English Version

ITLOS/PV.20/C28/4

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2020

Public sitting

held on Thursday, 15 October 2020, at 4 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President of the Special Chamber, Judge Jin-Hyun Paik, presiding

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN MAURITIUS AND MALDIVES IN THE INDIAN OCEAN

Preliminary Objections

(Mauritius/Maldives)

Verbatim Record

Uncorrected

Special Chamber
of the International Tribunal for the Law of the Sea

Present:	President	Jin-Hyun Paik
	Judges	José Luís Jesus
		Stanislaw Pawlak
		Shunji Yanai
		Boualem Bouguetaia
		Tomas Heidar
		Neeru Chadha
	Judges *ad hoc*	Bernard H. Oxman
		Nicolaas Schrijver
	Registrar	Ximena Hinrichs Oyarce

Mauritius is represented by:

Mr Dheerendra Kumar Dabee, G.O.S.K., S.C., Solicitor-General, Attorney General's Office,

as Agent;

Mr Jagdish Dharamchand Koonjul, G.O.S.K., Ambassador and Permanent Representative of the Republic of Mauritius to the United Nations in New York, United States of America,

as Co-Agent;

and

Mr Philippe Sands QC, Professor of International Law at University College London, Barrister at Matrix Chambers, London, United Kingdom,
Mr Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bar of the district of Columbia, United States of America,
Mr Pierre Klein, Professor of International Law at the Université Libre de Bruxelles, Brussels, Belgium,

as Counsel and Advocates;

Mr Remi Reichhold, Barrister at 5 Essex Court, London, United Kingdom,
Mr Andrew Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of Massachusetts, Boston, United States of America,
Ms Diem Huang Ho, Attorney-at-Law, Foley Hoag LLP, Paris, France,
Mr Yuri Parkhomenko, Attorney-at-Law, Foley Hoag LLP, Washington D.C., United States of America,
Ms Anjolie Singh, Member of the Indian Bar, New Delhi, India,

as Counsel;

Ms Shiu Ching Young Kim Fat, Minister Counsellor, Prime Minister's Office,

as Adviser;

Mr Scott Edmonds, International Mapping, Ellicott City, United States of America,
Mr Thomas Frogh, International Mapping, Ellicott City, United States of America,

as Technical Advisers;

Ms Lea Main-Klingst, Germany,

as Assistant.

Maldives is represented by:

Mr Ibrahim Riffath, Attorney General,

as Agent;

and

Ms Khadeedja Shabeen, Deputy Attorney General,
Ms Salwa Habeeb, Senior State Counsel in the Office of the Attorney General,

as Representatives;

Mr Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law; Senior Fellow, Massey College and Distinguished Visitor, Faculty of Law, University of Toronto; Member of the State Bar of New York and of the Law Society of Ontario; Member of the Permanent Court of Arbitration,
Mr Alan Boyle, Emeritus Professor of International Law, University of Edinburgh; Member of the Bar of England and Wales, Essex Court Chambers, United Kingdom,
Mr Jean-Marc Thouvenin, Professor at the University Paris-Nanterre; Secretary-General of The Hague Academy of International Law; Associate Member of the Institut de droit international; Member of the Paris Bar, Sygna Partners, France,
Ms Naomi Hart, Ph.D. (Cambridge); Member of the Bar of England and Wales, Essex Court Chambers, United Kingdom,

as Counsel and Advocates;

Ms Justine Bendel, Ph.D. (Edinburgh), Vienna School of International Studies, Austria,
Mr Mitchell Lennan, LL.M., University of Strathclyde, United Kingdom,
Ms Melina Antoniadis, LL.M., Barrister and Solicitor, Law Society of Ontario, Canada,

as Assistants.

1 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I now give the floor to
2 Mr Paul Reichler, who is connected via video link, to make his statement.
3 Mr Reichler, you have the floor.
4
5 **MR REICHLER** (Remote)**:** Mr President, Members of the Special Chamber, it is an
6 honour for me to appear before you, and a privilege for me to represent the Republic
7 of Mauritius. My only regret is that I cannot appear before you physically, but
8 I greatly appreciate the accommodation that you have made in allowing me to
9 appear virtually.
10
11 Although all you can see of me are my head and shoulders, I assure you that I have
12 dressed properly for the occasion, in a full, formal morning suit, just as I would have
13 if I had been able to appear before you in the courtroom. Whether the appearance is
14 virtual or physical, the occasion is solemn and serious, and my attire reflects my
15 utmost respect for this Tribunal and the important purpose for which it has been
16 convened.
17
18 Mr President, I have been asked by the Co-Agent of Mauritius to respond to the first
19 two of the Maldives' preliminary objections, which are, in their words: (1) that you
20 have no jurisdiction to determine what they call an "unresolved sovereignty dispute"
21 over the Chagos Archipelago; and (2) that, in such circumstances, the United
22 Kingdom, allegedly, is an indispensable party, whose absence from these
23 proceedings deprives you of jurisdiction.
24
25 Although these are framed as two separate objections, they are actually one and the
26 same. The objection that the United Kingdom is an indispensable party to these
27 proceedings depends entirely on it being a party to a supposedly "unresolved
28 sovereignty dispute" with Mauritius. If there is no unresolved sovereignty dispute
29 over Chagos because, as a matter of international law, that territory is, and has
30 always been, an integral part of the territory of Mauritius, then the UK cannot be
31 indispensable to these proceedings, and both of the Maldives' preliminary objections
32 must fail.
33
34 Mauritius submits that, whether viewed singly or in combination, the Maldives'
35 preliminary objections have no merit whatsoever. Our position in response to both of
36 them is reflected in Professor Sands' remarks, and can be summarized as follows:
37 The issue of whether the Chagos Archipelago is an integral part of the territory of
38 Mauritius or whether it is a lawful colonial possession of the UK was resolved
39 definitively, and as a matter of international law, by the International Court of Justice
40 in its Advisory Opinion of 25 February 2019.
41
42 As a consequence, Mauritius is the only State entitled to claim sovereignty over
43 Chagos; the United Kingdom has no sovereignty in respect of the Archipelago; and,
44 insofar as these proceedings are concerned, it has no legal rights that could be
45 affected by a delimitation of the maritime boundary between the Archipelago and the
46 Maldives. The United Kingdom is neither indispensable nor even relevant to the
47 delimitation of the maritime boundary that Mauritius asks you to delimit in these
48 proceedings.
49

1 Mauritius does not ask, and has never asked, the Special Chamber to make a
2 determination on which State is sovereign over the Archipelago, and there is no
3 reason for you to do so. The ICJ has already confirmed that, as a matter of
4 international law, the Chagos Archipelago is an integral part of Mauritius, and only
5 Mauritius, and that the UK's ongoing colonial administration is a continuing wrong
6 under international law which the UK is obligated, under international law, to
7 terminate as rapidly as possible. The Special Chamber is called upon only to
8 recognize and respect the ICJ's authoritative determination of this issue, and then
9 proceed to delimit the maritime boundary between Mauritius and the Maldives, which
10 is all that Mauritius has requested of you.
11
12 The Maldives makes three specific arguments in its effort to support its case that,
13 notwithstanding the ICJ's determination that the Chagos Archipelago is an integral
14 part of the territory of Mauritius, there still exists a so-called "unresolved sovereignty
15 dispute". Their arguments are: first, that the ICJ did *not determine* who is sovereign
16 over the Chagos Archipelago, so that sovereignty allegedly remains unresolved;
17 second, even if the ICJ determined that Mauritius is sovereign, its determination is
18 *not binding*; and third, even if the ICJ determined the sovereignty issue, and even if
19 its determination is binding, the United Kingdom *does not accept it*. All three of these
20 arguments are manifestly erroneous or misguided, and they fail to support the
21 Maldives' preliminary objections. I will spend the balance of my presentation today
22 demonstrating this for you, by refuting each of their three arguments in turn, and then
23 showing you why the *Monetary Gold* principle, invoked by the Maldives, has no
24 application to this case.
25
26 I begin with the Maldives' argument that the ICJ did not determine which State is
27 sovereign over the Chagos Archipelago. As a starting point, I call your attention, as
28 Professor Sands did, to a very significant admission that the Maldives has made on
29 the first page of its Written Observations of 15 April 2020, at paragraph 4:
30
31 > the Maldives does *not* suggest that the advice rendered by the ICJ in the
32 > *Chagos* Advisory Opinion was wrong or lacking in authority.[1]
33
34 This is quite helpful. It recognizes that the Court's Opinion is both correct and
35 authoritative. Although the Maldives did not repeat this statement on Tuesday, they
36 made no effort to retract it either. So, we can say that both sides are in agreement
37 that the Advisory Opinion is correct, and that it is authoritative.
38
39 The disagreement between us in these proceedings is over what it was that the ICJ
40 correctly and authoritatively determined. You have heard them repeat over and over
41 again, in every speech, and even several times within a speech, that the Court did
42 not determine that Mauritius is sovereign over Chagos. But what you did not hear
43 from them on Tuesday, from any of them, is any kind of textual analysis of the
44 Court's Opinion. You won't find one in their written pleadings either. For a party that
45 purports to be so convinced of the correctness of its interpretation of that Opinion,
46 they are remarkably – we would say, revealingly – silent about what the Court
47 actually said. In this, they have taken social distancing to a new extreme, running as

[1] Written Observations of the Republic of Maldives in Reply to the Written Observations of the Republic of Mauritius (15 April 2020), para. 4 (hereinafter "Maldives' Written Observations").

far away as possible from the Court's actual words, as if by reading them they might contract a potentially lethal virus.

In fact, their entire argument that the Court did not determine which State is sovereign is based on their reading of a single sentence in the Opinion, not even an entire paragraph. Both Professor Akhavan and Professor Boyle quoted this sentence and built their arguments entirely upon it. Professor Thouvenin did not quote or cite even that much from the actual Opinion; his speech made no reference whatsoever to what anything that the Court said. The magic sentence – at least for Professors Akhavan and Boyle, is found in the middle of paragraph 86 of the Opinion. It reads as follows: "The General Assembly has not sought the Court's Opinion to resolve a territorial dispute between two States."[2]

This turns out to be an astonishingly weak foundation for the argument that Counsel for the Maldives have attempted to construct. First, it doesn't mean what they say it means, even if interpreted in isolation from the rest of the Opinion. And second, the rest of the Advisory Opinion – which they entirely ignore – makes it crystal clear that the Court determined, in no uncertain terms, that the Chagos Archipelago belongs exclusively to Mauritius as an integral part of its territory.

Let us first examine the Maldives' favourite sentence in context. Instead of surgically removing it from the middle of paragraph 86, as the Maldives have done, let us look at it and read it, together with the sentences immediately before and after it.

In sequence, the three sentences read as follows:

> The Court notes that the questions put to it by the General Assembly relate to the *decolonization* of Mauritius. The [UNJ] has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius.[3]

This was the Court's response to the United Kingdom's objection that the questions submitted by the General Assembly improperly sought to have the Court rule on a bilateral territorial dispute, and the UK's request that the Court exercise its discretion to decline to answer the questions on this basis. Here, the Court was rejecting the UK's objection by distinguishing a request for an Opinion on *decolonization*, specifically whether the decolonization of Mauritius had been lawfully completed, which it considered appropriate as a subject of an Advisory Opinion, from a purely bilateral territorial dispute between two States, unrelated to decolonization. It is instructive in this regard that the paragraph in question falls squarely within the section of the Opinion addressing the nature of the questions presented by the General Assembly, and whether the Court should answer them, or exercise its

---

[2] Maldives' Written Observations, para. 31 *citing Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 86; ITLOS/PV.20C28/1, p. 14, paras. 35-36 (Prof. Akhavan); ITLOS/PV.20C28/2, p. 5, paras. 12-16 (Prof. Boyle).

[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 86 (emphasis added). Judges' Folder, Tab 6.

discretion not to do so, and not in the part of the Opinion where the Court gives its answers to the Assembly's questions.

Significantly, the Court goes on to further explain in the same section of its Opinion that, because the UNGA's questions related to decolonization, it was appropriate to answer them, even though answering those questions required the Court to address other legal issues that were related to and inseparable from the issue of decolonization.

These related and inseparable issues included whether the Chagos Archipelago, at the time of its purported separation from Mauritius in 1965, and thereafter, was and is an integral part of the territory of Mauritius. This is evident from the paragraphs that immediately follow the one I just showed you, but which the Maldives has completely ignored and would bury deep underground, if it could. For example, the Court wrote in paragraph 88:

> The Court therefore concludes that the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable.[4]

The Court left no doubt about which issues it regarded as inseparable from one another. In particular, it recognized that the issue of whether the Chagos Archipelago forms an integral part of Mauritius was inseparable from the issue of the lawfulness of Mauritius' decolonization, and that its Opinion on decolonization would necessarily address and resolve both issues. This was unavoidable, and it was not regarded as a problem by the Court. As it continued in the next paragraph, paragraph 89:

> the Court observes that there may be differences of views on legal questions in advisory proceedings … . However, 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.[5]

Inevitably, in replying to the General Assembly's request, and deciding whether the decolonization of Mauritius had been lawfully completed, the Court was also determining which State is sovereign over Chagos. Simply put, if the Court had answered the question on decolonization in the manner proposed by the UK and found that its decolonization of Mauritius had been lawfully completed, then there would be no question but that the UK's retention of Chagos, and its exercise of sovereignty over that territory, would be lawful. In contrast, an Opinion that the decolonization of Mauritius had not been lawfully completed, because of the UK's failure to include Chagos in the decolonization of Mauritius in 1968, could only mean that Chagos was and still is an integral part of Mauritius, and therefore subject to its sovereignty.

---

[4] *Ibid.*, para. 88 (emphasis added).
[5] *Ibid.*, para. 89.

1 Tellingly, and not at all helpful to the Maldives' arguments here, the UK itself
2 recognized that the issue of sovereignty over Chagos was inextricably linked to the
3 lawfulness of Mauritius' decolonization, so that the Court's answer on decolonization
4 would unavoidably determine which State is sovereign. Indeed, this is exactly what
5 the UK told the Court. As Professor Sands pointed out, in its written pleadings to the
6 Court, at paragraph 7.15, the UK made this perfectly clear, and it is worth seeing
7 what they said again:
8
9 > The United Kingdom has no wish to contest the suitability of the Court
10 > addressing matters of decolonization in general. If the current request could
11 > be answered without *de facto* determining the longstanding bilateral dispute
12 > over sovereignty and related matters, the United Kingdom could and would
13 > have no objection. *However, this does not appear to be possible (or*
14 > *intended).*[6]
15
16 Mr President, Members of the Special Chamber, it was not possible for the Court to
17 address decolonization without determining what the UK called a longstanding
18 dispute over sovereignty, and this was what the UK itself told the Court.
19
20 The United Kingdom was not the only State to recognize that the Court's Opinion on
21 decolonization would necessarily determine sovereignty over Chagos. This was
22 Mauritius' position as well. Counsel for the Maldives have egregiously
23 mischaracterized that position. Contrary to the insistence of Professors Akhavan and
24 Boyle, Mauritius did not "invite" the Court to find that the sovereignty issue was
25 subsumed within the question of decolonization, such that deciding the one would
26 also decide the other; nor did the Court reject an "invitation" from Mauritius that it
27 never received.[7] Rather, Mauritius' argument to the Court was similar to that of the
28 UK: that the underlying sovereignty dispute could not be separated from the question
29 of decolonization, and that by answering the UNGA's questions on decolonization –
30 which was the foundational and dispositive issue – the sovereignty issue would
31 inevitably be resolved. The difference between the UK and Mauritius was that, for the
32 UK, this was a reason for the Court to refrain from answering the UNGA's questions;
33 while for Mauritius, this was a reason for it to answer them. It is of paramount
34 significance, therefore, that, faced with these entirely congruent views by the two
35 main protagonists in the Advisory Proceedings, on the consequences of answering
36 the questions, the Court chose to do so.
37
38 Indeed, it was obvious to everyone that the issuance of an Opinion on the lawfulness
39 of decolonization would necessarily determine sovereignty over Chagos. The
40 representative of India, for example, stated:

---

[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 February 2018), para. 7.15 (emphasis added), available at: https://www.icj-cij.org/files/case-related/169/169-20180215-WRI-01-00-EN.pdf (last accessed 15 October 2020).
[7] ITLOS/PV.20C28/1, p. 15, paras. 32-36 (Prof. Akhavan); ITLOS/PV.20C28/2, p. 5, paras. 8-11 (Prof. Boyle).

1 The Court, in our view, in the making of its advisory opinion on the questions
2 referred to it, would need to analyze certain factors, *inter alia*, that with which
3 country the sovereignty of the Chagos Archipelago rests ...[8]
4
5 According to the representative of Zambia:
6
7 [T]hat the advisory proceedings will have implications for sovereignty over
8 territory in no way makes it a purely bilateral matter… [D]ecolonization always
9 implicates sovereignty over territory. This is because the law relating to
10 decolonization is about the right of a people to govern themselves and the
11 territory within which they live.[9]
12
13 Zambia got it exactly right. Decolonization always implicates sovereignty, because
14 the end result of decolonization is independence, and the exercise of sovereignty by
15 the newly independent State over the entirety of the former colonial territory. This is
16 hardly a novel proposition. The Max Planck Encyclopedia of International Law,
17 among many authoritative sources, states that decolonization is defined as "[t]he
18 process by which a colonial power divests itself of sovereignty over a colony …"[10]
19
20 Thus, in answering the General Assembly's first question, whether the decolonization
21 of Mauritius had been lawfully completed, the Court clearly understood that, in so
22 doing, it was determining which State was the lawful sovereign over Chagos. The
23 Court began its analysis at paragraph 170, by finding that "at the time of its
24 detachment from Mauritius in 1965, the Chagos Archipelago was an integral part of"
25 Mauritius. In paragraph 172, the Court determined that "this detachment was not
26 based on the free and genuine expression of the will of the people concerned." In the
27 next paragraph, the Court found that international law "require[d] the United
28 Kingdom, as the administering power, to respect the territorial integrity of that
29 country, including the Chagos Archipelago." Finally, in paragraph 174:
30
31 The Court concludes that, as a result of the Chagos Archipelago's unlawful
32 detachment and its incorporation into a new colony, known as the BIOT, the
33 process of decolonization of Mauritius was not lawfully completed when
34 Mauritius acceded to independence in 1968.
35
36 Thus, what made the decolonization of Mauritius incomplete, in the Court's words,
37 was the UK's failure to fulfill its legal obligation "to respect the territorial integrity of
38 that country, including the Chagos Archipelago." There can be no clearer
39 determination that, as a matter of international law, the Archipelago is an integral part
40 of the territory of Mauritius.
41
42 But there are equally clear determinations, as I will show you now, in the Court's
43 answer to the General Assembly's second question, regarding the legal
44 consequences that flow from the failure of completion of the decolonization of

[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Verbatim Record 2018/24 of Public Sitting Held on 5 September 2018, p. 49.
[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Verbatim Record 2018/25 of Public Sitting Held on 6 September 2018, p. 10.
[10] The Max Planck Encyclopedia of International Law, *Decolonization: British Territories* (by Pietro Sullo), February 2013, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e924 (last accessed 15 October 2020).

Mauritius. The Court was very blunt, some might even say uncharacteristically so, in setting out these consequences. Nevertheless, they appear to have escaped notice by the Maldives, or at least they have pretended not to notice them. It therefore falls to me to call them out for you.

We begin with paragraph 177. Here, the Court determines that because the UK continued to occupy and administer Chagos after Mauritius achieved independence as a sovereign State, the UK was engaged in "an unlawful act of a continuing character."[11] As a consequence, "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State."[12]

This meant that, under international law, as the Court declared in paragraph 178:

> The United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling *Mauritius* to complete the decolonization of *its* territory in a manner consistent with the right of peoples to self-determination.[13]

Mr President, Members of the Special Chamber, in light of this language, the only conclusion that can be drawn is that in the Court's view Mauritius alone is sovereign over Chagos, as it is over all the other integral parts of its territory.

Conspicuously, in its oral presentations on Tuesday, as well as in its written submissions, the Maldives has completely ignored all of these determinations by the Court. It has made no mention at all of the discussion at paragraphs 173-178 of its Opinion, which we have just reviewed. Having no response to any of this, they put their pens down and turn their microphones to mute, but they cannot make this part or any part of the Opinion disappear by choosing to ignore it. Talk about an elephant in the room!

On Tuesday Professor Akhavan told you that the Court's answer to the UNGA's second question, about the legal consequences of the failure to lawfully complete decolonization, was "a short one", consisting, in his presentation, of a single sentence from paragraph 182, the last paragraph of the Opinion before the *dispositif*.[14] Mr President, the Court's answer to the question is certainly a lot shorter when you completely ignore five-sixths of it, as Professor Akhavan did, including the first five paragraphs, which is where the Court determines that the UK's administration is unlawful, reiterates that the Chagos Archipelago is an integral part of Mauritius' territory and concludes that the unlawful administration of Chagos must be terminated so that Mauritius is enabled to complete the decolonization of its territory. This is another typical example of the other side's refusal to address the text of the Advisory Opinion and their failure to interpret it on the basis of what it actually says.

---

[11] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 177. Judges' Folder Tab 6.
[12] *Ibid.*
[13] *Ibid.*, para. 178.
[14] ITLOS/PV.20C28/1, p. 15, paras. 10-15 (Prof. Akhavan).

1 Mr President, Members of the Special Chamber, what the Court determined in regard
2 to the legal status of the Chagos Archipelago could not possibly be clearer, as
3 everyone who has read it – except apparently the Maldives – recognizes. The
4 detachment of the Chagos Archipelago from Mauritius was unlawful because
5 international law requires the UK to respect the territorial integrity of Mauritius,
6 including the Chagos Archipelago*.* The UK's colonial administration of that integral
7 part of Mauritius is an ongoing wrongful act entailing that State's international
8 responsibility. The UK must terminate its unlawful administration as rapidly as
9 possible so that Mauritius can recover "its territory".[15] I repeat the words "its territory".
10 There can be no doubt whatsoever that the Court determined that the Chagos
11 Archipelago is part of Mauritius' territory, not just in 1965 but every day since, right up
12 to the present day and beyond.
13
14 As if to put an exclamation point at the end of this determination, in the *dispositif* the
15 Court declared – without any dissent on the merits, as Professor Sands has
16 explained, and by a vote of 13 to a solitary one – that "the United Kingdom is under
17 an obligation to bring an end to its administration of the Chagos Archipelago as
18 rapidly as possible."[16] The one contrary vote was based on that Judge's view that the
19 Court should not have answered the General Assembly's questions.[17] Not a single
20 judge expressed the view that the UK's administration of the Chagos Archipelago
21 was lawful. Not a single judge disagreed that Chagos forms an integral part of the
22 territory of Mauritius.
23
24 In the face of such clarity, the Maldives is compelled to resort to a series of spurious
25 arguments on what the Court purportedly decided. They are all far-fetched and
26 entirely lacking in credibility. Most importantly, none of them has any basis in the text
27 of the Court's Opinion. Indeed, as I have pointed out, they don't even attempt to
28 ground any of their arguments in what the Court actually said; or, in the one case
29 where they do, they blatantly mischaracterize the Court's finding. Here is an example.
30 Professor Akhavan argued that the ICJ determined *only* that the Chagos Archipelago
31 was part of Mauritius in 1965, at the time it was detached by the UK, and he told you
32 that the Court made no finding as to its status thereafter.[18] In the event that you find it
33 hard to believe me about this and are tempted to think that I must be
34 mischaracterizing the Maldives' argument, I refer you to what the Maldives wrote in
35 its submission of 15 April 2020, at paragraph 43: The Court "did not express any
36 opinion that the Chagos Archipelago remained a part of Mauritius after 1965 …"[19]
37 This is what Counsel repeated this on Tuesday.
38
39 For this astonishing assertion, the Maldives cites the following statement in the
40 Court's opinion, at paragraph 170: "at the time of its detachment from Mauritius in
41 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing

---

[15] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 178.
[16] *Ibid.*, para. 183(4).
[17] See: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Dissenting Opinion of Judge Donoghue, *available at* https://www.icj-cij.org/files/case-related/169/169-20190225-ADV-01-06-EN.pdf (last accessed 15 October 2020).
[18] ITLOS/PV.20C28/1, p. 16, paras. 35-37 (Prof. Akhavan).
[19] Maldives' Written Observations, para. 43.

territory."[20] True enough. Both Parties agree that the Chagos Archipelago was an integral part of Mauritius in 1965, but the Maldives somehow reads this language as saying that was it an integral part of Mauritius *only in 1965* and not thereafter; and that is certainly not what the Court found.

Contrary to the Maldives' assertion, just three paragraphs later, in paragraph 173, the Court found, as shown on the previous slides, that at the time Mauritius achieved independence in 1968, the UK was required by international law "to respect the territorial integrity of [Mauritius], including the Chagos Archipelago." Four paragraphs after that, in paragraph 177, the Court found that the UK's retention and administration of Chagos after Mauritius' independence, is a "wrongful act" and an "unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius." Lest there be any doubt, the UK was deemed to be under an obligation to terminate its unlawful administration of the territory, thus "enabling Mauritius to complete the decolonization of *its* territory…"[21] in 2019, not 1965. It is simply absurd for the Maldives to make this argument. That they do suggests that they have nothing better to say.

As if to say that this is the case, the Maldives, even more erroneously, argues that the ICJ recognized the UK's sovereignty over Chagos by allowing it to continue as administering power. Again, strange as it may seem, I am telling you the truth about what the Maldives is arguing in these proceedings. This is from paragraph 51 of their submission of 15 April 2020:

> As a matter of international legal principle, it is not the case that an administering State which bears an obligation to complete the process of decolonization of a given territory is immediately stripped of sovereignty over this territory.[22]

And, again, at paragraph 54 of the same submission: "The Chagos Advisory Opinion makes clear that the right of administration remains with the United Kingdom until it departs."[23]

Unsurprisingly, the Maldives cites not a single authority for the existence of an alleged "legal principle" that an administering power whose administration has been declared unlawful somehow continues to enjoy sovereignty over the territory that it unlawfully administers. Nor has Maldives been able to supply any authority for a so-called continuing "right of administration" of a territory that is being unlawfully administered.

To the contrary, in its Namibia Opinion, the ICJ found that South Africa had no right of administration of South West Africa after its mandate was terminated and that its ongoing presence in that territory was unlawful, conferring on it no rights. Professor Boyle strains to distinguish that case from this one on the ground that, in his words,

---

[20] Maldives' Written Observations, para. 43, citing *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 170.

[21] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 178.

[22] Maldives' Written Observations, para. 51.

[23] Maldives' Written Observations, para. 54.

repeated at least three times on Tuesday, the ICJ did not label the UK an “illegal occupier”.[24] He does not dispute, however, that the Court found the UK’s administration of Chagos a “wrongful”, “unlawful act of a continuing character”, “entailing its international responsibility” and requiring it, as a matter of international law, to terminate that administration as quickly as possible. Perhaps in the second round Professor Boyle will explain to us the difference.

Whatever that might be, the ICJ most certainly did not, in 2019, state or imply that the UK had a “right” of administration in respect of the unlawfully-detached and unlawfully-administered Chagos Archipelago. We can safely assume that the Court was well aware of the international principle of *ex injuria non oritur jus*. We referred to this principle in our written pleadings. Counsel for Maldives chose to ignore it on Tuesday.

The UK’s situation with regard to Mauritius may be contrasted with that of lawful decolonization processes, such as those followed in many parts of the world, including by the UK itself, especially in the 1950s and 1960s. Colonial powers, which were entrusted under the United Nations system with preparing their subject peoples for independence, and which more or less faithfully carried out their obligations in this regard, retained the right to administer their colonial territories until independence was achieved. But that is not the case for the UK and the Chagos Archipelago. As the ICJ found, and the Maldives has not disputed, the UK’s detachment of the Archipelago and its continuing administration of the territory were unlawful. An unlawful administration is exactly that: unlawful. It is simply not sustainable to argue that, in spite of its unlawfulness, maintaining such an unlawful administration generates any rights or entitlements, let alone sovereignty over an integral part of another State’s territory. Plainly, the UK neither had nor acquired sovereignty or rights of administration over Chagos, after its unlawful separation of the Archipelago from the territory of Mauritius.

Having determined the legal consequences of the failure to complete the lawful decolonization of Mauritius, as requested by the General Assembly, the Court considered that the specific “modalities” for bringing the decolonization to an end should be left for the General Assembly to determine, given its longstanding remit over decolonization matters.[25] The UNGA, in resolution 73/295, determined that the UK’s administration of the Chagos Archipelago should be brought to an end within six months. That is, by 22 November 2019. That date has come and gone without any steps taken by the UK to terminate its unlawful administration. There can thus be no question whatsoever in regard to any putative “administrative rights” of the UK. What interest could it possibly have, even if *quod non* it had any such rights temporarily, in the delimitation of a permanent maritime boundary between Mauritius and the Maldives. The answer is clear: absolutely none.

In an even less supportable attempt to buttress its argument that the Court’s Opinion did not resolve the territorial issue in regard to Chagos, the Maldives contends that the Court could not have intended to resolve it, because that would have required it

[24] ITLOS/PV.20C28/2, p. 1, paras 44; p. 2, paras. 6-7, 18-19; p.3, paras 17-20; p. 5, paras. 38-39 (Prof. Boyle).
[25] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 179.

1 to overrule the arbitral award rendered in 2015, in the Annex VII case between
2 Mauritius and the UK. This is another baseless argument, which did not benefit from
3 its seemingly endless repetition by Counsel for the Maldives on Tuesday.
4
5 The Maldives appears to be arguing that the 2015 arbitral award has *res judicata*
6 effect on the territorial issue.[26]
7
8 This is the very same argument that was made by the UK in the ICJ Advisory
9 Proceedings: and it was soundly rejected by the Court. The ICJ found, expressly,
10 that the arbitral award did not have *res judicata* effect in respect of any of the issues
11 that were submitted to it by the General Assembly.[27] Not only the issues, but the
12 parties and the relief sought, were different, all of which precluded the application of
13 *res judicata*, in the Court's view.[28]
14
15 In any event, it should be indisputable that the arbitral award could not have had *res*
16 *judicata* effect on the question of who is the "coastal State" in respect of the Chagos
17 Archipelago, because the Annex VII tribunal did not make any decision on that issue.
18 To the contrary, it decided, by a 3-2 vote, that it would not rule on that issue because
19 it had no jurisdiction under the 1982 Convention to decide questions of land
20 sovereignty.[29] As Professor Sands recalled for you, the two arbitrators who
21 constituted the minority – both of whom were sitting ITLOS judges at the time –
22 would not only have exercised jurisdiction but found that Mauritius, and not the UK,
23 was the "coastal State" because the UK's separation of Chagos from Mauritius
24 violated the right of self-determination, and the concomitant obligation not to impair
25 the territorial integrity of a colonial possession absent the freely expressed will of the
26 people.[30] In any event, the fact remains that the tribunal made no ruling on this
27 question. In short, sovereignty over Chagos was not the *res* that was *judicata* in the
28 Annex VII case.
29
30 Contrary to what you heard from Professor Akhavan on Tuesday, Mauritius has
31 never argued that the ICJ overrode or overruled the Annex VII tribunal's Award.[31]
32 The Court had no need to do so because, as it found, the issues decided by the
33 arbitral tribunal were not the same as those before the Court. The Court was thus
34 free to opine on the lawfulness of Mauritius' decolonization and whether the Chagos
35 Archipelago was an integral part of Mauritius' territory, before and after
36 independence, without treading on the arbitral tribunal's turf. The fact that the
37 Annex VII tribunal decided not to decide the "coastal State" issue only underscores
38 that there was no decision on this issue for the ICJ to overrule. The jurisdictional
39 limitation on the Annex VII tribunal, which the narrowest of majorities found to exist,
40 had no application to the ICJ, whose jurisdiction was not, in any event, derived from
41 the Law of the Sea Convention.

---

[26] Maldives' Written Observations, paras. 73-75. Thouvenin, ITLOS/PV.20C28/2, p.14, paras. 27-30.
[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 81.
[28] *Ibid.*
[29] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award of 18 March 2015, para. 221.
[30] *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Dissenting and Concurring Opinion of Judge Wolfrum and Judge Kateka, paras. 45, 70-80. Judges' Folder, Tab 4.
[31] ITLOS/PV.20C28/1, p. 10, paras 15-16 (Prof. Akhavan).

1 On our side, we fail to see why our learned opponents keep making such a fuss
2 about the 2015 arbitral award. It plainly has no application to these proceedings. At
3 the time that case was argued and decided, there was no Opinion, by any
4 international court or tribunal, let alone the ICJ, on the legal status of the Chagos
5 Archipelago. The Annex VII tribunal would have had to rule on it for the first time, as
6 two prominent ITLOS judges were prepared to do. But that is most definitely not the
7 situation here. Now you have the ICJ's Advisory Opinion before you. We say it
8 settles the question of whether the Chagos Archipelago is an integral part of
9 Mauritius' territory, hence subject to its sovereignty, so that you are not called upon
10 to make this determination. Mauritius asks you only to respect the determination that
11 the ICJ has already made.
12
13 The Maldives' invocation of another arbitral tribunal's award, in *Ukraine* v. *Russia*, is
14 of no assistance to it either.[32] That case, with which you are quite familiar, turned on
15 whether Ukraine was sovereign over Crimea or whether sovereignty was disputed.
16 The tribunal declined to exercise jurisdiction because it regarded an underlying
17 sovereignty dispute as unresolved.[33] That is what distinguishes the case from the
18 one we are addressing here. Unlike Mauritius, Ukraine could not point to any
19 authoritative judicial or legal determination to support a claim that its sovereignty was
20 undisputed. Unlike this Special Chamber, the Annex VII tribunal in that case would
21 have had to determine for itself which State was sovereign over the territory; it
22 considered the question without any prior judicial determination of this issue to rely
23 upon. And, unlike Mauritius, Ukraine could not argue that its case was premised on a
24 matter of decolonization.
25
26 Counsel for Maldives argued on Tuesday that *Ukraine* v. *Russia* is identical to this
27 case, because Ukraine argued there that the sovereignty dispute had been resolved
28 by a resolution of the General Assembly and by international opinion. That is plainly
29 a false paradigm. Mauritius relies here on what both sides have agreed is an
30 authoritative and correct legal determination by the ICJ. There is a world of
31 difference between relying on the Opinion of the world's supreme judicial authority,
32 except, perhaps for ITLOS, and relying on the resolutions of the political organs of
33 the United Nations. As the distinguished Annex VII tribunal observed: "The UNGA
34 resolutions [on which Ukraine relied] were framed in hortatory language" and "were
35 not adopted unanimously or by consensus, but with many States abstaining or voting
36 against them."[34]
37
38 Mr President, Members of the Special Chamber, the Maldives does not challenge
39 the jurisdiction of the ICJ to issue its Advisory Opinion on the lawfulness of the
40 decolonization of Mauritius. Nor does it challenge the correctness of the Opinion or
41 its authoritativeness.[35] Rather, the Maldives' challenge is to the interpretation of the
42 Opinion. They argue over what the Opinion says, but they base themselves on an
43 interpretation that entirely avoids reading it. For them, the Court's Opinion does not
44 speak to, let alone resolve, the issue of whether the Chagos Archipelago is an
45 integral part of Mauritius' territory, and therefore subject only to Mauritian

---

[32] See: Maldives' Written Observations, paras. 99-101.
[33] Dispute Concerning Coastal States' Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. Russian Federation*), PCA Case No. 2017-06, Award of 21 February 2020.
[34] *Ibid.*, para. 175.
[35] Maldives' Written Observations, para. 4.

sovereignty. I have now addressed all of their arguments in support of this proposition, and, with all due respect, they are completely wrong.

In consequence, Mauritius respectfully submits that the ICJ's Opinion can only be read as an authoritative, and correct, determination, under international law, that the Chagos Archipelago is an integral part of the territory of Mauritius – and only of Mauritius – and therefore, that only Mauritius can be said to have an interest in, and rights in respect of, the delimitation of the relevant maritime boundary with the Maldives

With one eye on the clock, Mr President, I am prepared to continue or to suspend here, if that is your decision, for the next coffee break. I will, in any event, continue into the next session with the remainder of my speech.

THE PRESIDENT OF THE SPECIAL CHAMBER: Mr Reichler, you may continue to finish your statement, although it may go beyond the time planned. You may continue.

MR REICHLER: That is fine, Mr President, but just so that I am entirely transparent here, I have at least 20 more minutes of my speech, so that I can continue until whatever point that you would like, or we can break at any point that you would like – but it will require at least another 20 minutes. I want to underscore that Mauritius will finish today well within its allotted time, but my speech, unless you prefer that I continue and deliver it now, would commence our next session and then lead in to Professor Klein's speech. I just want to be entirely clear with you about that, and I will follow whatever instruction you give me. I am happy to continue if you would like.

THE PRESIDENT OF THE SPECIAL CHAMBER: Yes, you may continue.

MR REICHLER: Thank you very much.

I am now going to address Maldives' argument that even if the ICJ determined as a matter of law that the Chagos Archipelago is an integral part of the territory of Mauritius, they say that that determination is not binding under international law.

The Maldives argues that Advisory Opinions are not legally binding, and therefore, the ICJ's conclusions (i) that the Chagos Archipelago is an integral part of the territory of Mauritius, (ii) that the UK's administration is unlawful and constitutes an ongoing violation of international law, and (iii) that the UK is under a legal obligation to terminate its administration as rapidly as possible – they say that all of these determinations lack binding force. With respect, our friends on the other side misstate the nature of Advisory Opinions – whether rendered by the ICJ or ITLOS – and again misinterpret the Court's Opinion in the Chagos case.

To be sure, Advisory Opinions themselves, per se, are not legally binding as such in the same way as judgments in contentious cases. But – and this is where the Maldives goes off track – they constitute authoritative declarations of international law, and all States are obligated to comply with the law. Thus, although compliance may not be obligatory in respect of an opinion itself, States are bound and obliged to

comply with the law, as declared and defined by the world's supreme judicial authorities, whether in contentious cases or advisory opinions. This is hardly a novel concept, although the Maldives professes not to be aware of it. On Tuesday, they called our position on the significance of Advisory Opinions "hopeless".[36] So, let's look at what others have had to say.

Rosenne, for example, wrote that Advisory Opinions are authoritative statements of the law, which most definitely have legal consequences.

> The fact that an Advisory Opinion has no binding force … nevertheless does not confer upon the statement of law contained in the Advisory Opinion characteristics any different from those of the statement of law contained in a judgment.[37]

To the contrary, Rosenne wrote: "In both instances, the Court has declared the law."[38]

Like Rosenne, Professor Pellet and his co-authors underscore the legal, as well as moral, authority that Advisory Opinions carry:

> In practice, advisory opinions are generally required because of their moral authority. Moreover, they contain one of the components of any judicial act, namely, the establishment of the law in force. Thus, advisory opinions are placed on the same level as judgements in the determination of the Court's jurisprudence.[39]

Are Rosenne and Pellet to be regarded as hopeless? Apparently not everyone believes they are, because they are not alone in underscoring the legal force and obligatory character of judicial declarations of law in Advisory Opinions. According to Sir Arthur Watts, the ICJ Advisory Opinion in the *Wall* case

> was more than just a restatement of the pre-existing positions adopted by the political organs of the United Nations; it was a legally reasoned exposition, lending the full weight of the UN's "principal judicial organ" to propositions which hitherto had been grounded almost as much in politics as in law.[40]

---

[36] ITLOS/PV.20C28/2, p. 31, paras. 10-11 (Prof. Akhavan).

[37] S. Rosenne, The International Court of Justice: An Essay in Political and Legal Theory (1961), p. 113.

[38] *Ibid.*, p. 492.

[39] P. Daillier, M. Forteau & A. Pellet, Droit International Public (2009), p. 1010 ("Dans la pratique, les avis consultatifs s'imposent généralement en raison de leur autorité morale. Ils contiennent au surplus l'une des composantes de tout acte juridictionnel, à savoir la *constatation du droit* en vigueur. Aussi les avis sont-ils placés sur le même plan que les arrêts dans la détermination de la 'jurisprudence' de la Cour "). See also: I. Hussain, Dissenting And Separate Opinions At The World Court (1984), p. 38; B. Raïs Monji, *Le règlement judiciare des différends internationaux*, in Règlement Pacifique des Diffèrends Internationaux (Horchani, ed., 2002), p. 370; A. Peeters, *Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?* in The Law and Politics of the Kosovo Advisory Opinion (M. Milanovic & M. Wood eds., 2015), p. 296.

[40] Sir A. Watts & R. Jorritsma, *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, Max Planck Encyclopedias of International Law (2019), para. 44.

1 Professor Dugard, also addressing the *Wall* Opinion, similarly described the
2 significance of the Court's advisory jurisprudence:
3
4 While not bound by the Opinion itself, Israel and States are nonetheless bound
5 by the obligations upon which it relies. The Opinion has simply elucidated and
6 confirmed their obligations.[41]
7
8 The same is true of the Chagos Opinion. It is replete with references to the legal
9 obligations by which the United Kingdom, and other States, are legally bound. At
10 paragraph 173, for example, it declares that:
11
12 the obligations arising under international law and reflected in the resolutions
13 adopted by the General Assembly during the process of decolonization of
14 Mauritius require the United Kingdom, as the administering power, to respect
15 the territorial integrity of that country, including the Chagos Archipelago.[42]
16
17 At paragraph 178: "the United Kingdom is under an obligation to bring an end to its
18 administration of the Chagos Archipelago as rapidly as possible."[43] And, at
19 paragraphs 180 and 182: "Since respect for the right to self-determination is an
20 obligation *erga omnes*, all States have a legal interest in protecting that right …" and
21 "all Member States must co-operate with the United Nations in order to complete the
22 decolonization of Mauritius."[44]
23
24 The Maldives entirely overlooks, or, again, chooses to ignore, these paragraphs in
25 the Advisory Opinion. It never once, in its written or oral pleadings, makes mention of
26 the Court's references to the legal obligations identified and defined in the Advisory
27 Opinion, including in these paragraphs. Such legal obligations are, indeed, binding,
28 even if the Advisory Opinion itself, per se, is not. This is manifest in article 2(2) of the
29 UN Charter, which provides: "All members … shall fulfil in good faith the obligations
30 assumed by them in accordance with the present Charter." These obligations include
31 not only those arising under the Charter itself but also under general international
32 law. As explained by Professor Kolb:
33
34 The Charter obligations as well as other obligations of international law in
35 accordance – or at least not incompatible – with the Charter … fall within the
36 reach of art 2(2).[45]
37
38 The same principle, that States must fulfill their obligations under international law, is
39 also reflected in the 1970 Declaration on Principles of International Law concerning
40 Friendly Relations and Cooperation among States in accordance with the UN

[41] J. Dugard, *Advisory Opinions and the Secretary General with Special Reference to the 2004 Advisory Opinion on the Wall* in International Law and the Quest for Implementation/Le Droit International Et La Quête De Sa Mise En Oeuvre (L. Boisson de Chazournes & M. Kohen eds., 2010), p. 403, at 410.
[42] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 173.
[43] *Ibid.*, para. 178.
[44] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, paras. 180, 182.
[45] R. Kolb, *Chapter I. Purposes and Principles* in Charter of the United Nations: a Commentary (B. Simma, D. Khan, G. Nolte, A. Paulus, N. Wessendorf eds., 2012), p. 107, at 168-169.

Charter: "Every State has the duty to fulfill in good faith its obligations under generally recognized principles and rules of international law."[46]

There can thus be no doubt that the ICJ's determinations regarding the unlawfulness of the UK's purported detachment of the Chagos Archipelago from Mauritius, the ongoing unlawfulness of its colonial administration, and the obligations on the United Kingdom to terminate its unlawful administration and enable Mauritius to complete the decolonization of its territory, are authoritative determinations of binding legal obligations by the supreme judicial authority of the United Nations. The President of the Court, Judge Yusuf, described them exactly as such – "authoritative" – in his annual presentation to the General Assembly in September 2019.[47] And, as we have seen, the Maldives itself concedes, at paragraph 4 of its 15 April 2020 submission, that these determinations by the Court are not "lacking in authority."

Nevertheless, the Maldives argues, against the grain of the ICJ's own jurisprudence, that, even if the determinations of law in Advisory Opinions are authoritative and binding in most situations, they are neither, when they address a dispute that, they say, is about territorial sovereignty.[48] This is a thoroughly contrived and meritless argument. No such exception to the rule can be found in the jurisprudence of the Court, or any court, or in the writings of leading legal authorities. Plainly, when the Court determined that the Chagos Archipelago is – and has always been – an integral part of Mauritius, and that the UK is under an obligation to terminate its unlawful administration and enable Mauritius to complete the decolonization of its territory, it intended these determinations to be authoritative and legally binding. There is not the slightest bit of language in the Opinion to suggest otherwise; and the Maldives points to none.

The Maldives' efforts to derive a contrary interpretation from the Western Sahara and Namibia Advisory Opinions are contorted and unpersuasive. In neither of these cases did the Court state, or even hint, that it could not make an authoritative or binding determination of the law on an issue related to territorial sovereignty. To the contrary, as the Maldives itself is forced to concede, at paragraph 59 of its submission of 15 April 2020, in regard to the Court's Advisory Opinion on *Western Sahara*:

> the ICJ's opinion on historical sovereignty was explicit: the evidence did not establish "any legal tie of sovereignty between Western Sahara and the Moroccan State".[49]

---

[46] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (General Assembly Resolution 2625 (XXXV) of 24 October 1970).

[47] Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the occasion of the seventy-fourth session of the United Nations General Assembly (30 October 2019), pp. 10-11, *available at* https://www.icj-cij.org/files/press-releases/0/000-20191030-STA-01-00-BI.pdf (last accessed 15 October 2020).

[48] Maldives' Written Observations, paras. 29(c), 61-63.

[49] Maldives' Written Observations, para. 59.

Apparently, Professor Boyle ignored, or forgot about, his own written pleading when he told you on Tuesday that the *Western Sahara* opinion was about decolonization, but had nothing to do with, and had no implications for, sovereignty.[50]

The significance of the ICJ's Advisory Opinions, and, in particular, of the legal obligations defined by the Court, had been underscored not only by prominent legal authorities, but also by the Court of Justice of the European Union, precisely in respect of matters of territorial sovereignty. I refer to that Court's application of the ICJ's legal determinations in both the *Western Sahara* and *Wall* cases.

In the case of *Council of the European Union* v. *Polisario Front*, the CJEU, after concluding that the Members of the European Union were obligated to comply with international law, found that, under the ICJ's *Western Sahara* Opinion, Morocco could not be considered sovereign over Western Sahara, and therefore an agreement between the EU and Morocco had no application to Western Sahara.[51] In the case of *Organisation Juive Européenne* v. *Ministry of Economy and Finance*, the same Court found that, under the authority of the ICJ's *Wall* opinion, the EU acted lawfully in determining that products originating in the occupied Palestinian territories, over which the ICJ found that Israel had no rightful claim of sovereignty, could not be labelled as coming from Israel.[52] These cases close the door on the Maldives' argument that the ICJ's determinations on territorial sovereignty, expressed in Advisory Opinions, are somehow not to be regarded as authoritative, or as not having binding consequences under international law, or as not capable of being relied on by other international courts on the basis that the findings of law are dispositive.

I would add to this one more point that further underscores the weakness, the emptiness, of the Maldives' case. Mauritius, as you know, commenced these proceedings as an Annex VII arbitration, because that was the only vehicle available for compulsory dispute resolution. But shortly after doing so, Mauritius offered the Maldives an opportunity to transfer the case to either the ICJ or ITLOS, in lieu of arbitration. The Maldives' response was, in effect, "anywhere but the ICJ". Of course that would be their response! The Maldives had no desire to put before the ICJ the question of whether its determinations in the Chagos case were authoritative and legally binding. It knew very well what the Court's answer would be. We say the answer given by this Special Chamber can be no different.

This brings me to the Maldives' third and final argument that there is somehow an unresolved territorial dispute over Chagos, which is that, even if the ICJ determined that Mauritius is sovereign over the Archipelago, and even if that determination is authoritative and legally binding, there is still an unresolved sovereignty dispute because the United Kingdom refuses to accept or comply with the obligations set out in the Court's Opinion.

[50] ITLOS/PV.20C28/2, p. 4, paras. 37-42 (Prof. Boyle).
[51] *Council of the European Union v. Front Polisario*, CJEU Case C-104/16P, Judgement (21 December 2016), paras. 92, 104-105.
[52] *Organisation juive européenne & Vignoble Psagot Ltd v. Ministre de l'Economie et des Finances,* CJEU Case.
C-363/18, Judgment (12 November 2019), paras. 35, 48, 56-58.

This argument is not only wrong, it is dangerous. If accepted, it would set a very destabilizing precedent.

First, the alleged territorial dispute is not unresolved. It has been resolved. By the ICJ. In the Chagos Opinion. Based on that Opinion, as a matter of international law, the Chagos Archipelago is recognized by the ICJ – the principal judicial organ of the UN – as an integral part of the territory of Mauritius. That is an authoritative determination of international law, and the law is binding on the UK.

In fact, Maldives itself all but concedes this to be the case when it states, at paragraph 50 of its submission of 15 Aril 2020, curiously but revealingly, that:

> [Mauritius] cannot deny that there is a dispute between itself and the UK over the consequences of the Advisory Opinion for the sovereignty dispute between them.[53]

If that is their definition of the purported dispute between Mauritius and the United Kingdom, then it is plainly not a legal dispute about sovereignty over the Chagos Archipelago. It is a dispute, in their words, over "the consequences of the ICJ's Advisory Opinion", that is, whether it is authoritative and legally binding on the UK. But that is an issue over which this Special Chamber very much has jurisdiction here. Indeed, it is the very question the Maldives itself has placed before you in its preliminary objections, which invite the Special Chamber to interpret the ICJ's Opinion and determine whether it is authoritative and has legally binding consequences. If the Special Chamber finds that it is and does (and we respectfully submit that it must), then there is no unresolved sovereignty dispute before you, and no basis for the Chamber to abdicate its jurisdiction in this case. If, on the other hand, it does not so find, it will undermine the authority and effect of the ICJ Advisory Opinion. That is precisely what the Maldives invites you to do, whether on its own behalf or some third party.

To that end, the Maldives parrots the UK's assertions of sovereignty made after the ICJ's Advisory Opinion. As George Orwell once said, nothing is gained when a parrot is taught a new word. In any event, these words, whether uttered by the UK or echoed by the Maldives, are, in the end, only assertions. They cannot, as a matter of law, establish the existence of a dispute, especially after the dispute has been resolved by the authoritative pronouncement of an international court or tribunal. As the Annex VII tribunal in *Ukraine* v. *Russia* recognized: "Certainly a mere assertion would be insufficient in proving the existence of a dispute."[54] The Maldives appears to accept this principle, at paragraph 100 of their submission of 15 April 2020.

In regard to the UK's assertions, the Maldives attributes to us an argument that we have never made. And then they proceed to beat down that non-existent argument, repeatedly. So let me be very clear. We do not contend that the UK's continued assertion of sovereignty over Chagos should be disregarded because it is implausible – though it is. We argue that it is irrelevant because the issue of has already been resolved by the ICJ's determination that Chagos is an integral part of

[53] Maldives' Written Observations, para. 50.
[54] Dispute Concerning Coastal States' Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. Russian Federation*), PCA Case No. 2017-06, Award of 21 February 2020, para. 188.

the territory of Mauritius, and that the UK's ongoing administration is unlawful, and must be terminated. There is thus no "unresolved sovereignty dispute".

To hold otherwise, that is, that an unresolved sovereignty dispute exists because the UK stubbornly persists in asserting its sovereignty in defiance of the ICJ and in defiance of international law, would turn the law on its head. It would mean that no dispute could ever be considered finally resolved, as long as a recalcitrant State, dissatisfied with an international tribunal's reasoned and authoritative resolution of it, refused to accept the result.

It would mean, for example, that China could continue to argue that a legal dispute still exists over the lawfulness of its so-called nine-dash line, notwithstanding the well-reasoned rejection of that claim by a unanimous arbitral tribunal, which included four sitting or former ITLOS Judges. On the same basis, Colombia, which defiantly rejected the ICJ's unanimous 17-0 Judgment delimiting its maritime boundary with Nicaragua, could claim that a legitimate dispute still exists simply by insisting, without any basis in law, that the continental shelf and exclusive economic zone that the Court awarded to Nicaragua are Colombian; or that Israel could argue that the wall it has constructed to separate itself from Palestinian territories is completely lawful under international law.

Regrettably, there are occasionally other defiant States which have employed a similar strategy of refusal to accept judicial determinations contrary to their liking.

As Professor Dugard wrote in 1985:

> Since 1971, when the ICJ held in its Advisory Opinion on Namibia that South Africa is in illegal occupation of Namibia … the South African government's propaganda machine has waged a relentless campaign, both at home and abroad, to show that the Court did not make such a finding or that, if it did, it was wrong and biased.[55]

Surely, South Africa's obstreperous behaviour could not, as a matter of law, unresolve a dispute that the ICJ had resolved. In that very regard, the States Parties to UNCLOS refused to recognize South Africa's efforts to keep the dispute over the lawfulness of its administration alive, or they would not have allowed representatives of Namibia to negotiate and then sign the 1982 Convention.

A defiance of international judicial authority, in the form of a refusal by a State to accept or comply with its legal obligations, as defined in an authoritative determination by a competent tribunal, is a breach of international law that cannot be rewarded. When a disputed issue has been resolved by an international court or tribunal, whether by way of Judgment or Advisory Opinion, the parties are bound by the legal obligations identified therein; the court's legal determination cannot be annulled, and the dispute cannot suddenly become unresolved, and the obligations set aside, by one party's unlawful rejection and defiance. In the words of Judge Nagendra Singh, the distinguished former ICJ President:

---

[55] John Dugard, *The Revocation of the Mandate for Namibia Revisited*, South African Journal on Human Rights (1985).

> The findings of law contained in Advisory Opinions have of course the authority and prestige of the Court behind them to the same extent as a judgment, and the State which chooses to contravene what has been defined by the court as a rule of law in an advisory opinion will find it difficult to claim that it is not in breach of international law.[56]

THE PRESIDENT OF THE SPECIAL CHAMBER: Mr Reichler, although I said you may continue to finish your statement, I realize that you have already spoken for 80 minutes. If I ask you to continue, although you have only four or five pages to go, I will be accused of infringing your basic human rights, so I would suggest we take a coffee break of thirty minutes; and then after some rest you may continue to finish your conclusions.

MR REICHLER: Thank you very much, Mr President. I would never make such an accusation of you in particular, given your career's devotion to the cause of human rights and rule of law – but I will defer to your judgment and stop here at this time.

THE PRESIDENT OF THE SPECIAL CHAMBER: We will pause for a break of 30 minutes and we will continue the hearing at six o'clock.

(*Break*)

THE PRESIDENT OF THE SPECIAL CHAMBER: I give the floor to Mr Reichler to continue and finish his statement.

MR REICHLER: Mr President, Members of the Special Chamber, just before the break I had read you the words of former ICJ President Judge Nagendra Singh.

Thank you, Mr President, I can think of no better place to conclude my remarks today than with those of Judge Nagendra Singh.

Mr President, Members of the Special Chamber, there can be no serious question about what the ICJ determined in its Chagos Opinion, or about the authoritativeness of what it determined, or about the legal obligations it imposed, especially on the United Kingdom. The Court left no doubt that, as a matter of international law, the Chagos Archipelago is and has always been an integral part of the territory of Mauritius. It necessarily follows from this that Mauritius alone is sovereign over the Archipelago, just as it is sovereign over all of the other territory that forms an integral part of the country. That is why the ICJ found that the detachment of the Archipelago from Mauritius was unlawful, and the ongoing colonial administration is a continuing breach of international law, entailing the international responsibility of the United Kingdom, such that the UK is under a legal obligation – obligation – to terminate its unlawful administration as rapidly as possible. This is, expressly, in order to enable Mauritius to finally complete the decolonization of "its territory", which is an unambiguous, unmistakable declaration by the Court that the Chagos Archipelago is Mauritius' territory.

The United Kingdom is plainly not an indispensable party in this case. It is not even an interested party, because it has no legal interest in the Chagos Archipelago, and

[56] N. Singh, The Role and Record of the International Court of Justice (1989), p. 26.

therefore none that can be affected by a delimitation of the maritime boundary separating the Archipelago from the Maldives, which is the object of this case. This is not the *Monetary Gold* case, where the ICJ was required to adjudicate the legal rights of Albania, an absent party. Nor is this the *East Timor* case, where the Court would have had to pass judgment on the lawfulness of the conduct of Indonesia, an absent party.

The bar for declining to exercise jurisdiction is very high. As the Court explained in *Monetary Gold*, "[i]n the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[57]

The same high bar was underscored in *East Timor*, 41 years later:

> [I]n this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful … Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgement made in the absence of that State's consent.[58]

In the Nauru case, which the Maldives conspicuously fails to cite or discuss, the Court made it even clearer just how high the bar is for sustaining a preliminary objection based on the absence of a purported indispensable party. Nauru brought the case against Australia claiming that the Respondent State breached its obligations under the Trusteeship Agreement between Nauru and the Administering Authority. The Administering Authority was actually a tripartite arrangement that included Australia, New Zealand and the United Kingdom. As such, all three had interests that were implicated by Nauru's claims. On this basis, Australia claimed that New Zealand and the United Kingdom were absent indispensable parties. The Court disagreed, and it rejected Australia's objection.

It explained that:

> [T]he interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim.[59]

In this light, we ask: after the ICJ has determined that Chagos is an integral part of Mauritius' territory, that the UK's administration of that territory constitutes an ongoing international wrong of a continuing character, and that this unlawful

---

[57] *Case of the Monetary Gold removed from Rome in 1943* (It*aly v. France, United Kingdom and United States of America*), Preliminary Question, Judgement of June 15, 1954, ICJ. Reports 1954, p. 19, p. 32.
[58] *East Timor* (*Portugal v. Australia*), Judgement, ICJ Reports 1995, p. 90, para. 34.
[59] Certain Phosphate Lands in Nauru (*Nauru v. Australia*), Preliminary Objections, Judgement, I.C.J. Reports 1992, p. 240, para. 55.

administration must be terminated as rapidly as possible, what legitimate interest could the UK possibly have in the delimitation of a maritime boundary between Chagos and the Maldives? The question answers itself: absolutely none.

The Maldives' reliance on the *Monetary Gold* and *East Timor* cases is therefore entirely misplaced. Unlike Albania and Indonesia in those cases, the United Kingdom has no cognizable legal interests that would be affected by a delimitation of the maritime boundary between the Chagos Archipelago and the Maldives. And it certainly has no legal interests that would form the very subject matter of the decision by the Special Chamber, or constitute a prerequisite for that decision. The only thing the United Kingdom has in common with the absent parties in *Monetary Gold* and *East Timor* is its absence. But more than 190 other States are also absent from these proceedings. And the United Kingdom has no greater legal interest in respect of the maritime boundaries of the Chagos Archipelago than any of them might have, which is to say again: it has absolutely none.

Professor Thouvenin pointed to what he called "striking similarities" between the present case and East Timor.[60] He devoted almost his whole speech to that case, but what were these similarities? In *East Timor*, Portugal argued that Indonesia was not an indispensable party because the Court did not have to determine the lawfulness of its seizure of East Timor; instead, according to Portugal, it needed only to accept as "givens" the decisions of the UN's political bodies, the Security Council and General Assembly, as reflected in their resolutions.

Mr President, Members of the Special Chamber, there is nothing "strikingly similar" between the resolutions of the UN's political bodies, and the legal determinations made by the ICJ in its Advisory Opinion. Plainly, in *East Timor* the Court could not treat the resolutions of political organs, without more, as having resolved a dispute about the lawfulness of Indonesia's conduct and on that basis alone proceed to adjudicate Indonesia's rights in its absence. In contrast, here we have the ICJ's authoritative, and correct, by admission, judicial determinations that directly address, and resolve, the legal status of the Chagos Archipelago as an integral part of Mauritius' territory. There is nothing left of this alleged territorial dispute for the Special Chamber to resolve. You do not need the UK in order to go forward and delimit a maritime boundary in which the UK could have no legitimate interest.

There is absolutely no merit, therefore, to the challenge to this Special Chamber's jurisdiction that the Maldives has raised in its first two preliminary objections. Professor Klein will now show you that there is likewise no merit to any of their other objections.

I thank you, Mr President, and Members of the Chamber, for your kind courtesy and patient attention, and I ask that you call upon my dear colleague, Professor Pierre Klein, to continue and complete Mauritius' first round presentation.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Reichler and now give the floor to Mr Klein, who is connected by video link, to make his statement. Mr Klein, please.

---

[60] ITLOS/PV.20C28/2, p. 8, para. 30-32 (Prof. Thouvenin).

MR KLEIN (Remote) (*Interpretation from French*)**:** Thank you, Mr President.

Mr President, Members of the Special Chamber, it is an honour for me to appear before you in these proceedings on behalf of the Republic of Mauritius. In addition to its objection based on the absence of an alleged indispensable third State, Maldives argues that your Chamber cannot rule on the merits of the dispute referred to it by the Republic of Mauritius for two further reasons. First, because there is no real dispute between the Parties regarding the delimitation of their maritime areas. Second, because even if it were assumed that the existence of this dispute could be established, Mauritius would not have satisfied the obligation of attempting to settle it by negotiation before initiating the dispute settlement procedures provided for in Part XV of the Convention on the Law of the Sea. Lastly, Maldives also invites you to declare the request by the Republic of Mauritius inadmissible because, by instituting these proceedings, Mauritius allegedly committed an abuse of law and of process. I would like to show you, in this last part of Mauritius' oral pleadings, that none of these objections have any basis and that, if there is any question of abuse in these proceedings, it certainly cannot be found in the attitude of the Republic of Mauritius. Allow me therefore to begin by taking you back to the question of the existence of a maritime delimitation dispute between the Parties.

According to Maldives, a maritime delimitation dispute cannot exist between the Parties in the present case as long as the dispute which purportedly continues between the Republic of Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago has not been resolved. The other side claims that it is only once this has been achieved and the sovereignty of Mauritius over the Chagos Archipelago has potentially been recognized that Mauritius could claim the status of a State whose coasts are opposite to those of Maldives for the purposes of articles 74 and 83 of the Montego Bay Convention. It is, according to this logic, only at that point that a genuine delimitation dispute between the two States might come about. My colleagues Philippe Sands and Paul Reichler have just shown you in considerable detail to what extent the argument of the purported perpetuation of a sovereignty dispute over the Chagos Archipelago is untenable in the light of the Opinion delivered by the International Court of Justice in February 2019. I will not therefore return to that line of argument. There is nothing left at this stage to challenge the status of the Republic of Mauritius as a coastal State in the context of this dispute.

However, Maldives goes even further in contesting the existence of a dispute. Our opponents claimed the day before yesterday that a "careful examination" of the evidence in the present case did not reveal any dispute, since no opposing claims of the Parties concerning the delimitation of their exclusive economic zones or their continental shelves can be found. Plainly, Mr President, Members of the Special Chamber, we do not share the same conception of what constitutes a careful examination of the evidence, because when we examine it very carefully, as I now propose to do with you, the evidence shows precisely the opposite of what Maldives claims on this point.

The starting point in this respect is the legislation adopted by the two Parties with a view to determining their respective maritime zones. In 1977 the Republic of Mauritius adopted its Maritime Zones Act, which declared an exclusive economic

zone and continental shelf 200 nautical miles from the baselines (or to the outer edge of the continental margin in the case of the continental shelf). The 1977 Act was replaced by a new Maritime Zones Act in 2005, which provides for the same limits. This legislation applies to the entire territory of Mauritius, including the Chagos Archipelago. The chart before you depicts the 200-nautical-mile area surrounding the Chagos Archipelago, measured from the baselines of the archipelago. Like all the documents that will be presented in the course of my oral pleadings this afternoon, this chart is included in your Judges' folder. In May 2009, Mauritius submitted to the Commission on the Limits of the Continental Shelf preliminary information concerning the extended continental shelf in the Chagos Archipelago region.

In 1996 Maldives also adopted a law pertaining to its maritime zones, also claiming the existence of an exclusive economic zone and a continental shelf of 200 nautical miles measured from the archipelagic baselines of that State. Here is a graphic representation of the zones in question. Like Mauritius, in July 2010 Maldives submitted information to the Commission on the Limits of the Continental Shelf on the limits of its continental shelf beyond 200 nautical miles. That submission was accompanied by a chart showing both the shelf areas and the exclusive economic zone claimed by Maldives.

Overlaying the maritime claims made by the two States, as they appear in their respective legislation, leaves no doubt as to the fact that they necessarily create a conflict affecting an area of some 96,000 square kilometres, as you will now see displayed on the screen.

Maldives attempts to dismiss these graphic representations out of hand by arguing that they hold no official character, but it is not a question of claiming that these charts, with the exception of the one filed by Maldives in support of its submission to the Commission on the Limits of the Continental Shelf, in some way reflect Maldives' position. Mauritius' sole aim in referring to them is simply to illustrate the extent of the Parties' claims and the fact that those claims inevitably create a situation of conflict.

This state of affairs was, moreover, confirmed in no uncertain terms by the Parties themselves in the course of their exchanges on the delimitation of their maritime areas. The terms used in the documents recording these exchanges leave absolutely no room for doubt in this regard and clearly contradict the incomplete presentation that our opponents set out before you earlier this week.

In October 2010 high-level delegations from Maldives and Mauritius met for a first meeting on the question of the maritime delimitation between the two States and on the submission made by Maldives to the Commission on the Limits of the Continental Shelf. In the minutes of this meeting its purpose is defined as follows: *(Continues in English)* "to discuss a potential overlap of the extended continental shelf", (*Interpretation from French*) an overlap thus presented at the time as only "potential", a term which you heard our friends on the other side repeat with a great deal of insistence, indeed enthusiasm, in their oral pleadings on Tuesday. To quote the words of Professor Akhavan, one can find in the exchanges between the Parties "at best a vague reference to a potential … dispute". And yet, even at this very preliminary stage in the exchanges between the two Parties, that statement is

1 inaccurate. At the end of the document the Minister of Foreign Affairs of Maldives
2 expresses his agreement that the two Parties will work together on the overlapping
3 area. So the term “potential” disappears. From that point in time, the overlap is
4 presented as very real and is recognised as such by the highest authorities of
5 Maldives themselves. In any event, the story does not end there. Far from it.
6
7 In subsequent exchanges between the Parties, the disappearance of the qualifier
8 “potential” is confirmed and reference is made clearly and exclusively to an
9 established overlapping area between the maritime zones of the two States. Thus in
10 the Joint Communiqué published in March 2011 following the visit to Mauritius of the
11 President of Maldives, it is stated that (*Continues in English*) “[b]oth leaders agreed
12 to make bilateral arrangements on the overlapping area of extended continental shelf
13 of the two States around the Chagos Archipelago.”
14
15 (*Interpretation from French*) You will note in passing that Maldives makes no mention
16 during this period of any legal interest of a third State that might be called into
17 question by initiating a negotiation process. Maldives was quite ready to proceed
18 along this path by taking as given that it was Mauritius that should be considered as
19 the coastal State affected by the process.
20
21 Mr President, Members of the Special Chamber, I could certainly stop there in this
22 demonstration of the existence of a dispute. The two Parties explicitly agreed to
23 recognize the existence of an overlapping area between their respective exclusive
24 economic zones and continental shelves and, if such an overlapping area exists, it is
25 obviously because the Parties have expressed opposing claims over the maritime
26 areas in question. I do not believe I need to make a long speech here to remind you
27 that opposing claims, in fact or in law, are precisely what, according to the most
28 conventional definitions, characterizes the existence of a dispute in international law.
29 Our opponents themselves referred insistently to these definitions of the concept of
30 “dispute” two days ago.
31
32 However, if the slightest doubt were to remain in your minds, I am sure it will be
33 dispelled definitively by the diplomatic note sent by the Republic of Mauritius to the
34 United Nations Secretary-General on 24 March 2011. The purpose of this note was
35 to protest against the fact that, contrary to what they had indicated, the Maldives
36 authorities had made no amendment to their submissions to the Commission on the
37 Limits of the Continental Shelf to take into account the coordinates of the exclusive
38 economic zone of Mauritius in the Chagos region. The terms of the note are
39 particularly trenchant and I quote (*Continues in English*):
40
41 > The Republic of Mauritius hereby protests formally against the submission
42 > made by the Republic of Maldives in as much as the Extended Continental
43 > Shelf being claimed by the Republic of Maldives encroaches on the Exclusive
44 > Economic Zone of the Republic of Mauritius.
45
46 (*Interpretation from French*) In their written pleadings, the other side did not have
47 much to say about this note. They merely stated that it contained only vague
48 statements about Maldives’ submission without any clarification as to an area of
49 overlapping claims.

1 Once again, this is a rather surprising analysis. There is nothing vague about this
2 note. It is a protest, made in due form, against what Mauritius clearly identifies as an
3 encroachment on its exclusive economic zone. It could hardly be clearer. The fact
4 that the precise area of overlapping claims is not specified in the note is of no
5 importance here. What the note from Mauritius strikingly confirms is the existence of
6 an established disagreement between the two States over the extent of their
7 respective maritime areas. When a State protests formally, at the highest possible
8 multilateral level, against claims put forward by another State to maritime areas
9 which it deems to fall within its jurisdiction, it is proclaiming – to the world, what is
10 more – the existence of a dispute between the States in question.
11
12 In its oral arguments at the start of this week, Maldives this time tried to claim that
13 this document is of no relevance in terms of establishing the existence of a dispute
14 between the Parties because it does not contain any claim by the Republic of
15 Mauritius to which Maldives could have objected. However, in giving you this reading
16 of the note, our opponents are reversing roles entirely. In fact, it was Maldives that
17 made a prior claim, as shown by its submission to the Commission on the Limits of
18 the Continental Shelf. And it was Mauritius that opposed this in the clearest possible
19 terms through the note of 2011. If we look again at the elements in the case file in
20 sequence, there is no doubt that the constitutive elements of a dispute are indeed
21 present according to our opponents' own definition. We have here a claim by one
22 Party – Maldives – which the other Party opposes and rejects.
23
24 The dispute between the two Parties to these proceedings concerning the extent of
25 their maritime areas does not date from only recently, or even from the filing of the
26 document instituting proceedings by the Republic of Mauritius, as the other Party
27 seems to be suggesting. The evidence in the file shows that the existence of this
28 dispute is clearly established and that the overlapping of their respective claims was
29 recognized by the Parties themselves as of 2010. Therefore, the preliminary
30 objection raised by Maldives based on the purported absence of a dispute between
31 the Parties to these proceedings clearly has to be dismissed.
32
33 The same should apply, as I will now show you, to the objection based on the
34 purported absence of prior negotiations between the Parties.
35
36 According to Maldives, the Special Chamber cannot exercise its jurisdiction with
37 respect to the dispute submitted to it by the Parties because the obligation to enter
38 into prior negotiations pursuant to articles 74 and 83 of the Convention on the Law of
39 the Sea has not been met. The Parties disagree in this respect on two levels. The
40 first aspect of this disagreement is of a legal nature. Is it correct to assert, as our
41 opponent does, that these two provisions require negotiations as procedural
42 preconditions for the exercise of jurisdiction by the dispute settlement bodies
43 provided for in Part XV of the Convention? The second aspect of the disagreement is
44 clearly factual. On the basis of the facts of this case, can it be said that the Parties
45 have not tried to resolve their dispute by way of negotiation? I would now like to
46 examine these two points in further detail to show that in both respects the
47 arguments put forward by Maldives cannot be accepted.
48
49 I will not dwell long on the legal issues or the assertion that articles 74 and 83 lay
50 down procedural preconditions. The Parties have already expressed their views on

this subject in detail in their written pleadings and it serves no purpose to go over this again in detail now.

I will simply recall the basic position of Mauritius in this respect, according to which recourse should be had to Part XV of the Convention on the Law of the Sea, and to that Part alone, in order to determine whether the conditions for bringing a case before one of the courts or tribunals referred to in article 287 are met. As article 288, paragraph 1, very clearly states:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

I would just point out that, contrary to what our opponents seem to think, a dispute concerning a question of maritime delimitation is indeed a dispute concerning the interpretation and application of the Convention on the Law of the Sea. Article 286 refers to the jurisdiction of one of these courts or tribunals for any dispute "where no settlement has been reached by recourse to section 1" of Part XV. The main obligation arising from section 1 is the one laid down in article 283, to proceed to "an exchange of views regarding [the dispute's] settlement by negotiation or other peaceful means." It is in the light of these provisions, and not articles 74 and 83, which our opponents are trying to construe as elements of an arbitration clause – which clearly they are not – that the jurisdiction of a court or tribunal hearing a dispute concerning the interpretation or application of the Convention is to be determined.

There is no doubt that in the instant case these conditions have been met and the dispute before you today could not be resolved by way of negotiations. The history of the exchanges between the Parties shows very clearly that their attempts to reach an agreement on the delimitation of their maritime areas have remained entirely unsuccessful. So I shall now turn to the factual aspect of this question of prior negotiations.

The first approach made by the Republic of Mauritius goes back to 2001. The Mauritius Minister of Foreign Affairs wrote to his counterpart in Maldives to propose negotiations on the question of the maritime delimitation between the two countries. The question on the table and the means of providing a solution are explained very clearly (*Continues in English*):

> As we are embarking on the exercise to delimit the Continental Shelf around the Chagos Archipelago, we would appreciate it if you could agree to preliminary negotiations being initiated at an early date.

(*Interpretation from French*) This approach met with a flat refusal from Maldives at the time, which considered that such negotiations were inappropriate given that Mauritius did not exercise jurisdiction over the Chagos Archipelago.

That position of Maldives evolved over time, however. In 2010 a genuine dialogue began between the Parties. Indeed, it was Maldives that took the initiative, as is shown by the letter sent by the Mauritius Minister of Foreign Affairs to his counterpart in Maldives. The Minister for Foreign Affairs of Mauritius stated (*Continues in*

English): "I appreciate your proposal that Mauritius and Maldives hold discussions for the delimitation of the exclusive economic zones of our two countries."

(*Interpretation from French*) In September 2010 the Government of the Republic of Mauritius indicated that it considered that the holding of EEZ delimitation talks is all the more relevant in the light of the submission made by Maldives to the Commission on the Limits of the Continental Shelf. What happened next? Did Maldives fail to respond to this proposal? Absolutely not. As I indicated earlier, a first meeting between the representatives of the two States was held in Malé in Maldives in October 2010 on maritime delimitation and the submission. As the conclusion of the minutes of the meeting show, this meeting was clearly perceived at the time as being the start of a negotiation process that would last for some time. For Maldives (*Continues in English*)

> Minister Shaheed … stated that this is only the beginning of an era of cordial relationship between the two sides and that further meetings would have to be held to finalize the pending issues.

(*Interpretation from French*) For Mauritius, (*Continues in English*) "Mr Seeballuck … expressed the wish that more talks should be held between the two sides to resolve issues to their mutual benefit."

(*Interpretation from French*) Allow me to dwell for a moment on these documents. First of all to point out that the desire expressed at the time by the two States to engage in a process of negotiation is in itself indicative of the existence of a dispute. What would be the point of embarking on such discussions if the two Parties were not aware of a problem to be resolved in relation to the delimitation of the maritime areas? Second, these documents should be compared against the way in which our opponents presented the evidence on this question of negotiations the day before yesterday. You will find only two dates in their oral arguments relating to negotiations – 2001 and 2019 – referring to the attempts made by Mauritius in those years to open or resume negotiations with Maldives. There is nothing, not a word, about the particularly significant exchanges between the Parties which took place in 2010. Would it this happen to be because these exchanges nullify Maldives' arguments concerning the purported absence of a dispute, as I have just pointed out, and the purported absence of negotiations? In substance, our opponent's description of the dynamics between the Parties at the time is also problematical. The file only shows, so they say, "attempts by Mauritius to commence maritime delimitation negotiations." However, in fact, I should really refer to the original version of the oral arguments from Ms Habeeb – as the official translation does not really do justice to the strength of her language. Ms Habeeb refers there to (*Continues in English*) "Mauritius' unilateral attempts to force Maldives to agree to a maritime delimitation" – (*Interpretation from French*) Mauritius' unilateral attempts to force an agreement on maritime delimitation, according to Maldives; offers of negotiations made by Maldives themselves, according to the case file. These are two propositions which seem rather difficult to reconcile. Maybe our colleagues on the other side will tell us on Saturday exactly how to do that.

In its written pleadings, Maldives similarly argued that (*Continues in English*)

> it is acknowledged that Mauritius has in the past requested that the Maldives meet to discuss a maritime boundary delimitation. But in the present circumstances, such negotiations between Mauritius and the Maldives would not be meaningful. This has been the consistent and clear position of the Maldives.

(*Interpretation from French*) Well, no. Mr President, Members of the Special Chamber. This position has been neither consistent nor clear, as the exchanges in 2010 show. It has varied over time, above all depending on political considerations, and this shows that, as regards the possibility of holding such negotiations, there has not been any problem which, according to conventional jurisprudential terminology in this field, could be classified a *non possumus*. Quite obviously, what was lacking here was solely the will to move negotiations forward.

The good intentions expressed by the two States following their meeting in 2010 came to naught. In February 2011 the Mauritius Ministry of Foreign Affairs, referring to the meeting in October 2010, re-established contact with the Maldives authorities to enquire about the possibility of discussions on the overlapping area of the continental shelves to the north of the Chagos Archipelago and, more generally, on the maritime boundary between the two States. However, this move saw no response, as did, moreover, the approach made by Mauritius in March 2019 with a similar aim, inviting Maldives to a second round of negotiations to delimit the maritime boundary following the Advisory Opinion handed down by the ICJ shortly before.

Thus, Mr President, Members of the Special Chamber, for almost 20 years the Republic of Mauritius has been trying to resolve the issue of maritime delimitation between the two States by way of negotiation. With, as we have just seen, rather mixed results. A genuine initiation of dialogue that started in 2010 but was not followed up. And, above all, Maldives' repeated refusal to engage in discussions on the ground that, according to it, the question of sovereignty over the Chagos Archipelago was and remained disputed, which purportedly rendered such negotiations impossible. Moreover, that remains the main argument of the other side in claiming that Mauritius failed in its obligation of prior negotiation under the Convention on the Law of Sea as a precondition to recourse to judicial dispute settlement procedures.

Looked at from a certain perspective, our opponents come out as real recycling experts. From a single starting point – the claim of a continuing dispute as to sovereignty over the Chagos Archipelago – they manage to fuel all their preliminary objections, including that of the purported absence of negotiations between the Parties. But once you have demonstrated the futility of that starting block proposition, as my colleague Mr Reichler has done with his customary efficiency, there is clearly nothing left of the preliminary objection based on a purported failure to fulfil an obligation to negotiate.

As Maldives itself notes, the Parties do not disagree on the substance of the obligation to negotiate, and thus there is no problem in referring to a few "classics" in this area, rehearsing, for example, the quotation from the ICJ in the *Gulf of Maine* case, which the other side mentions in its own written pleadings. The Court refers to

"the duty to negotiate with a view to reaching agreement and to do so in good faith, with a genuine intention to achieve a positive result." As the case file shows, Maldives ventured down this path for a while before giving up, and what the Republic of Mauritius has run up against, more generally, before and after the 2010 episode, was a forceful *non volumus* on the part of its neighbour. When confronted by such a *non volumus*, the best established consequence is – and I hardly dare remind you – that the obligation to negotiate may be considered to be exhausted. Thus, as your Tribunal has set out on a number of occasions, "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted." This was clearly the situation facing the Republic of Mauritius when it decided to bring these proceedings. The maritime delimitation dispute between it and Maldives is manifestly one that cannot be settled by agreement, and this state of play fully justifies recourse to judicial dispute settlement methods under Part XV. So, just like the objection based on the alleged absence of a dispute between the Parties, the objection based on the alleged absence of prior negotiations is manifestly contradicted by the very evidence in the case file, and must therefore be dismissed.

Let me also show you, finally, that the last objection raised by Maldives based on an alleged abuse of process should meet the same fate.

Our opponents, manifestly zealous in neglecting no obstacle that might bar your ruling on the merits of the application submitted by the Republic of Mauritius, are of the opinion that the institution of these proceedings constitutes an abuse of process. According to this approach, Mauritius purportedly committed a veritable abuse of process by having recourse to the dispute settlement mechanisms provided for by the Convention on the Law of the Sea in an attempt to settle what it claims is, above all, a sovereignty dispute with a third State over the Chagos Archipelago. However, this last objection is just as unpersuasive as those which my colleagues and I have dealt with so far.

Abuse of process is clearly a very popular notion, with litigants at any rate. You can find it invoked in at least 11 cases before the Permanent Court of International Justice or the International Court of Justice. It is, however, a concept that is much less popular before judges. Not one single time has the argument been accepted by the current Court or by its predecessor, and the reason for this is extremely simple. It resides in the fact that these Courts have set a particularly high threshold before abuse of process can come into play. As the Judges in The Hague have held on numerous occasions, and very recently in the *Certain Iranian Assets*:

> only in exceptional circumstances should the Court reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process.

Maldives considers that these exceptional circumstances are present in this case. This is because the Republic of Mauritius is purportedly repeating here what it already attempted, according to our opponents, in the *Chagos Marine Protected Area Arbitration*. In this instance, it is supposedly an attempt to force the resolution of the dispute between Mauritius and the United Kingdom concerning sovereignty over

1 the Chagos Archipelago, all the while knowing perfectly well that territorial
2 sovereignty disputes do not fall within the jurisdiction of a court such as the
3 International Tribunal for the Law of the Sea.
4
5 Here again, our opponents obstinately refuse to see that the wheel of history has
6 turned and that we are no longer in 2015, when the arbitral tribunal handed down its
7 award. What Mauritius has done in bringing these proceedings is not, as Maldives
8 alleges, to use proceedings for aims alien to the ones for which they were intended.
9 It is quite simply to draw the consequences of the Advisory Opinion handed down by
10 the ICJ in February 2019, which confirms that the United Kingdom does not hold any
11 title of sovereignty over the Chagos Archipelago and that the principle of *res judicata*
12 inherent in the 2015 arbitral award is no impediment to this conclusion. As my
13 colleagues have explained in detail this afternoon, Mr President, Members of the
14 Special Chamber, you are not called upon to resolve some sort of sovereignty
15 dispute which, as the 2019 Advisory Opinion confirmed, simply does not exist. In
16 these circumstances, it is obviously perfectly logical for Mauritius to take the initiative
17 in resolving the question of maritime delimitation with Maldives, a question which has
18 arisen in their bilateral relations for almost 20 years now. There is not the slightest
19 trace here of an "exceptional circumstance" which would justify the objection based
20 on abuse of process being upheld.
21
22 It is, in reality, quite extraordinary that it is Maldives that is putting forward this claim,
23 given that the way in which it elected to respond to the institution of these
24 proceedings by Mauritius reveals, to say the least, an arms' length relationship with
25 international law. The Court asserted as clearly as possible that the continued
26 administration of the Chagos Archipelago by another State constitutes an unlawful
27 act of continuing character which should be brought to an end as rapidly as possible.
28 However, Maldives maintains that the purported title to sovereignty to which this
29 other State continues to cling bars the continuation of the current proceedings. The
30 Court stated that "all Member States are under an obligation to co-operate with the
31 United Nations in order to complete the decolonization of Mauritius", and that appeal
32 was renewed by the General Assembly. However, Maldives is of a mind that this
33 pronouncement does not oblige it to a particular course of conduct. Therefore, it is
34 rather strange, under such circumstances, that it is the Republic of Mauritius that is
35 reproached for abuse of law and international procedures; and it is even more
36 strange that the Republic of Mauritius finds itself accused of harassment and
37 intimidation merely for having recalled the importance of complying with international
38 law.
39
40 Maldives tries to justify its position in this regard by explaining that it does not desire
41 to take sides in a bilateral dispute – a position, let me recall, that was absolutely not
42 that of Maldives in 2010 – but this defence shows, if any further proof was
43 necessary, the extent to which the analysis by our opponents is misguided. As my
44 colleagues have reminded you, the 2019 Advisory Opinion confirmed with the
45 greatest possible clarity that what was at issue was the question of decolonization,
46 calling into play principles of international law with a much wider scope. Once the
47 question of decolonization was resolved, there was quite simply no sovereignty
48 dispute any more. In defending its position in this case, Maldives is indeed taking a
49 stance, not in a bilateral dispute but with regard to international law, by inviting you to
50 refuse to have regard to the findings of the Court in its Advisory Opinion and, by so

1 doing, to perpetuate a situation of continuing breach of one of the most fundamental
2 principles of the international legal order, namely the right of peoples to
3 self-determination. That is a rather bizarre invitation to address to a tribunal, and
4 I respectfully invite you to draw all the attendant consequences by rejecting all the
5 preliminary objections raised by the Republic of Maldives.
6
7 Mr President, this brings to an end the oral statements of the Republic of Mauritius in
8 this first round of oral argument. I would like to express my thanks to you,
9 Mr President, Members of the Special Chamber, for your kind attention.
10
11 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Klein. This brings
12 us to the end of this evening's sitting and the first round of oral pleadings. The
13 hearing will resume on Saturday, 17 October at 2 p.m. to hear Maldives' second
14 round of pleading. The sitting is now closed.
15
16 (*The sitting closed at 6.56 p.m.*)