
Reflections on the UK's Assertion of Sovereignty over the Chagos Archipelago in the Wake of the *Chagos* Advisory Opinion

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8.1 Introduction

This chapter considers the UK's assertion of sovereignty over the Chagos Archipelago in the wake of the Advisory Opinion of the International Court of Justice (ICJ) in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. It will be argued in this chapter that the UK's assertion to sovereignty is tenuous, as it rests on weak foundations which are increasingly undermined by the colonial context in which the then colony of Mauritius agreed to the detachment of the Chagos Archipelago. The UK's sovereignty over the Chagos Archipelago is contested by Mauritius (and by the majority of countries that have given their support to the campaign to force the return of the territory). The Republic of Mauritius first challenged the UK's sovereignty at the United Nations General Assembly (UNGA) in 1980, some twelve years after gaining its independence.¹ The Court's Advisory Opinion is a landmark in terms of how sovereignty over the Chagos Archipelago must now be approached.

I would argue that by sovereignty it is meant legitimate possession of territory, legitimate not just in the context of colonial-era agreements about territorial control between the metropolis and the colonial subordinate, but also in the eyes of the international legal order created in the

^{*} I would like to thank the two anonymous reviewers for their helpful feedback. All errors remain my own.

¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 para 46.

aftermath of the Second World War. The United Kingdom's position is at odds with the overwhelming court of global opinion, albeit supported by the world's only superpower, the United States. The purpose of this chapter is to succinctly set out the arguments submitted by the UK in its written statement of 15 February 2018, thus providing a treatment of sovereignty from the UK's legal position. This chapter will consider the arguments that the UK put forward to defend its sovereignty over the Chagos Archipelago and to attempt to stymy any attempt by Mauritius to have the Court give an opinion as to the legitimacy of the UK's assertion of sovereignty. It will then consider the Advisory Opinion and how the finding that the decolonisation of Mauritius had not been lawfully completed challenges the UK's assertion of sovereignty. Finally, it will consider the UK's attempts to reiterate its position, namely, that it has legitimate sovereignty over the Chagos Archipelago in the aftermath of the Advisory Opinion and the UNGA Resolution ordering it to complete the decolonisation of Mauritius and return the territory.

Mauritius (and as a consequence the Chagos Archipelago) first came under British sovereignty by virtue of the Treaty of Paris in 1814. The treaty had been intended to bring the Napoleonic Wars to an end and dealt in part with what was to happen to those French overseas colonies that the UK had occupied as part of the global war effort against firstly the First French Republic and then the First French Empire. Mauritius had been a thorn in the side of the UK's leading trading corporation, the East India Company, based in Leadenhall Street, London, as it provided a base for French forces to intercept the Company's ships and could serve as a launchpad for any French military assistance to the Company's local rivals.² By acquiring the sovereignty of Mauritius and its dependencies, the UK gained an important colony that would remain under the Crown's sovereignty until 1968, when Mauritius gained its independence. It has been well documented how and why the UK decided to detach the Chagos Archipelago from Mauritius in November 1965. This detachment (agreed to by the Mauritian representatives at Lancaster House, London) led to the creation of the British Indian Ocean Territory (BIOT) by Order in Council. The UK having persuaded the Mauritian representatives to agree, however tenuous the level of consent

² For the role played by Mauritius, see Amita Das, *Defending British India against Napoleon: The Foreign Policy of Governor-General Lord Minto, 1807–13* (Boydell and Brewer 2016) and Cyril Henry Philips, *The East India Company 1784–1834* (Manchester University Press 1940).

achieved in hindsight, left the UK with a strategically important colonial outpost in the middle of the Indian Ocean.

Before considering the UK's written statement, I want to make four initial points about the circumstances of, and background to, the dispute. Firstly, from the outset the UK made clear that the detachment of the Chagos Archipelago from Mauritius was never going to be absolute, as it made a (legally) binding commitment in the Lancaster House Agreement of 1965 that the territory would be returned to Mauritius when it was no longer needed for defence purposes.³ The reason for the detachment of the Chagos Archipelago and the creation of the BIOT was to facilitate the construction and maintenance of a joint UK–US military base. It should also be observed that, however much the UK sought to argue (as will be discussed in Section 8.2) that the Chagos Archipelago was administered from Mauritius as a matter of convenience and that it was never part of Mauritius proper, there was enough of a connection to entitle Mauritius, by virtue of the Lancaster House Agreement, to have the Archipelago returned when it was no longer needed. The original language used in the Lancaster House Agreement was to 'return' the Archipelago, whereas today this term has been superseded by the word 'cede', which arguably reflects the UK's position as to defending its assertion of sovereignty.

Secondly, as a consequence of detaching the Chagos Archipelago, the UK acquired a colony with a distinct population, known as the Chagossians or Chagos Islanders. The UK removed the entire population from the Chagos Archipelago and, in order to defend its actions, denied at both a national level, before Parliament, and an international level, before the UNGA, the existence of a permanent population. The UK has apologised for how it treated the Chagossians, both in domestic litigation before the Appellate Committee of the House of Lords⁴ and internationally in its written statement in these proceedings and in oral pleadings. For example, at the oral hearing, Robert Buckland MP QC, the then

³ However, it is important to note that the United Kingdom (and the United States) may never cease to require the territory for defence purposes.

⁴ *R (On the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61. Domestically, the legality of the UK's removal of the Islanders and its subsequent refusal to allow their return has been challenged before the courts. As a result of the House of Lords' decision in *Bancoult (No 2)*, the Islanders cannot return, as the prerogative Orders in Council preventing their return were found to be lawfully made. For a critical commentary, see Chris Monaghan, 'An Imperfect Legacy: The Significance of the *Bancoult* Litigation on the Development of Domestic Constitutional Jurisprudence' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean: Legal Perspectives* (Springer 2018).

Solicitor General, informed the ICJ: 'At the outset, let me say that the United Kingdom reiterates that, as stated in its Written Statement and in its Written Comments, it fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact.'⁵

Thirdly, the military base situated on Diego Garcia, the largest island in the Chagos Archipelago, is used by the USA, and there have been substantiated allegations that human rights abuses have occurred on and around Diego Garcia during the so-called War on Terror.⁶

Finally, the proceedings before the ICJ were as a result of a request by the UNGA for an Advisory Opinion on the question of whether the decolonisation of Mauritius was lawfully completed following the separation of the Chagos Archipelago. This is important, as the request was framed to address decolonisation, not sovereignty, as this was the subject of a bilateral dispute between the UK and Mauritius, and would, if presented as such, have most likely resulted in the Court declining jurisdiction.⁷ However, the non-decolonisation of Mauritius

⁵ *Chagos* (n 1) Oral Submissions of the United Kingdom, Verbatim Record of the 21st Public Sitting (3 September 2018) ICJ CR 2018/21 6–7 para 5.

⁶ See Peter H Sand, 'The British Indian Ocean Territory: International Legal Black Hole?' [2018] 55 QIL, *Zoom Out* 35 and Stephen Allen, 'The Scope of Third-Party Responsibility for Serious Human Rights Abuses under the European Convention on Human Rights: Wrongdoing in the British Indian Ocean Territory' [2016] 16(4) *Human Rights Law Review* 771.

⁷ In the *Western Sahara* Advisory Opinion the ICJ had observed that, 'in certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction' (*Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 para 33). Judge Donoghue in her Dissenting Opinion in *Chagos* was clear that the Court was wrong to have given an Advisory Opinion, as there were compelling reasons not to do so, based on the bilateral dispute between Mauritius and the UK and the absence of the latter's consent. Judge Donoghue was critical: 'Today the Court recites once again that there would be "compelling reasons" to decline to give an advisory opinion when such a reply "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" (Advisory Opinion, paragraph 85, quoting *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 25, para. 33). However, the decision to render today's Advisory Opinion demonstrates that this incantation is hollow. It is difficult to imagine any dispute that is more quintessentially bilateral than a dispute over territorial sovereignty. The absence of United Kingdom consent to adjudication of that bilateral dispute has been steadfast

by the retention of the Chagos Archipelago meant that Mauritius's claim to sovereignty would be founded upon the UK's failure to decolonise Mauritius as required by General Assembly Resolutions, including 2066 (XX), 2232 (XXI) and 2357 (XXII). Milanovic observed that 'the formulation of the question . . . was VERY clever on the part of Mauritius'.⁸

8.2 The UK's Written Statement

This section will discuss the pertinent parts of the UK's written statement regarding its sovereignty over the Chagos Archipelago and, as part of this, the legitimacy of detaching the territory from Mauritius in 1965. The facts are in dispute and therefore many of the UK's assertions and the interpretations given have been contested by Mauritius.

A number of themes are prevalent in the written statement. The first is that the UK was clear that the present request for an Advisory Opinion should be declined.⁹ This was because of the fact that there was 'a long-standing bilateral dispute' relating to sovereignty of the Chagos Archipelago between Mauritius and the UK. The UK relied on the ICJ's earlier Advisory Opinion in *Western Sahara*, which stated that a party to a dispute, such as between Mauritius and the UK, should not be 'obliged to allow its disputes to be submitted to judicial settlement without its consent'.¹⁰ This was not a 'matter of decolonization' but rather another attempt by Mauritius to challenge the UK's sovereignty over the Chagos Archipelago, having failed to achieve this in the Chagos Marine Protected Area arbitration (*Mauritius v United Kingdom*).¹¹ The UK was clear that Mauritius was pursuing sovereignty and using the issue of decolonisation as a way to bypass the rule articulated in *Western*

and deliberate. Mauritius was thwarted by this absence of consent, so took another route, pursuing the present request and thereby fulfilling the affirmation of its Foreign Minister in 2004 (see paragraph 6 above) that the State would use "all avenues open to us in order to exercise our full sovereign rights over the Chagos Archipelago". The delivery of this Advisory Opinion is a circumvention of the absence of consent' (*Chagos* (n 1) Diss Op Donoghue para 21).

⁸ Marko Milanovic, 'ICJ Delivers Chagos Advisory Opinion, UK Loses Badly' (*EJIL: Talk!*, 25 February 2019) <www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/> accessed 29 April 2020.

⁹ *Chagos* (n 1) Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 February 2018) para 1.3.

¹⁰ *ibid* para 1.3. See *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

¹¹ *ibid* para 1.2. See *In the Matter of the Chagos Marine Protected Area (Mauritius v United Kingdom)* (Final Award) [18 March 2015] PCA No 2011-03, 31 RIAA 359.

Sahara.¹² Making its objections to the request for an Advisory Opinion clear, the UK informed the General Assembly that, '[d]espite the terms of the draft resolution, this is not a matter of decolonization . . . I must underline again that this is a bilateral dispute between two States . . . The draft resolution is therefore a back-door route to the Court.'¹³ Furthermore, in its written statement the UK argued that whilst the request did not mention sovereignty or legitimate ownership, the Court would have to effectively decide on this if it were to give an Advisory Opinion.¹⁴

The second theme is that the UK has had continuous sovereignty over the Chagos Archipelago since 1814. This was as a result of the Treaty of Paris. The UK argued that the Chagos Archipelago was never an integral part of Mauritius; it was only ever a lesser dependency.¹⁵ The Archipelago never formed part of Mauritius when it received its independence in 1968.¹⁶ In its written statement the UK emphasised the geographical distance between Mauritius and the Chagos Archipelago.¹⁷ Importantly, the UK argued that, '[a]s the status of Dependency was an administrative convenience[,] the nature of the relationship with its administering overseas territory was, by definition, variable. In the British context, Dependencies could be, and often were, detached or attached as between one colony and another by exercise of the Royal Prerogative.'¹⁸ It was acceptable to reorganise colonies, such as the detachment of the Seychelles from Mauritius in 1903.¹⁹ There is a strong emphasis on administrative convenience and the legitimacy of attaching and detaching territory from one colony to another. The UK was clearly emphasising that not much should be made from the fact that the Chagos Archipelago was a dependency of Mauritius. Indeed, the level of control was limited and neither was the territory of any economic importance for Mauritius.²⁰ The UK argued that the Chagos Archipelago was not an integral part of Mauritius, with laws and the constitution having to be explicitly extended to apply to the Chagos Archipelago, and there was a 'distinction between Mauritius and its Dependencies [which]

¹² *ibid* paras 1.12–1.13, 1.15.

¹³ *ibid* para 1.15.

¹⁴ *ibid* para 1.20.

¹⁵ *ibid* para 1.23.

¹⁶ *ibid*.

¹⁷ *ibid* para 2.5.

¹⁸ *ibid* para 2.15.

¹⁹ *ibid* para 2.17.

²⁰ *ibid*.

was maintained' whilst under British rule.²¹ The 1968 constitution, which preceded Mauritian independence, implicitly excluded the Chagos Archipelago from constituting part of Mauritius.²²

This is important as Mauritius had been a sovereign colony of the UK and been administered under the prerogative, meaning that the UK had been free to decide how to arrange its territory as a sovereign state, and had, as a matter of constitutional law, decided to detach the Chagos Archipelago from Mauritius. From this argument one can see the continual thread of sovereignty that extended from 1814 through to 1965, and from 1965 to the present day. The UK's presentation of the facts is initially attractive as it potentially explains why the detachment could be regarded as legitimate and not extraordinary.

The third theme is that the detachment of the Chagos Archipelago operated within the field of UK constitutional law and involved the use of the prerogative.²³ The creation of the BIOT by an Order in Council was not an exceptional event, in as much as the detachment of territory was accepted constitutional practice.²⁴

The fourth theme is that the detachment was agreed to by Mauritius and implicitly approved in the 1967 general election prior to independence.²⁵ The UK denied that Mauritius's consent to the detachment of the Chagos Archipelago was 'closely linked to the grant of independence'.²⁶ Furthermore, the agreement by the Mauritians was in return for financial benefits and defence assurances and '[t]here is no basis whatsoever for saying that there was any form of duress or that consent to detachment was not validly and freely given'.²⁷

The final theme is that of the treatment of the Chagossians and the attempts before domestic courts²⁸ and at the European Court of Human Rights²⁹ to challenge the decision to exile the inhabitants of the

²¹ *ibid* para 2.29.

²² *ibid* para 3.40.

²³ *ibid* paras 2.30–2.33.

²⁴ *ibid* paras 2.17.

²⁵ *ibid* paras 1.4, 1.19.

²⁶ *ibid* para 3.8. See also para 3.28.

²⁷ *ibid* para 3.8.

²⁸ The Bancoult litigation is still ongoing in England and Wales. The most recent decision is *R (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin).

²⁹ *Chagos Islanders against the United Kingdom App no 35622/04 (ECtHR, 11 December 2012)*. For the human rights of the Chagos Islanders and the attempt to bring a case before Strasbourg, see Ralph Wilde, "Anachronistic as Colonial Remnants May Be . . .": Locating the Rights of the Chagos Islanders as a Case Study of the Operation of Human Rights Law in

Archipelago, to prevent their return and to refuse requests for additional compensation. The UK has apologised for historic mistreatment of the Chagossians and for misleading the UN as to the status of the Archipelago's population.³⁰

8.3 The ICJ Advisory Opinion

The request for an Advisory Opinion asked the Court to consider two questions. The first related to whether 'the process of decolonization of Mauritius [was] lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius . . . ' and the second considered the consequences of the UK's 'continued administration' of the Chagos Archipelago.³¹ The Court, in considering the background facts, noted that the Chagos Archipelago had been a dependency of Mauritius since 1814, with UK officials in 1947 and 1948 describing Mauritius as comprising the Chagos Archipelago.³² It also noted that the pre-independence Mauritian constitution of 1968 did not define the territory of Mauritius as including the Chagos Archipelago.³³

On the question of whether it should decline the request to give an Advisory Opinion, the Court considered a number of arguments that had been advanced by the participants to the proceedings. Of particular interest in regard to the issue of sovereignty, the Court noted that it had been argued that the bilateral sovereignty dispute between the UK and Mauritius 'is at the core of the advisory proceedings'.³⁴ Consequentially, it had been argued that 'to render an Advisory Opinion would contravene "the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent"'.³⁵ The Court was clear that the Advisory Opinion did not relate to sovereignty but to the 'decolonization of Mauritius'.³⁶ Furthermore, the General Assembly which had made the request 'has a long and

Colonial Territories' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean: Legal Perspectives* (Springer 2018) and Chris Monaghan, 'The Chagossians Go to Strasbourg' [2013] 3 *European Human Rights Law Review* 314.

³⁰ *ibid* para 1.5.

³¹ *Chagos* (n 1) para 1.

³² *ibid* paras 28–9.

³³ *ibid* para 42.

³⁴ *ibid* para 83.

³⁵ *ibid*. See *Western Sahara* (n 10) 24–5.

³⁶ *Chagos* (n 1) para 86.

consistent record in seeking to bring colonialism to an end' and the Court implied that the request was not seeking to determine the question of sovereignty by using decolonisation as a way to get the Court to hear the dispute.³⁷ The fact that, in determining whether Mauritius was decolonised in 1968, 'the Court may have to pronounce on legal issues' on which Mauritius and the UK disagreed 'does not mean that ... the Court is dealing with a bilateral dispute'.³⁸

Of particular interest is the Court's treatment of the negotiations between the UK and Mauritius prior to the detachment of the Chagos Archipelago in November 1965. The Court observed that, as a matter of domestic constitutional law, the UK believed that it could unilaterally detach the Chagos Archipelago from Mauritius.³⁹ In terms of the status of the Mauritian negotiating team, the Court also observed that the Committee of Twenty-Four, a committee responsible for decolonisation at the UN, had reported in 1964 'that the Constitution of Mauritius did not allow the representatives of the people to exercise real powers, and that authority was virtually all concentrated in the hands of the United Kingdom Government'.⁴⁰ The Court was clear as to its own view: '[I]t is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter.'⁴¹ The Court noted that the Mauritian position since 1964 had been consistently in favour of a lease and opposed to detachment of the Chagos Archipelago.⁴² The UK's position was always detachment, with Sir Oliver Wright, the Private Secretary to Harold Wilson, informing the Prime Minister in 1965 that he should frighten the Mauritian Premier, Sir Seewoosagur Ramgoolam, with the prospect of not supporting independence 'unless he is sensible about the detachment of the Chagos Archipelago'.⁴³ In his meeting on 23 September 1965, Wilson conveyed this message to Ramgoolam and, later that day, the meeting that produced the Lancaster House Agreement between the Mauritian representatives and the Colonial Secretary resulted in the approval to detach the Chagos Archipelago.⁴⁴ The facts,

³⁷ *ibid* paras 87–8.

³⁸ *ibid* para 89.

³⁹ *ibid* para 95.

⁴⁰ *ibid* para 99.

⁴¹ *ibid* para 172.

⁴² *ibid* paras 100–4.

⁴³ *ibid* para 105.

⁴⁴ *ibid* paras 107–8.

as outlined by the Court, cannot otherwise but show the causal link between the unequal positions of the parties, the pressure applied by the UK and the threat of withholding independence, and the Mauritian delegation's agreement to the detachment.

Importantly, the UK had agreed at Lancaster House 'that if the need for the [defence] facilities on the islanders disappeared the islands should be returned to Mauritius'.⁴⁵ A subsequent communication included a promise that any minerals or oil discovered near the Chagos Archipelago would 'revert' to Mauritius.⁴⁶ The contemporary language would suggest that the UK viewed the Chagos Archipelago as having been part of Mauritius and not, as had been argued in the written statement, administered from Mauritius as a matter of convenience.

The Advisory Opinion reiterated the underhanded manner of the UK in its decision to detach the Chagos Archipelago and to initially remove the Chagos Islanders and then to prevent them from returning to the outer islands and Diego Garcia. The Court also made reference to an apology by the UK during the oral pleadings.⁴⁷

The Court was clear in its Advisory Opinion that the Chagos Archipelago had always been part of Mauritius whilst under the UK's rule. There was no question that the dependency of Chagos was somehow separate to the territory that constituted the colony of Mauritius: '... [A]t the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory.'⁴⁸ The Advisory Opinion provided a succinct overview of the dealings between the UK and Mauritian authorities prior to the detachment of the Chagos Archipelago in November 1965. The opinion makes it clear that the UK did not engage with Mauritius on equal terms, as the former was a colony of the UK and real power in that respect remained with British officials and not the Mauritian politicians.⁴⁹ The Court made clear that 'this detachment was not based on the free and genuine expression of the will of the people concerned'.⁵⁰ The Court held that the UK had not completed the decolonisation of Mauritius prior to its independence in 1968.⁵¹

⁴⁵ *ibid* para 108.

⁴⁶ *ibid* para 110.

⁴⁷ *ibid* para 116.

⁴⁸ *ibid* para 170.

⁴⁹ *ibid* paras 171–2.

⁵⁰ *ibid* para 172.

⁵¹ *ibid* para 174.

Therefore, the UK's detachment of the Archipelago violated the territorial integrity of Mauritius and was contrary to Resolution 2066 (XX) which had been adopted in December 1965.⁵²

8.4 The Aftermath of the Advisory Opinion: Doubling Down on Sovereignty

The Advisory Opinion was delivered on 25 February 2019. That day's headline in *The Guardian* was not atypical: 'UN Court Rejects UK's Claim of Sovereignty over Chagos Islands.'⁵³ By rejecting the UK's submission that it was essentially dealing with a bilateral dispute concerning sovereignty, and instead accepting that the issue was whether there had been a failure to decolonise Mauritius, the ICJ had undermined the UK's position as to sovereignty. It is important to reiterate that the Advisory Opinion was just that: advisory and non-binding.

However, the Court's Advisory Opinion was not unanimous, as one of the judges, Judge Donoghue, had dissented. Donoghue had accepted 'that the Advisory 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 regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court's judicial function' and therefore considered that the Court should have declined to give an Advisory Opinion.⁵⁴ Donoghue accepted the UK's submission that this was essentially a sovereignty dispute, observing '[t]o be sure, there is no reference to "sovereignty" in the request. However, Mauritius' own statements make clear that the dispute over sovereignty is at the heart of the request.'⁵⁵ Donoghue also observed the 'centrality of the dispute over sovereignty'.⁵⁶ Donoghue was alive to the significance of the Advisory Opinion: 'The Advisory Opinion, like the request, avoids references to sovereignty. Yet the Court's pronouncements *can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius*. The Court has decided the very issues

⁵² *ibid* para 173.

⁵³ Owen Bowcott, 'UN Court Rejects UK's Claim of Sovereignty over Chagos Islands' (*The Guardian*, 25 February 2019) <www.theguardian.com/world/2019/feb/25/un-court-rejects-uk-claim-to-sovereignty-over-chagos-islands> accessed 30 April 2020.

⁵⁴ *Chagos* (n 1) Diss Op Donoghue para 1.

⁵⁵ *ibid* para 11.

⁵⁶ *ibid* para 14.

that Mauritius has sought to adjudicate, as to which the United Kingdom has refused to give its consent.⁵⁷

This was significant, as how can the UK assert its sovereignty if this assertion is in full violation of its international obligations to decolonise Mauritius, whose territory, according to the Court, had always included the Chagos Archipelago? The UK has not retreated from holding that it possesses sovereignty, as evidenced by the official reaction to the Advisory Opinion and the subsequent UNGA Resolution. The UK's position regarding its sovereignty of the Chagos Archipelago had been immediately addressed in Parliament by Sir Alan Duncan, who was then a minister at the Foreign and Commonwealth Office (FCO). Duncan informed the House of Commons on 26 February 2019 that '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.'⁵⁸ The UK's position was to challenge the validity of the opinion and to emphasise its non-binding nature.

This position was reiterated in a written ministerial statement by Sir Alan Duncan on 30 April 2019, which stated that '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.'⁵⁹ This presented a twofold approach to the issue of ownership of the Islands: firstly, a reiteration that sovereignty remained with the UK and, secondly, a commitment to its legal obligation to cede sovereignty if the Archipelago was no longer required. Duncan emphasised the global benefits of the UK's sovereignty over the Archipelago, namely the strategic and humanitarian benefits of the military bases: '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.'⁶⁰ Given the language employed by

⁵⁷ *ibid* para 19 (emphasis added).

⁵⁸ HC Deb 26 February 2019, vol 655, cols 144–5.

⁵⁹ Alan Duncan, 'British Indian Ocean Territory' (30 April 2019) HC Written Statement 1528.

⁶⁰ *ibid*.

the UK government regarding the status and validity of the Advisory Opinion, it was clear that, for the foreseeable future, the government's position as to sovereignty remained unchanged.

Also of significance was the UNGA Resolution adopted on 22 May 2019, which demanded 'that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible'. The Resolution was passed with 116 states in favour and only 6 voting against; however, there were 56 abstentions. This Resolution placed further political pressure on the UK to comply with the Advisory Opinion. In response, Karen Pierce, the UK's Permanent Representative to the UN, reiterated the UK's position as to its continued sovereignty on 22 May 2019: '[T]he United Kingdom is not in doubt about our sovereignty over the British Indian Ocean Territory. It has been under continuous British sovereignty since 1814. Contrary to what has been said today, it has never been part of the Republic of Mauritius.'⁶¹ Commenting on the Lancaster House Agreement, Pierce stressed the UK's commitment to cede the Islands at some future point: 'The agreement also included a commitment by the United Kingdom to cede the Territory – I use the word "cede" here deliberately, not "give back" – to cede the territory when it is no longer needed for defence purposes. And I've just outlined those defence purposes.'⁶²

During a debate in Westminster Hall on 3 July 2019, Sir Alan Duncan reiterated the legally binding nature of the Lancaster House Agreement and declared: 'No international court or tribunal has ever found our sovereignty to be in doubt.' Duncan was critical of the Advisory Opinion:

When Mauritius took the matter to the UN General Assembly in 2017, it did so using the argument that our continued administration of BIOT means that the process of decolonisation remains incomplete. That argument completely fails to acknowledge the 1965 agreement. Mauritius's claim to sovereignty over the islands, which we strongly refute, is not a decolonisation matter, but a bilateral dispute between Mauritius and the UK. It is therefore disappointing that the matter should ever have been referred to the International Court of Justice by the UN General

⁶¹ Karen Pierce, 'Speech, Resolution on the British Indian Ocean Territory' (FCO, 21 June 2019) <www.gov.uk/government/speeches/resolution-on-the-british-indian-ocean-territory> accessed 15 January 2020.

⁶² *ibid.*

Assembly. It is an accepted international principle that states should not be compelled to have their bilateral disputes adjudicated on by the ICJ without their consent, particularly on questions of sovereignty. Circumventing that principle sets a very dangerous precedent.

Nevertheless, the Government have considered the Court's advice carefully. We have concluded that the approach set out in the Advisory Opinion failed to give due regard to material facts and legal issues that the UK Government explained in detail in our submissions to the ICJ. For instance, it did not take account of the 1965 agreement with Mauritius or the numerous affirmations of that agreement made by Mauritius since independence. Furthermore, it fails to address the fact that the UK and US have entered into a binding treaty obligation to maintain UK sovereignty over the whole territory until at least 2036.⁶³

Interestingly, Duncan presented the General Assembly's Resolution as being supported by emotivism: '[W]e fully expected a large number of member states to support the resolution in Mauritius' favour, framed as it was around the emotive theme of decolonisation.' It was hardly surprising that the UK failed to comply with the deadline imposed by the General Assembly, as on 22 November 2019 it had not met the obligation to return the Chagos Archipelago to Mauritius.⁶⁴

8.5 Conclusion

The UK's response to the Advisory Opinion was to reiterate its assertion of sovereignty over the Chagos Archipelago. The assertion of sovereignty is arguably grounded in the mindset of a colonial ruler, with the ability to recast the territory of its colonies and to determine which dependencies will continue to be ruled from this or that colony. This degree of control by the metropolitan state over the territorial affairs of its colonies arguably undermines the ability of a colony's people via its representatives, on the eve of independence, to freely determine the future status of the territory. The ICJ was clear that this could not be the case and that there had been a failure to properly decolonise Mauritius by unlawfully detaching the Chagos Archipelago. The Lancaster House Agreement, at least in the eyes of the Court, could not change this conclusion.

What does this mean for the UK's assertion of sovereignty? Notwithstanding the somewhat defiant reaction to the Advisory

⁶³ HC Deb 3 July 2019, vol 662, cols 584–6.

⁶⁴ Andrew Harding, 'Chagos Islands Dispute: UK Misses Deadline to Return Control' (*BBC News*, 22 November 2019) <www.bbc.co.uk/news/uk-50511847> accessed 30 April 2020.

Opinion and subsequent Resolution, the UK's assertion of sovereignty over the Chagos Archipelago would appear to rest on very weak foundations. Whether the UK will be forced to reconsider its position on sovereignty rests with broader political considerations that are beyond the scope of this chapter. However, the Advisory Opinion has certainly strengthened Mauritius's position as to sovereignty without explicitly making a determination on this issue.