to rulings against us at the United Nations and at the International Court of Justice, so let us conclude those negotiations and then at some stage we will consult the Chagossians. Those are the responses I have received to many written parliamentary questions: "Do not interfere in the negotiations now. Let us conclude these sensitive negotiations—it is all rather discreet—and at some stage in future we will consult the Chagossians." No, no, no. That puts the cart before the horse. If the Government have any intention to transfer even one of those 58 islands, they need to have a referendum of the Chagossian people. They need to make a decision themselves, rather than our Government even starting to negotiate with Mauritius.*

Thus, Daniel Kawczynski picks up the point made by some of his parliamentary colleagues in 2019 and 2020, namely that it would be wrong for the UK to cede the Islands to Mauritius regardless of the wishes of the Islanders themselves.

In the course of the debate, James Sunderland MP (Conservative) made the following point:

> *I may be one of very few parliamentarians, if not the only one, who has been to the British Indian Ocean Territory on duty as a military person, so I have seen at first hand how important that base is to NATO and beyond. For me, it is clear; we have two submarine Z-berths there and a large airbase, which was directly involved with the operations in Afghanistan and Iraq. It*

> *is an American airbase that is owned by the British. To my mind, it would be pathological nonsense to concede access to that part of the world.*

James Sunderland does not spell out the point (viz. to whom access would be conceded and what this would mean in practical terms for the joint US-UK facility), but clearly implies that ceding the BIOT to Mauritius would have calamitous implications for US-UK defence interests.

Henry Smith MP restated his concern about cession regardless of the wishes of the Islanders:

> *I believe that the Chagos islanders should have a right of return to their homeland. I am pleased that as a result of the Nationality and Borders Act passed earlier this year, they and further generations have a right to settle here in this country: they are British citizens, and should be so by right. I am pleased that that has been recognised. However, the future of the Chagos islanders should be determined by them. The prospect of their future being decided by London, Port Louis, the UN in New York, the International Court of Justice in The Hague or wherever else—as has happened throughout the past half century or more—is fundamentally wrong. The Chagos islanders must be able to determine their own future.*

He went on to note the point that others had made about the strategic importance of the Islands and added that:

> *Those islands were very strategically important during the cold war and during the actions in Afghanistan and Iraq, and they are very strategic again with a new cold war now seemingly having started as a result of Russian aggression. The point about the threat from China has already been made: the Chinese belt and road initiative has already resulted in Commonwealth countries in the Caribbean and the Pacific ocean coming under Chinese coercion and influence. There is a very real danger that if the British Indian Ocean Territory is ceded to Mauritius, there will be significant pressure to put Chinese military installations on those extremely strategic islands. That would be a major military and strategic error for the global community, and I wonder what discussions have been had with Washington regarding its views on defence and foreign policy should those islands be ceded to Mauritius. Perhaps the Minister could address that point.*

This may be the first occasion on which a parliamentarian has expressly raised the threat from China in the context of the Chagos Islands. It is a powerful point and Henry Smith is right to invite the Minister to address it, as well as to ask what the Americans make of the Government's apparent intention to relinquish sovereignty over the BIOT and thus to abandon our capacity to repel Chinese aggression, or subversion, in relation to the Islands.

Stephen Doughty MP (Labour), who has been Shadow Minister for Foreign and Commonwealth Affairs and International Development since 9 April 2020, made a substantial speech. This speech is important in understanding the position that the Labour Party now takes, under the leadership of Sir Keir Starmer KC MP. For that reason, we set it out in length.

This is a deeply complex issue, and I want to start with the question of the rules-based international order, which must be central to UK foreign policy. This historic injustice continues to prevent us from adhering to that, and I share the absolute and deep regret for the past actions of previous Governments, including Labour Governments. The actions taken in the late 1960s and early 1970s were completely unjustifiable. A number of us will have read the shocking documents from that period and the language expressed in them, which was completely and utterly unacceptable. We have a fundamental moral responsibility to the islanders that will not go away. I remain convinced that there must be a lasting resolution to this challenge that lives up to our moral and legal obligations, that draws on the views of Chagossians around the world and that is reached in co-operation with our partners and allies. There must be an apology from all of us—there certainly is from our side—for those past actions, but we need to look to the future and to what is being done for Chagossians today, not just in relation to the situation in the archipelago, but for Chagossians here in many communities.

The ICJ in 2019 was unequivocal in its ruling that

> "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible".

That was adopted after a vote of 116 to six by the United Nations General Assembly, which called on the UK to

> "unconditionally end its occupation of the Archipelago as soon as possible."

That was supported by the 2021 ruling of the special chamber of the International Tribunal for the Law of the Sea. Although the tribunal did not have competence on territorial disputes, it stated that

> "Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations."

Unfortunately, the Government have spent several years simply ignoring and denying these developments, and that has damaged our diplomatic reputation with not just Mauritius but many other countries across Africa, Asia and the Pacific, and with a range of international legal and human rights bodies. Even the Maldives, which historically has been aligned with the UK Government position on this matter, recently changed its position to align with the rest of the international community.

I take on board the comments made by the hon. Member for Shrewsbury and Atcham [Daniel Kawczynski MP] on China and its expansion in the South China sea, the Indian ocean and beyond, and he raises some legitimate concerns, although I do not accept his wider characterisations of Mauritius. It is a fact that China has made increasing encroachments into the territorial waters of its neighbours and vast claims in the South China sea while ignoring judgments against itself. That has been matched by a growing assertiveness, and even

> *belligerence, towards some of our allies and partners in the region, so I hope the Minister can set out what assurances we have had on these matters and on China's activities in the region.*
>
> *It is my view that the inverse will play out if we do not resolve this matter, because if this is unresolved in terms of international law, it will only play into the hands of China and others who seek to undermine international judgments and law. When we want to call on China to comply with the Permanent Court of Arbitration's judgment on the South China sea, it will say, "Well, you are not in compliance with the ICJ or the International Tribunal for the Law of the Sea". That could be the case for a number of other maritime and territorial disputes that it is in our interests to pursue and defend resolutely. We cannot have one hand doing one thing and the other doing the opposite…*
>
> *On defence, it is crucial that we understand, as many Members have rightly said, that the United Kingdom-United States defence facility in the territory plays a vital role in keeping us and our allies safe. It plays a role in monitoring drugs and piracy, and in the national security activities of regional partners. It supports allies from many countries, and it carries out nuclear test ban monitoring and regional humanitarian efforts. Can the Minister say what discussions have been had with our allies, particularly the United States, about those negotiations and ensuring we maintain our defence capabilities in Diego Garcia?*
>
> *On the environment and the maritime importance of the islands, we recognise the judgment in relation to the Mauritius Ports Authority, but, given the importance of the archipelago, it is clear that we need to protect that environment. What discussions have been had on that with Mauritius and other partners in the region, as well as with the Chagossians, who believe in protecting their environment and historical homeland?*

This speech, by a senior Labour figure, is significant and worrying insofar as it suggests that the Opposition takes the view that the 2019 ICJ advisory opinion, the 2019 General Assembly resolution and the 2021 ITLOS Special Chamber preliminary ruling (each or cumulatively?) mean that the UK is obviously under a legal obligation now to cede the Islands to Mauritius. Stephen Doughty states that the UK's failure to comply undermines not only the UK's diplomatic reputation but also our leverage to argue for Chinese compliance with international law and the rulings of international tribunals. He seems to acknowledge the risks of Chinese influence over Mauritius and damage to the UK-US defence interests in the region, as well as the risks to the environment, but sets them aside as secondary matters, which are not reasons to refrain from ceding the Islands to Mauritius.

Unresolved in this speech is the question of how the UK can reasonably – lawfully – attempt to secure assurances in exchange for cession if the UK has an obligation immediately to cede the Islands to Mauritius. This speech would seem to mark a major development of Labour Party policy

since the 2019 manifesto, which spoke only about making provision for the Chagossians to return and said nothing about cession to Mauritius.

Setting aside Jeremy Corbyn's confused statement to the Guardian, on the campaign trail and in apparent ignorance of the legal detail, this speech by Stephen Doughty in the House of Commons is the first occasion on which the Opposition has expressly called for the Government to comply with the ICJ's advisory opinion and to cede the Islands to Mauritius. In view of the Foreign Secretary's statement on 3 November 2022, which of course is the backdrop to this debate, it may be that the Opposition and the Government are effectively in agreement on this point, which is very worrying, not least in view of the firm position to the contrary taken by the last Labour Government.

However, one must also consider the rather more careful remarks that Stephen Doughty made in a debate in the House of Commons about Overseas Territories, on 11 May 2023:

> *On Chagos there is a complex and nuanced set of issues. There is an historic injustice that I have rightly referred to in the past. We must balance national security, our compliance with international law and obligations, and the rights and wishes of the Chagos people, who have long suffered. I have heard their voices clearly. There are also environmental and biodiversity concerns, which I set out a few months ago.*

This strikes quite a different note to his earlier, more substantive speech on 7 December 2022. It is striking to see here the emphasis on balancing (1) national security, (2) international law, (3) the Chagos people, and (4) the environment. In his earlier speech, it seemed clear that (2), or at least his mistaken understanding of (2), had priority. This later speech is much better insofar as it suggests the Opposition is starting to have concerns about cession, even if the speech still wrongly assumes, presumably for the reasons set out in his earlier speech, that the UK fails to comply with international law insofar as it fails to cede the BIOT to Mauritius.

In closing the 7 December 2022 debate, Anne-Marie Trevelyan MP, the Minister of State, Foreign, Commonwealth and Development Office, said:

> *The UK and Mauritius intend to secure an agreement on the basis of international law to resolve all outstanding issues. I anticipate any agreement will be subject to parliamentary scrutiny under the Constitutional Reform and Governance Act 2010 in the usual way. Let me be clear that both the UK and Mauritius have reiterated that any agreement between us will ensure the continued effective operation of the joint UK-United States defence facility on Diego Garcia. For more than 40 years, this joint base has contributed significantly to regional and global security. It is the result of a uniquely close and active defence and security partnership between two longstanding allies.*

It is unfortunate—and telling, when one compares earlier parliamentary materials—that the minister did not correct the various misconceptions about the legal position that were expressed in the course of the debate, including by the shadow minister. This speech would seem to repeat

the subtext of the Foreign Secretary's 3 November 2022 statement, namely that the Government has decided, under the felt pressure of legal proceedings, to cede the Islands to Mauritius. The minister's speech does at least hold out the prospect of parliamentary consent being required before cession takes place – parliamentarians should hold the Government to this statement – and does make an agreement in relation to Diego Garcia a condition on cession. However, the speech does nothing to address the risks that cession would place, even with such an agreement, to the UK's vital strategic interests and the environment. Neither does it address the concern raised by several parliamentarians about the exclusion of the Chagossians from negotiations and the risk that sovereignty may be ceded to Mauritius despite their opposition to such.

Conclusions

In the initial aftermath of the ICJ's advisory opinion, the Government's firm view was that the opinion has no effect on the UK's sovereignty over the Chagos Islands, which was well established. Ministers made clear, further, that the UK had a vital strategic interest in the Islands, which would be compromised if sovereignty was ceded. There has been a major shift in tone since the Government announced, on 3 November 2022, that it would negotiate with Mauritius about the exercise of sovereignty over the Chagos Islands. In that statement and in subsequent statements in Parliament, ministers have not conceded that the UK is acting unlawfully, but neither have they restated the UK's legal position as it clearly was until 3 November 2022. There are strong reasons to fear that the Government is proceeding on the false premise that the UK is legally obliged to cede the Islands to Mauritius or, almost as bad, that in view of the "relevant legal proceedings" and their international reception it has no acceptable diplomatic alternative save to cede the Islands while attempting to negotiate certain assurances.

The parliamentary record reveals that many parliamentarians have misunderstood, or misrepresented, the ICJ's 2019 advisory opinion, taking the UK to have a legal obligation to cede the Chagos Islands to Mauritius. Since 2022, some parliamentarians have also raised the ITLOS ruling in 2021, reasoning that this affirms the UK's legal obligation to cede the Islands. Many of the same parliamentarians have wrongly reasoned that the ICJ's advisory opinion was about the justice of the UK's treatment of the Chagossians and that complying with the opinion would somehow answer that injustice, making provision for a right of return to the Islands.

Many parliamentarians, including at one stage the Labour shadow minister, have asserted – incoherently – that the UK has a legal obligation to cede the BIOT to Mauritius immediately and that the UK should negotiate assurances about defence interests, the rights of Chagossians, and the environment. But if the UK has an obligation to cede the Islands it has no leverage to negotiate. In some statements, parliamentarians, again including the Labour shadow minister, have shown some awareness about this tension, yet have continued to attack the government for having failed

to comply with the ICJ's opinion.

Other parliamentarians have been concerned that in negotiating with Mauritius the Government is riding roughshod over the interests of the Chagossians, who should be entitled to express their wishes about who should enjoy sovereignty over the Islands. Some of these parliamentarians, and others too, have been concerned that cession to Mauritius would compromise the UK's vital strategic interests, in view of the risks of Chinese influence over Mauritius. Relatedly, some are concerned that cession to Mauritius would put the Marine Protected Area in jeopardy. These are very important reasons for the UK *not* to cede the BIOT to Mauritius. In having entered into negotiations, with a view to concluding a treaty of cession, the Government is putting at risk the interests of the Chagossians, the UK's strategic interests, and the environment. As we explain later in this report, its apparent legal reasoning is also liable to have wider damaging consequences.

The risk of over-reading the "relevant legal proceedings"

The parliamentary record does not disclose exactly why the Government has decided to enter into negotiations with Mauritius about the exercise of sovereignty over BIOT. However, the record strongly implies that the Government's understanding of the UK's legal position has changed. The reference in the Foreign Secretary's statement on 3 November 2022 to "taking into account relevant legal proceedings" suggests that the Foreign Secretary has been persuaded by FCDO lawyers that in light of the advisory opinion and its subsequent reception by the ITLOS Special Chamber, the UK has no choice but to negotiate with Mauritius. It is unclear what, if any, legal options FCDO believe the UK to have besides negotiations. It is also unclear what FCDO believe the aim of negotiations should be or, more precisely, what the outstanding issues between Mauritius and the UK are.

There is no doubt that Mauritius understands the main "outstanding issues" to be that Mauritius does not administer the Chagos and that the UK has not (as yet) accepted Mauritius's claim that Mauritius holds all sovereign entitlements to the Chagos. It seems possible that FCDO have convinced the Government that the UK not only must negotiate but also must concede both these points. In any event, for the UK to negotiate about these matters is to open at least the possibility of conceding them. For four reasons, it is mistaken to conclude that the "relevant legal proceedings" constrain the UK's position in respect of the BIOT in these ways.

First, the ICJ's advisory opinion did not adjudicate any dispute, nor could it have, between Mauritius and the UK concerning the BIOT. There is no jurisdiction under international law to adjudicate a dispute between States without the consent of the States that are parties to the dispute. As for the ICJ's advisory jurisdiction, as the title denotes this is a jurisdiction only to *advise*, not to adopt judgments that settle disputes such as that between the UK and Mauritius.

Second, the guidance that the ICJ supplied to the General Assembly in the advisory opinion does not prescribe a procedure for how decolonization of the Chagos Islands is to be implemented. The UK and its former colonies have attained the orderly disposition of their relations time and again through their own chosen approaches, not through compulsory third-party procedure. It would be a departure from practice and unsupported by law to interpret the ICJ's advisory opinion as imposing a procedure or a deadline on the UK in respect of the BIOT.

Third, quite apart from these fundamental objections, the ICJ's advisory opinion does not specify the form that a final disposition of the territory is to take. Instead, in accordance with UN decolonization practice, it leaves a range of possibilities on the table.

Finally, indications are visible in the ICJ's advisory opinion that the proper final disposition for the Chagos should be one chosen by the Chagossians themselves. Automatic reversion to Mauritius is not the self-evident outcome that Mauritius portrays.

Each of these is a reason for a reserved approach toward the "relevant legal proceedings", which FCDO seem to believe must be "tak[en] into account". Let us consider each reason in turn. Later in this report, we suggest that imputing so much (too much) weight to the ICJ's advisory opinion gives rise to a number of political and strategic problems that the Government has not yet considered.

The advisory opinion is not a legally binding settlement of a dispute

It is a fundamental principle of international law that "a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent".[44] The competence of the ICJ under Article 65 of its Statute to give advisory opinions is no exception to the principle. If "to give a reply [to a request for an advisory opinion] would have the effect of circumventing the principle that a State is not obligated to allow its disputes to be submitted to judicial settlement without its consent," the Court should decline to give an advisory opinion.[45]

Unsurprisingly, the ICJ in the *Chagos* advisory proceedings did not disagree that it shall not adjudicate a contentious case where the parties have not consented to it doing so. Indeed, the Court acknowledged the principle[46] and concluded on that point with an assurance: to give the opinion that the General Assembly had requested, the Court assured, "would [not] have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State".[47] The advisory opinion that the Court actually gave, however, all too readily reads as though it had precisely that effect.

In particular, two paragraphs in the opinion strongly suggest that the Court has settled the dispute between the United Kingdom and Mauritius in respect of the Chagos. At paragraph 177, the Court said that "continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility" of the United Kingdom[48]—that is to say, in the Court's view, the United Kingdom's conduct constitutes a breach of an international obligation of the United Kingdom and therefore the United Kingdom is liable for any injury that its conduct has caused.[49] And at paragraph 182, the Court said that the United Kingdom "has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible".[50]

The Court's declaration that the United Kingdom has international

44. *Western Sahara*, advisory opinion, 16 Oct. 1975, ICJ Rep. 1975 at p. 25 (para. 33); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, advisory opinion, 30 Mar. 1950, ICJ Rep. 1950 at p. 71; Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p. 27.

45. *Western Sahara*, advisory opinion, 16 Oct. 1975, ICJ Rep. 1975 at p. 25 (para. 33).

46. *Chagos*, advisory opinion, ICJ Rep. at p. 117 (para. 85).

47. ICJ Rep. 2019 at p. 118 (para. 90).

48. ICJ Rep. 2019 at p. 138 (para. 177).

49. The Court here was using the terminology of State responsibility. See ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 2 (Elements of an internationally wrongful act of a State).

50. ICJ Rep. 2019 at p. 139 (para. 182).

legal responsibility—i.e., liability—for a wrongful act drew rebuke from members of the Court. Judge Donoghue dissented on the ground that the opinion "has the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius."[51] Judge Donoghue said that "the Court's pronouncements can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius."[52] Judge Tomka objected to the Court's declaration because for a court to say that a State holds international legal responsibility for a breach of international law is tantamount to having adjudicated a claim against the State, a function that an international court can perform only where the State has consented to the court performing it.[53] Judge Gevorgian recorded his disagreement with the Court's declaration as well.[54]

Judge Gaja, in substance, was in accord with Judges Donoghue, Tomka, and Gevorgian, though he took a slightly different tack. He read the judgment not to have done what it falls beyond advisory competence for the Court to do. Judge Gaja read the judgment not to have adjudicated a dispute or to have declared the "existence of an obligation for the United Kingdom to make reparation to Mauritius."[55] As we will see below, Judge Gaja indeed was clear that he did not read the opinion to require the United Kingdom to convey the Chagos to Mauritius. Reading the opinion the way Judge Gaja did is necessary, if one is to accept that the Court remained within the proper bounds of its advisory competence.

It is difficult, however, to read the Court as having said anything other than what Judge Donoghue, in her dissenting opinion, said it did: that the United Kingdom must convey the Chagos to Mauritius. It takes rather fine parsing to avoid that reading. The Declaration which Judge Iwasawa appended to the advisory opinion, perhaps, achieves the requisite parsing. Judge Iwasawa concluded that "to give *the opinion requested* [by the General Assembly] does not have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State."[56] Judge Iwasawa did not say that the opinion in fact *given* might not be susceptible to a reading that would impute that effect to it. One interpretation of the Court's statement that the United Kingdom is in breach of international law, thus, is that the statement is unnecessary to the Court's task—unnecessary, that is to say, "to giv[ing] *the opinion requested*." The Court's task was to inform the General Assembly in respect of legal questions that that organ had requested the Court to answer, not to address legal obligations to a *State* in respect of a dispute to which the State was party, even if the dispute concerned the subject matter of the General Assembly's questions. Indeed, the Court in the *Chagos* proceedings "recall[ed] that its opinion 'is given *not to States*, but *to the organ which is entitled to request it*.'"[57] It follows that any suggestion in the advisory opinion that the Court was adjudicating an inter-State dispute and determining that the United Kingdom had violated international law is what an English lawyer would call dictum.

Another interpretation that might moderate the advisory opinion's

51. Dis. Op. Judge Donoghue, ICJ Rep. 2019 at p. 261 (para. 1).
52. *Id.* at p. 265 (para. 19).
53. Declaration of Judge Tomka, ICJ Rep. 2019 at p. 152 (para. 9).
54. Declaration of Judge Gevorgian, ICJ Rep. 2019 at p. 335 (para. 1), p. 337 (para. 7).
55. Sep. Op. Gaja, ICJ Rep. 2019 at p. 269 (para. 7).
56. Declaration of Judge Iwasawa, ICJ Rep. 2019 at p. 342 (para. 10) (emphasis added).
57. Advisory opinion, ICJ Rep. 2019 at p. 116 (para. 81) (emphasis added).

language about a wrongful act would be to say that the Court indicated only a duty of *cessation* of the supposed breach of international law; it did not indicate a duty of *reparation*. This would place weight on a distinction between cessation and reparation that the ILC Articles on State Responsibility reflect, treating, as the Articles do, cessation of a wrongful act and reparation for injury that the act has caused under two separate articles, Article 30 and Article 31 respectively. The distinction between those two legal concepts, however, does not avoid the problem that led Judge Donoghue to dissent: from the Court's purported finding that the United Kingdom had committed a wrongful act, a duty to make reparation necessarily follows. In its commentary on Article 31, the ILC described the "general obligation of reparation" as "the *immediate corollary*" when a State has been found responsible.[58] The obligation of reparation "arises *automatically* upon commission of an internationally wrongful act."[59] The Court declared the United Kingdom responsible; it declared that the United Kingdom's administration of the BIOT is an internationally wrongful act. The Court's omission of an express acknowledgement of the "immediate corollary" that "arises automatically" from that purported finding does not change the purport of the Court's advisory opinion. It still reads like a judgment against the United Kingdom by a court that has adjudicated a dispute.

If one hopes to salvage the advisory opinion from this evident over-reach, then another savings tactic that one might attempt is to say that the Court's finding about the United Kingdom's legal responsibility simply affirms what is plain from general international law: that the United Kingdom, as the administering power, has legal responsibility for the territory of the BIOT. This interpretation is not satisfactory either, however, as it does not give an account of what the Court meant when it referred to an "internationally wrongful act" and it otherwise merely re-states a rather obvious point. Perhaps the Court was concerned about a less obvious point: that its pronouncement that the Chagos in 1968 still formed part of the non-self-governing territory of Mauritius might invite the inference that, because Mauritius ceased to be non-self-governing that year, *no* State since 1968 has properly exercised responsibility for the Chagos. The concern would have been to avoid turning the Chagos into a legal no-man's land. Experience from late colonial practice suggests that such a concern is not entirely without foundation. The United Kingdom itself was effectively prevented from exercising its functions as administering power in Rhodesia between 1965 and 1980 by the white minority régime and questions arose as to the practical implications of the United Kingdom's ongoing responsibility. The Court itself struggled with the aftermath of Portugal's evacuation of East Timor in 1975, a sort of abandonment of territory, following which Indonesia invaded and a long crisis ensued. A dispute as to which State held international responsibility for the colony considerably complicated the *East Timor* case. In light of these examples, one could read the Court's pronouncement about legal responsibility of the United Kingdom in the BIOT as a cautionary step,

58. Art. 31, Comment (4): 2001 *ILC Yearbook* Vol. II, Part Two, at p. 91 (emphasis added).

59. *Id.* (emphasis added).

intended to avoid familiar pitfalls.

There is an aspect of squaring a circle, when one attempts to reconcile the non-binding character of the Court's advisory jurisdiction with the Court's declaration that the United Kingdom's presence in the Chagos is an internationally wrongful act. What is clear is that a serious problem of principle results, if one reads the *Chagos* advisory opinion as a binding, dispositive declaration that the United Kingdom holds legal responsibility for a breach of international law.

For another organ to suggest the same under its own interpretative gloss would not solve the problem. The ICJ in the *Western Sahara* advisory proceedings addressed the concern that the requesting organ might subsequently put the ICJ's opinion to use as a vehicle to settle a dispute in the absence of party consent. According to the Court,

> *[t]he 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.*[60]

The Court here stated a vital limiting condition. In order for the Court to exercise its advisory jurisdiction, not only must the Court itself refrain from adjudicating a contentious case between parties that have not consented to adjudication; so, too, must the requesting organ—and we would submit, other relevant organs and parties—not treat the eventual advisory opinion as if it were a judgment between parties to a dispute. Whosoever reads it, an advisory opinion is not properly read to settle a bilateral dispute between parties that have not consented to adjudication.

How ITLOS interpreted the advisory opinion is irrelevant

In this light, a few words are in order about the preliminary objections judgment in *Mauritius/Maldives*. To recall, the ITLOS Special Chamber in the judgment declared that the 2019 ICJ advisory opinion supports the inference that the Chagos is sovereign territory of Mauritius. The derivative quality of the judgment is explicit in the Special Chamber's reasoning. According to the Special Chamber, it "[did] not consider that the Parties' disagreement on the consequences of the *Chagos* advisory opinion falls outside its jurisdiction."[61] The Special Chamber thus characterized the disagreement that the parties called on it to settle as a dispute about the advisory opinion. The Special Chamber proceeded to interpret the advisory opinion as implying that Mauritius is sovereign over the Chagos. To interpret the advisory opinion that way is to interpret it as having settled a dispute, for, even though the Court was vague or evasive about the matter,[62] individual members of the Court acknowledged that a dispute as to sovereignty over the Chagos existed when the advisory proceedings began,[63] and the two parties to the dispute had no doubt that it did.[64] Concluding that the UK-Mauritius dispute no longer exists,

60. *Western Sahara*, advisory opinion, ICJ Rep. 1975 at pp. 26-27 (para. 39).

61. *Mauritius/Maldives*, Preliminary Objections, Judgment, 28 Jan. 2021, *para.* 190. Cf. para. 115.

62. The Court, in referring to the *Mauritius* v. *United Kingdom* Annex VII proceedings, seems to have acknowledged that the dispute existed: Advisory opinion, ICJ Rep. 2019 at p. 111 (para. 50). In its summary of objections relating to the dispute and its conclusion that answering the Request did not violate the principle of party consent, the Court evaded the point: *id.* at pp. 116-118 (paras. 83-91). The Court's lengthy treatment of the principle of party consent would have been otiose, however, if the Court had not assumed that a legal dispute exists.

63. See Declaration of Judge Gevorgian, ICJ Rep. 2019 at p. 336 (para. 3): "One cannot deny that the Request [for an advisory opinion] concerns a situation in which two States claim sovereignty over a territory"; Declaration of Vice-President Xue, ICJ Rep. 2019 at p. 142 (para. 2): "It is a plain fact that the dispute between Mauritius and the United Kingdom concerning the issue of the Chagos Archipelago has been going on for decades"; Sep. Op. Judge Gaja, ICJ Rep. 2019 at p. 268 (para. 4): "…the fact that there has been a long-standing dispute between Mauritius and the United Kingdom over the Archipelago…"; Declaration of Judge Tomka, ICJ Rep. 2019 at p. 149 (para. 4): "there is a long-standing dispute over the Chagos Archipelago between Mauritius and the United Kingdom"; Dis. Op. Judge Donoghue, ICJ Rep. 2019 at p. 262 (para. 5): "There is a bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago".

64. Mauritius had sought adjudication of the dispute a number of times. See Judge Donoghue's detailed summary, with references: Dis. Op. Judge Donoghue, ICJ Rep. 2019 at pp. 262-263 (paras. 4-9).

the Special Chamber ruled that it had jurisdiction to delimit the maritime area between the Chagos (which the Special Chamber took to be part of Mauritius) and the Maldives.

Being derivative of the ICJ's advisory opinion, however, the Special Chamber's judgment is convincing only to the extent that it reflects conclusions validly drawn from the opinion. For the reasons that we have set out, the advisory opinion is not to be read as having settled the dispute between the United Kingdom and Mauritius in respect of sovereignty over the BIOT. The Special Chamber's imputation to the ICJ advisory opinion of dispositive effect over that dispute is therefore unconvincing.

It is further unconvincing to say that the ITLOS Special Chamber, a different tribunal, exercising a consent-based contentious jurisdiction over different parties in a different case, had the authority independently to adopt a disposition binding on the United Kingdom. It plainly did not. Its pronouncement in regard to the dispute in respect of the BIOT is therefore open to criticism on its own terms. It would be all the more doubtful to assert that the Special Chamber's judgment constrains the conduct of the United Kingdom.

The House of Commons Library Research Briefing of 22 November 2022 alludes to "commentators" who "have argued [that the *Mauritius/Maldives* preliminary objections judgment] has significant implications for the claims of the UK to patrol the BIOT and management of the MPA."[65] We do not see that the preliminary objections judgment has implications for the UK at all and further note that the author of the Research Briefing did not endorse, but only acknowledged, the contrary position that the commentators have expounded.

The advisory opinion does not empower the General Assembly

Among UN organs, the General Assembly long has exercised the leading role in respect of decolonization. The ICJ grounded much of its reasoning in the advisory opinion on the centrality of the General Assembly in respect of decolonization. If the advisory opinion is to have any effect, then it is in that multilateral forum, not in the setting of the bilateral relations of Mauritius and the United Kingdom, for, as we have recalled, the ICJ does not bind a State in respect of a dispute with another State over which the State has not consented to the ICJ's exercise of jurisdiction.

What the ICJ does not do directly it does not do indirectly either. The ICJ does not circumvent the principle of State consent by purporting to impart legally binding force on General Assembly resolutions on decolonization that those resolutions otherwise lack. The General Assembly, when it addresses decolonization, does so for intramural purposes, not as a general court adjudicating contentious matters arising between States in their international relations.

It is true that the Assembly's practice in respect of decolonization is said to have evolved, to the point that the Assembly has the primary function in

65. Loft, *British Indian Ocean Territory*, at p. 19 sec. 4.1.

the UN system of overseeing the relations between administering powers and their colonies, including the eventual final disposition of colonial territories. However, as there is risk in over-reading an advisory opinion of the ICJ in respect of a bilateral dispute, so too is there risk in over-reading the powers of the General Assembly in respect of decolonization. The enlarged authority often attributed to the General Assembly in respect of decolonization is said to have arisen in the early 1960s.[66] Resolutions of the General Assembly addressed Portugal at that time, a State that had refused to submit reports under Article 73e of the Charter in respect of its colonial territories. Portugal said that these were not colonies but integral provinces of Portugal. The General Assembly rejected Portugal's position as a legal fiction and indicated that Portugal was obliged to submit reports. It is hard to separate the authority of the General Assembly resolutions addressing Portugal, whatever the substance of their authority, from the UN Security Council's subsequent affirmation of those resolutions. Judge Salam in his separate opinion in the *Chagos* advisory proceedings drew attention to the Security Council practice regarding Portugal.[67] Judge Gevorgian drew attention to the Security Council practice regarding Namibia.[68] No analogous practice exists in respect of the BIOT. The General Assembly's authority does not extend as far as to identify a specific disposition of the Chagos. Much less does its authority extend to adjudicating a bilateral dispute about the Chagos.

Judge Iwasawa said that the Court did not "indicate[…] detailed modalities by which the right to self-determination should be implemented in respect of the Chagos Archipelago".[69] Judge Gaja in his separate opinion understood that "the General Assembly has not requested the Court to state *how* decolonization should be effected in relation to the Chagos Archipelago, thus completing the process of decolonization of Mauritius."[70] According to Judge Tomka, "[t]he process of decolonization in relation to the Chagos Archipelago can be successfully completed only in negotiations between the key actors, in particular between Mauritius and the United Kingdom."[71]

Tellingly, Judge Robinson and the late Judge Cançado Trindade, exponents of the view that the General Assembly has the power and responsibility to implement decolonization, did not understand the Court to have affirmed that view.[72] One would have expected Judges Robinson and Cançado Trindade to have applauded, if they had read the advisory opinion to say that it is now for the General Assembly to determine the final disposition of the BIOT. Instead, they expressed disappointment at the Court's reticence on the point. It would be strange for the United Kingdom to read into the advisory opinion a pronouncement recognizing in the General Assembly an enlarged authority that it is doubtful whether the Court itself recognized.

66. Representative of the view that General Assembly practice resulted in the evolution of a General Assembly power in regard to decolonization, see *Chagos* advisory opinion, Joint Declaration of Judges Cançado Trindade and Robinson, ICJ Rep. 2019 at p. 259 (paras. 3-6).

67. Sep. Op. Judge Salam: ICJ Rep. 2019 at p. 247 (para. 4).

68. Declaration of Judge Gevorgian: ICJ Rep. 2019 at p. 336 (para. 6) (recalling that, prior to the *Namibia* advisory proceedings, the Security Council had declared South Africa's administrative acts in Namibia "illegal and invalid").

69. Declaration of Judge Iwasawa, ICJ Rep. 2019 at p. 342 (para. 10).

70. Sep. Op. Gaja, ICJ Rep. 2019 at pp. 268-269 (para. 5) (emphasis added).

71. Declaration of Judge Tomka, ICJ Rep. 2019 at p. 152 (para. 10).

72. Joint Declaration of Judges Cançado Trindade and Robinson, ICJ Rep. 2019 at p. 259-260 (paras. 7-8).

The advisory opinion does not oblige the UK to transfer the BIOT to Mauritius

As we addressed above, an advisory opinion of the ICJ does not settle a bilateral dispute between States that have not consented to third-party settlement. Motivating Judge Donoghue to dissent from the Court was the inference that the advisory opinion nevertheless purported to settle the dispute between the United Kingdom and Mauritius by declaring that the United Kingdom "has an obligation to relinquish sovereignty [over the BIOT] to Mauritius."[73] Other judges agreed that it was not proper for the Court to declare the United Kingdom's administration of the BIOT an internationally wrongful act. The principle of party consent, which is fundamental to international law, requires that the advisory opinion not be read to have adjudicated the outstanding issues between the United Kingdom and Mauritius.

Yet, even as the limits to the ICJ's advisory competence require restraint in the interpretation that one places on the advisory opinion, so too does the substantive law applicable to decolonization. If FCDO have inferred that the ICJ concluded that Mauritius is sovereign over the BIOT, and thus that the United Kingdom is obliged to transfer control of the BIOT to Mauritius, then the inference sits uneasily with one of the main General Assembly resolutions on decolonization and with considerations that a number of Members of the Court highlighted in separate opinions.

General Assembly resolution 1541 (XV) of 16 December 1960, entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter," is clear that non-self-governing territories may attain their final disposition in a number of forms. The resolution identifies three possible forms of final disposition: (*a*) emergence as a sovereign independent State; (*b*) free association with an independent State; or (*c*) integration with an independent State. Under (*b*) and (*c*), "free association" and "integration" are, in principle, available between *any* independent State and the territory if the State and the people of the territory agree. Moreover, the terms "free association" and "integration" entail a range of possible constitutional settlements. So resolution 1541 contemplates a wide degree of choice.

We drew attention above to Judge Iwasawa's understanding that the opinion is not to be read as having "determine[d] the eventual legal status of the Chagos Archipelago."[74] Judge Iwasawa elaborated this understanding when he considered the logical consequence of the Court's conclusion that the decolonization of Mauritius, as of 1968, had not been completed:

> *As a result of its detachment from Mauritius, the Chagos Archipelago was incorporated into a new colony of the United Kingdom known as the BIOT. Thus, the Chagos Archipelago is to be regarded as a non-self-governing territory in accordance with Chapter XI… of the Charter…, even though the United Kingdom has not submitted information under Article 73 (e) of the Charter.*

73. Dis. Op. Judge Donoghue, ICJ Rep. 2019 at p. 265 (para. 19).

74. Declaration of Judge Iwasawa, ICJ Rep. 2019 at p. 342 (para. 10).

> *As the administering Power, the United Kingdom has international obligations with respect to the Chagos Archipelago, including an obligation to respect the right of peoples to self-determinations…*[75]

Having just noted that "[t]here have been cases in which either a part of a non-self-governing territory was separated or a non-self-governing territory was split into more than one State," and that such "a separation or split… is not contrary to the principle of territorial integrity *as long as it is based on the free and genuine will of the people concerned,*"[76] Judge Iwasawa indirectly, but unmistakably, identified consultation with the people of the Chagos as the proper course for the United Kingdom in determining a final disposition of the territory. Vice-President Xue, in her Declaration, also described the establishment of the BIOT as "the United Kingdom… actually creating a new colony,"[77] from which it follows that transfer to Mauritius is not *a priori* the final disposition of the BIOT but, instead, only one of a number that the relevant parties might adopt.

Judge Gaja likewise declined to infer any pre-judging of the eventual fate of the Chagos. Judge Gaja noted that, though the law of decolonization requires the administering power to respect the wishes of the inhabitants of the "whole colonial territory," the law "does not necessarily require that the whole territory be attributed to one and the same newly independent State."[78] Judge Gaja said that the incompleteness of the decolonization of the BIOT owes to the fact that "[t]he *Chagossians* were never consulted or even represented" when the United Kingdom re-organized the administration of the territory.[79] Judge Gaja questioned whether the eventual final disposition of the matter entails the Chagos being incorporated into Mauritius. "[T]he General Assembly," Judge Gaja wrote, "may revisit the issue and in particular take into account the will of the Chagossians who were expelled… and of their descendants."[80] Judge Gaja suggested that the only fact that "*may* weigh against" consulting the Chagossians as to the fate of their territory "is… their limited number and their present dispersion."[81] Judge Gaja did not note the fact, but the smallest populations that administering powers are obliged to consult under UN Charter Chapter XI are smaller than the current estimated population of Chagossians.[82]

Judge Abraham also, at least implicitly, drew attention to the possibility of a future consultation of the Chagossians and the possibility that they might express a desire other than integration into Mauritius. In his Declaration, Judge Abraham noted that "British authorities at no point sought to ascertain the will of the population of the Chagos Islands itself."[83] He proceeded to observe that the law of decolonization "cannot… preclude taking into account… the freely expressed will of the different components of the population of [a non-self-governing] territory, even if that leads to partition as a solution."[84] In conclusion, Judge Abraham proposed that a consultation through which "the Chagossian people had expressed their free and informed will not to be integrated into the new independent State of Mauritius" would have given rise to a very different state of legal affairs than that which emerged after the separation of the

75. *Id.* at p. 341 (para. 8).
76. *Id.* at p. 341 (para. 6) (emphasis added).
77. Declaration of Vice-President Xue, ICJ Rep. 2019 at p. 144 (para. 9).
78. Sep. Op. Judge Gaja, ICJ Rep. 2019 at p. 267 (para. 1).
79. *Id.* at p. 267 (para. 2) (emphasis added).
80. *Id.* at p. 269 (para. 6).
81. *Id.* at p. 269 (para. 6) (emphasis added).
82. Some estimates are that 10,000 Chagossians live in the United Kingdom alone. See Loft, Research Briefing, p. 11, sec. 3.2. Tokelau, a Non-Self-Governing Territory under the administration of New Zealand, has 1,800 inhabitants; Montserrat, a Non-Self-Governing Territory under the administration the United Kingdom, 4,300; Tuvalu, an independent State and UN Member, 11,000.
83. Declaration of Judge Abraham, ICJ Rep. 2019 at p. 153.
84. *Id.* at p. 154.

Chagos in 1965.[85] The term "Chagossian people" in this setting is a term of art: it denotes a group associated with a territory and who hold the right to determine the fate of the territory. One assumes that Judge Abraham used the term deliberately.

Judge Sebutinde, like Judge Abraham, pointed in a similar direction as Judges Iwasawa, Gaja, and Abraham. Judge Sebutinde said that the Chagossians have a right to resettlement and that the right extends not only to resettlement in Mauritius but in "a third State *such as* the Seychelles or even the United Kingdom,"[86] a form of words entailing that there are, or could be, *other* "third States" in which the Chagossians might choose to resettle. Judge Sebutinde concluded her separate opinion as follows:

> *Consistent with the right to self-determination, that choice is entirely in the hands of the Chagossians, which they must be permitted to exercise freely and genuinely.*[87]

Judge Sebutinde here used the terminology of self-determination that the UN long has applied to a people having the right to control the destiny not only of their persons but of the territory they inhabit.

These separate writings further evince an understanding that the BIOT will not necessarily attain its final disposition as part of Mauritius. As Judges Iwasawa, Gaja, Abraham, and Sebutinde understand the advisory opinion, it does not require the United Kingdom to transfer administration of the BIOT to Mauritius. Quite the opposite. Implicit in those judges' expressed conclusions, for the United Kingdom to transfer the territory without consulting the Chagossians would entail a breach of the rights of that people.

Conclusion

Judges of the Court appended twelve separate writings to the ICJ's *Chagos* advisory opinion. Of the fourteen judges who took part in the proceedings (Judge Crawford, who before his election to the Court had acted for Mauritius in the UNCLOS Annex VII proceedings, did not take part),[88] one dissented and ten signed one or more of the separate writings. In the ICJ's advisory practice since 1945, only the *Nuclear Weapons* case occasioned a more divided bench.[89] Seven judges—over half the non-dissenting judges—expressed reservations about the advisory opinion.[90] The reservations varied, but, taken in aggregate, these should temper conclusions one might draw from the Court's pronouncements. A non-binding opinion, with which only a plurality of the Court expressed unreserved agreement, is not a guidepost for a State's legal policy.

To conclude that the ICJ in 2019 obliged the United Kingdom to relinquish administration of the BIOT to Mauritius is to over-read the *Chagos* advisory opinion. It is not mere polemic or policy advocacy when we observe that the *Chagos* advisory opinion is a non-binding statement, properly addressed only to the UN organ that requested it; or that the opinion does not prescribe the form that an eventual final disposition of the Chagos is to take or the mechanism through which the relevant parties

85. *Id.* at p. 155.

86. Sep. Op. Judge Sebutinde, ICJ Rep. 2019 at p. 202 (para. 51).

87. *Idem.*

88. As to the possibility of appointing judges *ad hoc* in advisory proceedings (none were appointed in the *Chagos* advisory proceedings), see Dapo Akande & Antonios Tzanakopoulos, "Composition of the Bench in ICJ Advisory Proceedings: Implications for the Chagos Islands case," *EJIL Talk!* (10 July 2017): https://www.ejiltalk.org/composition-of-the-bench-in-icj-advisory-proceedings-implications-for-the-chagos-islands-case/ No British judge sat during the *Chagos* advisory proceedings. The elections to the Court in 2017 re-composed the bench to include an Indian candidate, Judge Bhandari, instead of the incumbent British judge, Sir Christopher Greenwood. From 1945 to 2017, the ICJ always had included a British judge, and a British judge always had served on the ICJ's predecessor, the Permanent Court of International Justice.

89. Unsurprisingly, the *Nuclear Weapons* advisory opinion (*Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Rep. 1996 p. 226) has had little impact on the practice of the nuclear-weapon States.

90. Vice-President Xue; Judge Tomka, Judge Abraham, Judge Gaja, Judge Sebutinde, Judge Gevorgian, and Judge Iwasawa. If one adds to these Judge Donoghue, who appended a dissenting opinion, then the total is eight, over half the bench. To these might be added Judges Cançado Trindade and Robinson, who thought that the Court should have said more about the General Assembly's role.

are to agree to a final disposition: the jurisprudence of the Court sustains these points, and a large part of the ICJ bench wrote separately in *Chagos* to draw attention to them. If FCDO lawyers are advising Ministers that the *Chagos* advisory proceedings and the *Mauritius/Maldives* delimitation case are "relevant legal proceedings" that leave the United Kingdom no choice but to concede sovereignty over the BIOT, then they are misconstruing those proceedings and exaggerating their legal effects. To appreciate the extent of policy choices in respect of the future of the BIOT, the Government should take a more reserved view of the ICJ's advisory opinion and the ITLOS Special Chamber's judgment than we surmise FCDO has presented.

The strategic case against cession

As we argued above, it is mistaken as a matter of international law to treat the *Chagos* advisory opinion as requiring the United Kingdom to terminate its administration of the BIOT in favour of Mauritius. Reading the advisory opinion that way also gives rise to a number of political and strategic issues to which HMG should have careful regard. The issues include the long-range viability of pacific settlement of international disputes through legal process; the sovereign rights of a number of countries that emerged after the separation of territory from former colonial administrative units; and the United Kingdom's relations with allies and partners who have supported the United Kingdom in the defense of its rights in the BIOT.

Threat to the security of the United Kingdom and its allies

It would be hard to overstate the strategic importance of the Indian Ocean for the United Kingdom and its allies. It is the major space linking the Atlantic, Pacific, and even the Mediterranean, and around its periphery are some of the most strategically significant choke points: the Malacca Straits, the Straits of Hormuz and the Bab el Mandeb.

And if the Indian Ocean—a region at the core of the recent Integrated Review—is the centre of this critical region, then Diego Garcia is at the very centre of the Ocean. A ring of atolls forming a natural harbour, Diego Garcia is home to a large airfield, an anchorage and port, a logistic base and a communications hub. It is one of the most useful military pivots the five-eyes nations have. Just as the UK is the unsinkable aircraft carrier off the coast of north-western Europe, Diego Garcia plays a similar role, but for the expansive Indo-Pacific region. It is precisely because of their overwhelming strategic importance that the United Kingdom chose to preserve its sovereignty over the territory at a time when it was relinquishing virtually all of its former colonial empire.

Mauritius has suggested that it might be willing to continue to lease Diego Garcia to the United States on a long-term basis. However, if sovereignty is transferred to Mauritius, neither the UK nor the US could ever again assume that they have complete autonomy in their use of Diego Garcia. As the sovereign over the Chagos Islands, Mauritius could seek to vary or even terminate any base leasing agreement it concludes, thus making any long-term planning for Diego Garcia difficult. It could also

seek to use the other Chagos islands for other purposes, thus diminishing the isolation which is one of the key assets of Diego Garcia. There is a radical difference between agreeing a lease over Diego Garcia, which is at best temporary and is vulnerable to being modified, cancelled or not renewed, and exercising sovereignty over the BIOT, which provides categorical protection for continued UK-US operations.

There are many past examples of seemingly-permanent basing agreements being terminated or modified under pressure from one of the parties—one only has to think of the United States' basing rights in the Panama Canal Zone or the United Kingdom's facilities in Libya which were evacuated as a result of a change of regime. In the early 1990s, the United States had to abandon its largest and second largest military facilities outside of the United States as a result of the failure of negotiations with the Philippines. The reason why the UK insisted on the retention of sovereign rights, as opposed to a simple lease, was precisely to avoid such occurrences.

One does not need to look further away than the very history of the Chagos Islands to see how the future of Diego Garcia may be threatened. In 1965, the Chagos were detached from the crown colony of Mauritius by binding agreement by a moderate government of Mauritius which was sympathetic to the United Kingdom's security needs and the goals of the Western allies more generally, and which accepted British sovereignty over the Chagos Islands. A mere two decades later, Mauritius had a much more radical government which not only denied the validity of the agreement entered in 1965, but which called for the closing of the Diego Garcia base, a stance which the Mauritian government only abandoned in the twenty-first century. Notwithstanding any Mauritian guarantee over the future of Diego Garcia, it is obvious that the Mauritian government may well change its position yet again once it obtains sovereignty over the Chagos.

Moreover, there are obvious concerns over China's interests in the region. Mauritius and China maintain close economic relations, and a Mauritius-China free trade agreement entered into force in 2021. China is also a major provider of loans for infrastructure projects in Mauritius, which naturally raise concerns given its track record in using debt-trap diplomacy to further its strategic goals.

While the likelihood of the Chagos Islands being used as the site of a Chinese base in the near future may be small, there are mounting concerns on both sides of the Atlantic that China may eventually encroach on the Islands if they are ceded to Mauritius. In late 2022, Michael Waltz, the chairman of the United States House Armed Services Subcommittee on Readiness, wrote to the Pentagon to express concerns that an agreement between the United Kingdom and Mauritius could allow China to "take advantage of the resulting vacuum", which "would be catastrophic to deterring our adversaries in the Middle East and Indo-Pacific".[91] Rep Waltz noted that, in his understanding, "current negotiations do not include safeguards to prevent China from building military facilities on other islands in the Chagos Archipelago.".

91. "Waltz Raises Alarm Over Negotiations that Could Jeopardize Diego Garcia Naval Facility", 19 December 2022. https://waltz.house.gov/news/documentsingle.aspx?DocumentID=655

Later, in May 2023, a report noted that the White House had expressed "serious concerns" about the UK-Mauritius talks over Chinese encroachment in the area, a report confirmed by a senior British government source.[92]

And as former British prime minister Boris Johnson recently noted, "The Americans don't give us crucial nuclear secrets just because they love little old England. They don't share intelligence because they adore our quaint accents. We have a great and indispensable relationship because we have important things to offer – including Diego Garcia." If the UK-Mauritius negotiations result in an adverse outcome for the operation of the Diego Garcia base, this could severely damage the UK-US defence relationship, which has been crucial for both countries' security for almost a century.

Viability of consent-based dispute settlement under international law

An achievement of international law in the UN era has been its development of judicial and arbitral procedures that States have consented to use in order to achieve binding results in settlement of legal disputes. To treat an advisory opinion as a binding judgment in a contentious matter to which a State did not consent to third-party settlement would be to declare a constitutional transformation in international law against which States almost certainly would rebel. The continued viability of international dispute settlement procedures, therefore, depends upon judges and arbitrators respecting the limits of the adjudicative function. The principle of State consent, as we noted above, marks the limits.

Judge Donoghue (now President of the ICJ), dissenting in the *Chagos* advisory proceedings, observed that Mauritius, the African Union, and certain other States were explicit that they sought to enlist the advisory procedure of the Court in order to adjudicate and settle the bilateral dispute between Mauritius and the United Kingdom.[93] Judge Donoghue, with dismay, concluded that the *Chagos* advisory opinion "signals that the advisory opinion procedure is available as a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases."[94] This is a development that "undermines the integrity of the Court's judicial function."[95] Judge Tomka, in a Declaration appended to the advisory opinion, also expressed concern that "advisory proceedings have now become a way of bringing before the Court contentious matters, with which the General Assembly had not been dealing prior to requesting an opinion upon an initiative taken by one of the parties to the dispute."[96] Judge Tomka admonished that the "Court must not forget that what looms in the background is a bilateral dispute *over which the Court lacks jurisdiction*."[97]

The ICJ gave assurance that the opinion that the General Assembly had requested in respect of the Chagos would not violate the principle of State consent. In its advisory opinion, it emphasized that "the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute."[98]

92. Glen Owen, "Britain's plan to hand over 'unsinkable aircraft carrier' island in the Indian Ocean to Chinese ally Mauritius sparks row with US", *Daily Mail*, 20 May 2023. https://www.dailymail.co.uk/news/article-12106789/White-House-raises-concerns-plans-Britain-hand-aircraft-carrier-island.html

93. Dis. Op. Judge Donoghue, ICJ Rep. 2019 at pp. 263-265 (paras. 11-16) (quoting relevant pleadings).

94. ICJ Rep. 2019 at p. 266 (para. 23).

95. *Id.*

96. Declaration of Judge Tomka, ICJ Rep. at p. 148 (para. 2).

97. *Id.* at pp. 150-151 (para. 6).

98. ICJ Rep. 2019, p. 95 at 118 (para. 89).

To the extent that, in spite of the ICJ's assurance, the opinion pronounced judgment on the United Kingdom's dispute with Mauritius in respect of the Chagos, the opinion should be ignored. To treat it as having adjudicated the bilateral dispute would be to impute legal effects to the opinion that are incompatible with the advisory function of the Court.

Exponents of a general system of compulsory jurisdiction in international law no doubt welcome an expansive interpretation of the *Chagos* opinion. The States that are the main constituents of the international legal system, however, would resile from pacific dispute settlement if such an interpretation prevailed. Quite apart from protecting the United Kingdom's immediate rights and interests in the BIOT, interpreting the *Chagos* opinion no further than the principle of State consent allows would serve the United Kingdom's long-range interest in fostering confidence in international dispute settlement procedures.

To differentiate from objections sometimes heard in respect, e.g., of jurisdiction under the WTO Dispute Settlement Understanding or under the European Convention on Human Rights, we are not speaking here about accretive steps by which a court enlarges a jurisdiction to which a State, at least at base, had consented. Our concern is with a more radical claim—a claim that a State's consent is no longer necessary at all. *That* claim undoubtedly would challenge one of the core principles that has underlain international legal relations in the modern era.

We fear that FCDO, in its decision to make concessions to Mauritius in respect of the BIOT, has given the impression that it accepts the mistaken premise that the ICJ advisory proceedings on the Chagos have dispositive legal effect on the United Kingdom. If that premise indeed motivates current British policy, the long-term consequences will be very adverse, and Ministers ought to repudiate the premise and rethink their negotiation.[99] HMG is familiar with the challenges that have arisen from an international court exercising a far-reaching jurisdiction in human rights matters. The challenges that would arise from a general compulsory jurisdiction would be more serious still.

Casting a cloud over sovereign rights in other colonial and post-colonial settings

To treat a future integration of the BIOT into Mauritius as an automatic result—that is to say, to treat integration as an effectively irrebuttable presumption under the law of decolonization—is dubious on grounds that we have addressed. It also would have troubling effects: it would cast a cloud over sovereign rights in a number of other colonial and post-colonial settings.

Judge Iwasawa, whose separate opinion in the *Chagos* proceedings we discussed above, made clear that a consent-based "separation or split of a non-self-governing territory is not contrary to the principle of territorial integrity."[100] Judge Abraham, whose Declaration we also noted, recalled in particular the Gilbert and Ellice Islands.[101] Gilbert and Ellice had

99. See further Written Statement of the Government of Australia (27 Feb. 2018) p. 9 (para. 37), adverting to the problem of "increasingly familiar attempts by claimant States to recharacterize disputes in a way that avoids limits on jurisdiction"; Written Statement of the United States of America (1 Mar. 2018), p. 15 (para. 3.31), noting that the Court, in answering the request, "could lead to the normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when the States directly involved have not consented to judicial settlement."

100. Declaration of Judge Iwasawa, ICJ Rep. 2019 at p. 341 (para. 6).

101. Declaration of Judge Abraham, ICJ Rep. 2019 at p. 155.

constituted one British colony and were eventually separated to form two independent States, Kiribati and Tuvalu. As Judge Abraham noted, States never "espoused an absolutist conception of the principle of territorial integrity" of non-self-governing territories such as would "preclude the partition of a colonial territory during the independence process."[102] To espouse an "absolutist conception" today would invite retrospective challenges to the manner in which States such as Kiribati and Tuvalu gained their independence.

Also relevant in this connection is the final disposition of the former Trust Territory of the Pacific Islands. Placed under trusteeship responsibility of the United States after World War Two, this widely-dispersed series of territories emerged in the early 1990s as three independent States—the Marshall Islands, the Federated States of Micronesia, and Palau—and one Commonwealth Territory of the United States, the Commonwealth of the Northern Mariana Islands. There were objections at the time, in particular from the USSR, purporting that consultations with the inhabitants of the Trust Territory did not suffice to establish their desire to proceed as separate States to independence. The independent States of Rwanda and Burundi, too, resulted from the division of a Trust Territory. For the United Kingdom to treat the *Chagos* advisory opinion as requiring a particular final disposition of the BIOT will provoke questions as to why the same disposition did not apply to other former colonies.

A recent study of the independence of Sudan also, in a general way, suggests that one should approach with caution claims that the post-colonial disposition of a territory must be its integration with another territory to which it had been connected as a matter of administrative convenience. Tassinis and Nouwen considered the United Kingdom's pursuit of independence for Sudan, as against Egypt's claim for that territory to be absorbed into Egypt.[103] The authors posited no analogy between Egypt's claim in respect of Sudan and Mauritius's in respect of the Chagos. The authors said, instead, that, by having invoked self-determination at the Security Council in 1947 after Egypt asserted that Sudan belonged to Egypt, the United Kingdom created a record at variance with the United Kingdom's argument in the *Chagos* advisory proceedings that an international law right to self-determination only emerged in the 1960s or 1970s.[104] However, it seems to us that Tassinis and Nouwen's research is relevant to Mauritius's claim that the Chagos must be absorbed into Mauritius, for Egypt did not prevail in its arguments in 1947; Sudan was not absorbed into Egypt. The final disposition of Sudan, in short, offers a further example of how earlier administrative relationships do not necessarily determine the eventual disposition of a colonial territory. Sudan, no doubt, would be surprised if told that its separation from Egypt were somehow improper or to be re-considered in light of new understandings about decolonization law.

Exponents of the advisory opinion might argue that any concern about a cloud over sovereign rights in other post-colonial settings is misplaced. The sovereign rights of other countries in post-colonial settings, the

102. *Id.* at p. 155.

103. Orfeas Chasapis Tassinis & Sarah MH Nouwen, "'The Consciousness of Duty Done'? British Attitudes Towards Self-Determination and the Case of the Sudan," 2019 *British Yearbook of International Law* 1-56.

104. *Id.* at pp. 5-6, 53-54. For Egypt's assertion of sovereignty, see *id.* at p. 45.

exponents would say, have been settled with finality and, so, the United Kingdom should not be anxious that its policy toward the Chagos might disturb these. Yet the sovereign rights of the United Kingdom in the Chagos seemed settled in 1968. Mauritius was removed from the list of non-self governing territories;[105] independent Mauritius went over a decade without objecting to the United Kingdom's presence in the Chagos; the General Assembly went nearly half a century without saying anything about the matter at all.[106] Seeming finality in post-colonial questions has at times given way to sharpest contestation. The United Kingdom conceding its rights in the BIOT potentially affects the sovereign rights of countries in other post-colonial settings.

Lest the concern here seem entirely remote or hypothetical, it is to be noted that several of the States that made submissions in the *Chagos* advisory proceedings had emerged from colonization in circumstances where their separation from other former colonial territories, too, might have given rise to challenge. Niger had been part of French West Africa;[107] the Marshall Islands (as noted), part of the Strategic Trust Territory of the Pacific. Belize had been subject to a claim by its neighbour, Guatemala, that the United Kingdom should have ceded the entirety of the country to Guatemala rather than treat it separately.[108] No present-day claim of such extent being active against any of these States, it is no surprise that none of them explicitly announced that the Court's treatment of the Chagos might compromise their interests. However, the fact that a State as poor and under-resourced as Niger participated in the advisory proceedings suggests that its government was not insensible to the stakes.

Also evidently aware that the advisory opinion might support the inference that post-colonial integration is a mandatory presumption was Argentina. Of course, Argentina viewed the proceedings as an opportunity, not a risk: its submissions lay emphasis on integrating colonial territories into independent States.[109] The African Union, for its part in the *Chagos* advisory proceedings, expressly associated its "support to Chagos and the Chagossians, as part of Mauritius" to its support to "the Malvinas" (i.e., the Falkland Islands),[110] by which it presumably meant "as part of Argentina". Mauritius, too, preferred the Argentine nomenclature, though it did not elaborate the implications.[111]

An incautious approach to the advisory opinion would potentially affect the administration of territories that remain under Chapter XI of the UN Charter. Judge Tomka took the Court to task for its "unnecessary pronouncement" that the United Kingdom's administration of the BIOT is "'an unlawful act of a continuing character'".[112] We noted above that the ICJ had no authority to adjudicate a contentious case under its advisory competence, and, so, it is a mistake, if one reads the Court to have adjudicated a contentious case between Mauritius and the United Kingdom. Even if the United Kingdom had consented to the Court exercising jurisdiction over Mauritius's claims about the BIOT, it still would have been erroneous to declare the United Kingdom's administration illegal and as attracting international responsibility to the United Kingdom for a supposed breach.

105. A point that Vice-President Xue acknowledged: see ICJ Rep. 2019 at p. 144 (para. 10).

106. A point to which Judge Tomka drew attention: see ICJ Rep. 2019 at p. 149 (para. 4).

107. See *Frontier Dispute (Burkina Faso/Niger)*, Judgment, 16 Apr. 2013, ICJ Rep. 2013 p. 44, 58 (para. 12); *Frontier Dispute (Benin/Niger)*, Judgment, 12 July 2005, ICJ Rep. 2005 p. 90, 110 (para. 29). Cf. *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 Dec. 1986, ICJ Rep. 1986 p. 554, 569 (para. 31).

108. As to the Guatemalan claim and transactions seeking to quiet title, see James Crawford, *The Creation of States in International Law* (2nd edn. 2006) pp. 637-638 n. 165.

109. See, e.g., Written Statement of the Argentine Republic (1 Mar. 2018), in which the phrase "territorial integrity" appears thirty-six times. In the thirty-two Written Statements submitted, in only those of Mauritius and Belize does the phrase appear more. Belize currently is litigating in respect of potentially far-reaching territorial claims by Guatemala. See also Argentina's rejection of "the existence of a 'Chagossian people'," by which Argentina meant that integration of the Chagos into Mauritius is to be automatic: Written comment of the Argentine Republic in relation to the reply by the Republic of Mauritius to the question put by Judge Gaja (12 Sept. 2018).

110. Ms. Negm (for the African Union), Verbatim Record, CR 2018/27 (6 Sept. 2018) p. 16 (para. 2).

111. See Written Statement of the Republic of Mauritius (1 Mar. 2018) p. 207 (para. 6.33).

112. Declaration of Judge Tomka, ICJ Rep. 2019 at p. 151 (para. 8) (quoting advisory opinion at para. 177).

Colonial administration in the sense with which UN Charter Chapter XI is concerned is not, and has never been, an unlawful act *per se*.[113] And so would one expect. Colonial countries participated in drafting Chapter XI, and Chapters XII and XIII, its congeners on trusteeship, and those countries, or most of them, from 1945 onward faithfully implemented the Charter law. This widespread practice was not an act of self-condemnation; it was a consent-based step to place the present and future disposition of colonies in an orderly legal frame. As Judge Tomka noted, colonial administration, including the United Kingdom's administration in the BIOT, is simply not a matter embraced by the law of State responsibility for unlawful acts. It is, instead, a matter within the law of decolonization, and, thus, a matter to be addressed through the process of *that* law, a process that many times in the past has led to the emergence of new countries from the colonies that Chapter XI addresses.[114]

Some sixteen territories continue to be administered in accordance with Chapter XI, ten of them by the United Kingdom.[115] To embrace an interpretation of the *Chagos* advisory opinion that implies that state of affairs to constitute a breach of international law would have far-reaching and unsettling effects on international legal relations.[116] This is a further ground in legal policy for HMG to exercise caution in its approach to the *Chagos* advisory opinion.

A *volte-face* as potential embarrassment to the United Kingdom's partners and allies

Finally, the reception that the United Kingdom gives the *Chagos* advisory opinion has implications for relations with several partners and allies.

If the United Kingdom performs a *volte face*, accepting the ICJ's advisory opinion as – or as if it were – a binding judgment in respect of the United Kingdom's bilateral dispute with Mauritius, then this risks embarrassing partners and allies of the United Kingdom that participated in the proceedings, especially those that made clear that the ICJ does not have the power under its advisory procedure to settle contentious matters between States. Germany, for example, concerned that the General Assembly's request for the opinion "should not be interpreted in an overstretched manner," reminded the Court that it "cannot decide on the bilateral dispute which forms the background of the request… given the overarching principle of consent which governs the exercise of the Court's contentious jurisdiction."[117] Australia said that the request *cannot* be interpreted except as a request to adjudicate a contentious case, and therefore that the Court should have refused to answer it.[118] France, recalling in detail its explanation for having abstained from voting on the General Assembly resolution containing the advisory request, said that it agreed that the request, in truth, asked the Court to adjudicate a bilateral dispute and, thus, that the Court should not answer it.[119] The United States said that "[i]t is quite clear that Mauritius sought an advisory opinion in order to advance its sovereignty claim against the United Kingdom, after

113. See, e.g., Written Statement of the Kingdom of the Netherlands (27 Feb. 2018) p. 10 (para. 3.16).
114. Declaration of Judge Tomka, ICJ Rep. 2019 at p. 152 (paras. 9, 10).
115. The Non-Self-Governing Territories that the United Kingdom administers are Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, the Falklands, Montserrat, Saint Helena, the Turks and Caicos Island, Gibraltar, and Pitcairn.
116. Other Administering Powers that would be affected by the development that Judge Tomka warns against are the United States (for the administration of the U.S. Virgin Islands, American Samoa, and Guam), France (for the administration of French Polynesia and New Caledonia), and New Zealand (for the administration of Tokelau).
117. Written Statement of Germany (Jan. 2018) p. XI (paras. 33, 34).
118. Written Statement of the Government of Australia (27 Feb. 2018) pp. 5-6 (paras. 23-24), pp. 16-17 (para. 59).
119. Written Statement of the French Republic, (28 Feb. 2018), p. 2 (para. 6); p. 5 (paras. 16-19).

failed attempts to seek adjudication of that claim in other fora" and, so, the Court should not exercise jurisdiction over the matter.[120] The United States later added that "the vast majority" of States that submitted statements to the Court "affirm[ed] that the legal questions really in issue" concern "an ongoing bilateral dispute concerning sovereignty over territory".[121]

It has been suggested that negotiating a transfer of the BIOT to Mauritius would help the United Kingdom strengthen a coordinated response toward China in the Indo-Pacific. We find it difficult to understand the reasoning. An as-yet-unrealized advantage in diplomatic relations with a Non-Aligned country does not justify the risk of an immediate split from long-standing allies that share vital interests with the United Kingdom in the region. Given the vagaries and imprecision of diplomacy, a prospective improvement in diplomatic relations is not a substantial dividend. The costs, however, are clear. The United Kingdom now seems poised to relinquish control over a strategic asset.[122] Moreover, by embracing the results of the ICJ advisory proceedings and seeming to impute binding force to them, the United Kingdom exposes itself and other countries to further losses in future.

120. Written Statement of the United States of America (1 Mar. 2018) p. 14 (para. 3.25); pp. 15-16 (para. 3.32).

121. Written Comments of the United States of America (15 May 2018) p. 40.

122. See, e.g., U.S. Department of Defense letter dated 17 Mar. 2023 in response to a Congressman's inquiry into concerns about the People's Republic of China "deepening ties with Mauritius": https://www.dailymail.co.uk/news/article-11894657/Pentagon-reveals-concerns-Chinas-influence-Mauritius-amid-threat-Diego-Garcia-base.html

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