English Version

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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2020

Public sitting

held on Thursday, 15 October 2020, at 2 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

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:

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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,

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Ms Anjolie Singh, Member of the Indian Bar, New Delhi, India,

as Counsel;

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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;

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as Assistant.

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as Agent;

and

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

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Mr Alan Boyle, Emeritus Professor of International Law, University of Edinburgh; Member of the Bar of England and Wales, Essex Court Chambers, United Kingdom,
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as Assistants.

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. Today the Special Chamber will hear Mauritius' first round of pleading regarding the preliminary objection raised by the Maldives. I now give the floor to the Co-Agent of Mauritius, His Excellency Mr Jagdish Dharamchand Koonjul, Ambassador and Permanent Representative of Mauritius to the United Nations, to deliver his statement on behalf of the Agent of Mauritius, Dheerendra Kumar Dabee. You have the floor, sir.

MR KOONJUL: Honourable Members of the Special Chamber, Honourable Agent and members of the delegation of the Republic of Maldives, it is a privilege and an honour to appear before you, in my capacity as Co-Agent of the Republic of Mauritius, to open the oral pleadings on behalf of the Republic of Mauritius.

I sincerely thank you, Mr President and Members of the Special Chamber, for holding this hearing and for making it possible for some counsel to appear virtually in these incredibly special and difficult circumstances because of the COVID-19 pandemic. We are also grateful to the International Tribunal for the Law of the Sea and, in particular, to its Registrar and her staff for the exemplary manner in which they have been carrying out their mandate, not least in arranging this hearing during such trying times. We welcome the opportunity that this hearing offers to engage with our colleagues from the the Maldives delegation.

Mr President, Members of the Special Chamber, these proceedings, which are aimed at settling a friendly dispute between the Republic of Mauritius and the Republic of Maldives, touch upon a matter of high importance to both countries, namely the delimitation of their maritime boundaries. This matter has remained unsettled for more than a decade, and that is why proceedings were instituted before an UNCLOS Annex VII arbitral tribunal, prior to their transfer to this Special Chamber.

Such transfer to a special chamber of ITLOS is in line with the strong support expressed by developing countries for ITLOS, which itself is a creation of the post-colonial era, one that reflects the recognition of the role of States that have emerged in the process of decolonization.

Mr President, on Tuesday last, the Maldives, throughout their oral presentation, repeated one refrain to the effect that Mauritius has come to this Special Chamber to resolve, or to achieve what it failed to achieve at the Annex VII proceedings concerning the "Marine Protected Area" and at the International Court of Justice in respect of what they call, the "territorial dispute" between Mauritius and the United Kingdom. Allow me to set the record straight. Mauritius does not seek, nor has it ever sought, to use these proceedings to settle a territorial dispute. In fact, there is no territorial dispute because the Chagos Archipelago is recognized under international law as forming an integral part of the territory of Mauritius.

Our Application makes this very clear. We have requested only one thing from this Special Chamber: that it delimit our maritime boundary with the Maldives. We have not brought before you any territorial issue. If that issue is before you, it is because it was raised by the Maldives in their preliminary objections, not by Mauritius. There was no need for them to have done so. The overwhelming majority of States, in fact all but a very small handful, clearly understand the ICJ to have determined that the

Chagos Archipelago is, and always has been, an integral part of the territory of Mauritius.

It has also been alluded by the Honourable Agent of the Maldives that Mauritius has incorrectly and unjustifiably portrayed the Maldives as being opposed to decolonization. He has attempted to demonstrate his country's commitment to the principles of self-determination, decolonization and to international law by referring to the explanation of vote by the Permanent Representative of the Maldives at the United Nations after the adoption, by an overwhelming majority, of UN General Assembly resolution 73/295. That resolution affirmed the determinations of the ICJ and set out the responsibilities, under international law, of States, UN Agencies and specialized bodies in respect of the decolonization process of Mauritius. It is unfortunate that the Maldives was the only developing country in the world to vote against that resolution as well as resolution 71/292, which requested an advisory opinion of the ICJ precisely on the question of the decolonization of Mauritius. Mr President, actions speak louder than words.

Let me also express my delegation's disappointment with the tone and content of the Maldives' concluding presentation, which accused Mauritius and its Counsel of bad faith. Such comments are not in keeping with the spirit of friendliness and co-operation that characterizes our bilateral relationship, and are beneath the dignity of this Special Chamber. We will not respond further to them. As the former First Lady of the United States has said: when they go low, we go high.

Mr President, Members of the Special Chamber, let me now briefly describe the geographical setting of Mauritius.

As you can see from the map which is on the screen, the Republic of Mauritius consists of a group of islands located in the Indian Ocean. The main Island of Mauritius is about 900 kilometres east of Madagascar. In addition to the main Island, in the Republic of Mauritius we have:

(a) Cargados Carajos, which lie 402 kilometres to the north;
(b) Rodrigues, situated at 560 kilometres to the north-east;
(c) Agalega, located at 933 kilometres to the north;
(d) Tromelin, situated at 580 kilometres to the north-west; and
(e) The Chagos Archipelago, including Diego Garcia, which is about 2,200 kilometres to the north-east. The Chagos Archipelago is about 517 kilometres from the Maldives, with which it has an undelimited overlapping maritime claim.

Mr President, Members of the Special Chamber, Mauritius and the Maldives enjoy very friendly and cordial relations. We are both Small Island Developing States. We face common challenges, such as the effects of climate change, vulnerabilities – both economic and environmental – as well as inherent structural handicaps such as distance from the markets, and dependence on tourism which, as we are all aware, have been compounded by the COVID-19 pandemic.

Both Mauritius and the Maldives belong to the Commonwealth as well as other international organizations. More often than not, we take a common position on

world issues. Relations between Mauritius and the Maldives have been growing over the years with an increasing level of Mauritian investments in the banking and tourism sectors in the Maldives.

High-level visits have also been taking place, the highest one being the State visit of former President Nasheed in 2011, during which he was presented with the highest Mauritian Award – the Grand Commander of the Order of the Star and Key of the Indian Ocean (GCSK). Other visits by dignitaries from the Maldives have followed, the latest one being that of the President of the Maldives in July of last year in the context of the Indian Ocean Island Games hosted by Mauritius.

As small island countries, we both appreciate the value of marine and ocean resources for our economy. For many decades, because of lack of capacity, islands have not been able to fully exploit their resources for the benefit of their peoples. Despite these challenges, Mauritius has, over the past decades, endeavoured to conclude negotiations with neighbouring countries towards the delimitation of our maritime boundaries. In the same vein, in line with article 76 of UNCLOS, Mauritius has made submissions for an extended continental shelf in different regions of Mauritius. In the Mascarene Plateau region, in 2009, Mauritius and Seychelles, as two mid-ocean small island States, made a joint submission to the Commission on the Limits of the Continental Shelf (CLCS), and in 2011, the Commission endorsed an area of 396,000 square kilometres of extended continental shelf, which Mauritius and Seychelles are currently managing jointly.

Mauritius has also made a submission in respect of the southern region of the Chagos Archipelago and another one in respect of the Rodrigues region, both of which are awaiting consideration by the CLCS.

What remains for Mauritius is the preparation of a submission in respect of the northern region of the Chagos Archipelago, where there exists an overlap with the extended continental shelf claimed by the Maldives. As a prerequisite for such a submission, it is necessary to delimit the maritime boundary between Mauritius and the Maldives. The conclusion of such boundaries may also lead to the possibility of making – should the two States agree – a joint submission in respect of the extended continental shelf. The absence of such a boundary stops this process. It is unsettling and it undermines the rule of law.

As Counsel for Mauritius will elaborate in their presentations, Mauritius and the Maldives held discussions on delimitation in 2010. At that time, the Maldives raised no concern about it being “expected to take sides” in a dispute, as the Honourable Agent for the Maldives now appears to claim.[1] In fact, following those discussions, Mauritius has been expecting that the Maldives would take certain steps which would enable Mauritius to withdraw its objections to the Maldives’ extended continental shelf submission and which would allow for the continuation of the delimitation talks. Unfortunately, despite several attempts, it has not been possible to move further from this longstanding stalemate. The Maldives continues to elude all discussions pertaining to maritime delimitation. That is why we are here today.

[1] ITLOS/PV/20C28/1, p. 5, line 42 (Mr Riffath).

We consider that the Special Chamber plainly has the jurisdiction to hear this matter, and that there exists, equally plainly, no bar to the exercise of that jurisdiction. It is our hope that the Special Chamber will, in due course, apply the appropriate provisions of UNCLOS to delimit our maritime boundaries. In so doing, it will resolve the dispute between Mauritius and the Maldives. It will enhance the rule of law, offering respect for the International Court of Justice, as well as the rules and principles that the Court applied to complete the decolonization of Mauritius. To accede to the request of the Maldives, and to decline to exercise jurisdiction, will, we fear, diminish the standing of the Court and the Tribunal, undermine the rule of law, and give rise to fragmentation among international courts and tribunals. At a time when the International Court of Justice and the Tribunal have enhanced a common vision for matters of international law, including the law of the sea, and are sharing a commonality of judges, and even a Registrar, it would be dispiriting indeed to see these two international judicial bodies taking different approaches.

Mr President, Members of the Special Chamber, Counsel for Mauritius will go into greater details on the premise of our request, including the determinations of international law made by the ICJ in its Advisory Opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.

Mauritius considers the ICJ findings to be unambiguous: the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius. Therefore, as the lawful sovereign over the Chagos Archipelago, Mauritius is the only State lawfully entitled to conclude maritime boundaries with its neighbours. The Maldives has characterized Mauritius' position in terms that the ICJ "resolved" a 40-year-old sovereignty dispute. That is not our position. The ICJ was not asked to do so nor was it required to do so. The Court made it clear that there is no, nor has there ever been, an "unresolved sovereignty dispute". Instead, the Court determined that the Chagos Archipelago was unlawfully detached from the territory of Mauritius in 1965, three years prior to its independence. It follows that there is no basis for the Special Chamber to decline to exercise its jurisdiction, or to refrain from delimiting the maritime boundary between the two Parties.

Before I conclude, I wish to record the objection of Mauritius to the contents of a document entitled "List of Issues in Dispute", which was included in the Judges' folder submitted to you by the Maldives on Tuesday. We only saw that document for the first time that evening, when the Judges' folder was sent to us at 8:28pm, almost two hours after the adjournment of the hearing. That document purports to set out a list of issues that, according to the Maldives, are agreed between the Parties. This is absolutely not the case. That document reflects only the erroneous views of the Maldives on various matters. The position of Mauritius is clearly set out in the written pleadings, and will be elaborated upon in the presentations that follow.

Let me also place on record that we have given copies of our own Judges' folder to the Maldives delegation shortly before the beginning of today's proceedings.

Mr President, Members of the Special Chamber, let me end my presentation by setting out the order in which Counsel for Mauritius will be making their presentations. First, Professor Philippe Sands QC will address the legal status of the Chagos Archipelago following the Advisory Opinion of the International Court of

Justice. He will be followed by Mr Paul Reichler, who will present by video conference the arguments on why the Special Chamber should reject the preliminary objections of the Republic of Maldives. He will respond to the first two preliminary objections, which are, in their own words: (1) that you have no jurisdiction to determine what they call an “unresolved sovereignty dispute” over the Chagos Archipelago between Mauritius and the United Kingdom; and (2) that, in such circumstances, the United Kingdom is an indispensable party, whose absence from these proceedings deprives you of jurisdiction. Finally, Professor Pierre Klein will respond, also by video conference, to the last three preliminary objections and demonstrate that there is indeed a dispute between Mauritius and the Maldives which the Parties have thus far been unable to resolve and that the request made by Mauritius does not in any manner constitute an abuse of process.

Mr President, Members of the Special Chamber, it is a distinct privilege for Mauritius to participate in these hearings. My Delegation will remain available to provide any such assistance as you might need. We will be pleased to offer our fullest co-operation to the delegation of the Maldives in making these proceedings as helpful as possible to the Special Chamber. We welcome, of course, questions from the Special Chamber at any time during the course of the proceedings, and we will do our utmost to respond to those questions in a timely and comprehensive manner.

To assist the Special Chamber, we have made available a folder for each Judge, to which your attention will be directed during our presentations.

Mr President, I now respectfully request that you invite Professor Philippe Sands QC to make his presentation. Thank you, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Koonjul and now give the floor to Mr Philippe Sands to make his statement. You have the floor, sir.

MR SANDS: Mr President, Members of the Special Chamber, it is a privilege to appear before you on behalf of Mauritius and, I should say, a personal happiness to be here in person.

Mr President, in its written pleadings the Maldives has conjured up five supposedly distinct preliminary objections. Tuesday’s restatement repeated them, although it did so with so many mischaracterizations and selective uses – on the process of decolonization, on the ICJ Advisory Opinion, on the General Assembly resolutions that preceded and followed that Opinion – that it is necessary for us to spend a little more time this afternoon on some rather basic matters. We know this to be a most diligent Tribunal and Special Chamber, sir, and we know that you will look at each act and each decision with the great care they deserve, but we do need this afternoon, given what you heard on Tuesday, to set the record straight.

At the heart of the Maldives’ five objections – and of just about every statement it made on Tuesday – is the reality that they have, each of them, one thing in common: each is based on a “core” premise, as the Maldives puts it, that there is an “unresolved sovereignty dispute between Mauritius and the United Kingdom … with

respect to the Chagos Archipelago."[1] If the Maldives is wrong on its "core" premise, then each and every one of its preliminary objections collapses. Mr President, the Maldives is wrong. There is no "unresolved sovereignty dispute" before you which you are asked to, or must, decide before proceeding to the delimitation of the maritime boundaries. There is no interest of any other State which could "constitute the very subject-matter of the judgment to be rendered on the merits of our Application".[2] There is no bar to the Special Chamber proceeding with the task entrusted to it under the Special Agreement, namely to delimit the maritime boundary between Mauritius and the Maldives in the Indian Ocean.

There is no "unresolved sovereignty dispute", as the Maldives puts it, for the reason made clear by the International Court of Justice in The Hague, the principal judicial organ of the United Nations, without a single dissent on the merits, not even by one judge: the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius, the Court made clear. It was an integral part of Mauritius before the British conquest of 1810, and it continued to be so through British colonial rule, until that ended in 1968, and it continued to be so at all times thereafter, as the ICJ explicitly found. It continues to be so today, as the ICJ also expressly found. This is not because Mauritius says so, or because the African Union says so, or anyone else of a political nature; this is because the International Court of Justice has said so. Its Advisory Opinion has been endorsed by the United Nations General Assembly, and subsequently applied by the United Nations Secretary-General. Without ambiguity, without blinking, the Court made it absolutely clear that the Chagos Archipelago has always been a part of the territory of Mauritius, and that it remains an integral part of the territory of Mauritius today. Before 1968 it was part of the colony of Mauritius, and since 1968 it has been part of the territory of the independent sovereign State of Mauritius, even if it has been under the "administration" of the United Kingdom. The question of the territorial status of the Chagos Archipelago is not a matter that requires judicial determination. That has been done. It has been done definitively and authoritatively. It is a settled matter under international law, not as a political matter, but as a consequence of the expression of the principal judicial organ of the United Nations.

Let us be clear. This case is totally different from any of the ones cited by the Maldives on Tuesday, including, for example, *Ukraine* v. *Russia*. That is because this case is about decolonization, and it is also because, unlike any of those cases, there is an Advisory Opinion of the ICJ, a determination by the ICJ, that addresses the core issue. In none of the cases referred to by Professor Thouvenin – none – was there any ICJ determination directly on point.[3] Nor was there such a determination back in 2015 when the Annex VII arbitral tribunal gave its award. This case is not one in which the Tribunal is required to make a determination on competing territorial claims over the Chagos Archipelago, because last year the ICJ conclusively determined that the Archipelago is part of the territory of Mauritius, that the attempt at dismemberment in 1965 was unlawful, and that the subsequent colonial

[1] Written Preliminary Objections of the Republic of Maldives under article 294 of the United Nations Convention on the Law of the Sea and article 97 of the Rules of the International Tribunal for the Law of Sea (18 December 2019) (hereinafter "Maldives' Preliminary Objections"), para. 5.
[2] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 24, at para. 55.
[3] ITLOS/PV.20/C28/2, Mr Thouvenin, pp. 6-16.

1 “administration” is an international legal wrong of a continuing character that must be
2 terminated as rapidly as possible.[4] I hope you will forgive me for belabouring these
3 points but you heard nothing about any of this from the Maldives earlier this week. It
4 was though they were taking you to a completely different advisory opinion.
5
6 The determination of the Court has been adopted and affirmed by the United Nations
7 General Assembly, in resolution 73/295, just last year, by an overwhelming vote.[5]
8 Mr President, you have already heard there is only a single developing country in the
9 whole world that voted against that resolution on decolonization: it was the Maldives,
10 which, incidentally, also voted against the initial resolution requesting the Court to
11 give an opinion on decolonization. Remarkably – even more remarkably – the
12 Maldives, a former British colony, is alone among all the States in the world that
13 have achieved independence since 1945 to have voted against either resolution.
14 Mr President, on Tuesday we heard the Maldives profess its commitment to self-
15 determination, to decolonization and to territorial integrity: its actions, its votes, and
16 its arguments this week all offer a very different impression.
17
18 In the eyes of the world – the Court in The Hague, the General Assembly, the United
19 Nations Secretary-General, every African country, every developing country – under
20 international law the situation of Mauritius is entirely without any ambiguity: its
21 territory includes the Chagos Archipelago, period. As the International Court made
22 clear, self-determination, decolonization, independence and territorial integrity are, in
23 international law, a part of a seamless whole. They go together.
24
25 In other words, in applying the law of self-determination and decolonization, as it did,
26 the International Court necessarily had to and did express an opinion on the
27 territorial integrity of Mauritius. It did so explicitly. Did the Court get it wrong? No. Did
28 the Court lack authority? No. Does the Maldives disagree with what I have just said?
29 No. Let us look at what they said in their Written Observations of 15 April 2020: “The
30 Maldives does *not* suggest that the advice rendered by the ICJ in the *Chagos*
31 Advisory Opinion was wrong or lacking in authority.”[6] That is a huge concession. It is
32 dispositive, in fact, because the ICJ got it absolutely right.
33
34 Mr Reichler and Professor Klein will address you specifically on the five preliminary
35 objections. I will just address the factual and legal framework within which these
36 questions fall to be considered, in more detail than I expected because the Maldives
37 on Tuesday drove a coach and horses through that legal framework. First, I will offer
38 you a reminder of the broad legal context, the law of self-determination and
39 decolonization, matters on which the Maldives has said virtually nothing in its written
40 pleadings, and even less on Tuesday. Then I will return to the factual background of
41 this case and the circumstances in which it reaches you, including, significantly, the
42 circumstances in which Mauritius achieved independence. This too the Maldives has
43 totally ignored. Third, I will summarize the legal developments post-independence

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[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion, I.C.J. Reports 2019*, p. 95 (hereinafter “*Advisory Opinion on the Chagos Archipelago*”).
[5] United Nations General Assembly, resolution 73/295, *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (24 May 2019) (hereinafter “UNGA Res. 73/295”).
[6] Written Observations of the Republic of Maldives in reply to the Written Observations of the Republic of Mauritius (15 April 2020), para. 4 (emphasis in the original).

that put beyond doubt the territorial integrity of Mauritius, including the Chagos Archipelago.

I turn to the law of decolonization and self-determination. It is part of the applicable law to be applied by this International Tribunal, which we say should follow exactly the decision of the International Court of Justice. The origins of that law may be found in the mandate system embodied in article 22 of the Covenant of the League of Nations. This provided for certain territories which had become detached from defeated powers following the end of the First World War to come under the "tutelage" of Mandatory States on behalf of the League, which would then hold them as part of a "sacred trust of civilization" until such time as they would be "able to stand by themselves under the strenuous conditions of the modern world".[7] The mandate system envisaged self-determination as the ultimate outcome of that "sacred trust".

At the time of the San Francisco Conference in 1945, nearly one third of the world's population, more than 750 million human beings, lived in non-self-governing territories – words that offer a euphemism for colonies.[8] The Conference galvanized a significant shift in attitude, a move to an anti-colonialist sentiment. It applied the principles of the Atlantic Charter, signed by British Prime Minister, Winston Churchill, and United States President, Franklin Roosevelt, in August 1941. You can see it on your screen. I might just say, Mr President and Members of the Tribunal, that you will find all these documents at tab 12 of the Judges' folder, and this one is figure 2. The third paragraph, at tab 12, figure 2, the Atlantic Charter, is a commitment that the peoples shall "choose the form of government under which they will live".[9] Those words are the origins of what followed.

In 1945 – we are now at figure 3 of tab 12 – the League's mandate system was replaced by the trusteeship system, and Chapters XII and XIII of the Charter. "[S]elf-determination of peoples" was explicitly identified as one of the four purposes of the United Nations, in article 1, paragraph 2 ; and article 76 promotes what it calls the "progressive development towards self-government or independence … and the freely expressed wishes of the peoples concerned".[10]

By 1960, many countries had achieved independence, as the move to decolonization accelerated. In that year alone, 18 countries gained their independence, including 17 from Africa.[11] There are many people on this bench who are far more aware than I am of what happened in that period. In the autumn of 1960, self-determination reached centre stage at the General Assembly. In November, a draft "Declaration on the granting of independence to colonial countries and peoples" was debated, over

[7] Covenant of the League of Nations, article 22.
[8] United Nations Department of Public Information, *What the UN Can Do to Assist Non-Self-Governing Territories* (June 2017), p. 8, available at: https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/what_the_un_can_do_1.pdf (last accessed 19 September 2020).
[9] The Atlantic Charter (14 August 1941), available at: https://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html (last accessed 19 September 2020).
[10] Charter of the United Nations, articles 1(2) and 76.
[11] *Advisory Opinion on the Chagos Archipelago*, para. 150.

1 two intense weeks.[12] On 14 December 1960, resolution 1514 (XV) was adopted. You
2 will find it at figure 4 of tab 12.
3
4 Resolution 1514 set out the key principles, of which, for today's purposes, three are
5 paramount: first, that "[a]ll peoples have the right to self-determination"; second, that
6 self-determination requires the free and genuine consent of the population
7 concerned, namely the "[i]mmediate steps" to transfer "all powers to the peoples …
8 without any conditions or reservations, in accordance with their freely expressed will
9 and desire"; and, critically for our purposes, third, that the right to self-determination
10 prohibits "[a]ny attempt aimed at the partial or total disruption of the national unity
11 and the territorial integrity of a country". "Territorial integrity"; the words come alive in
12 1960.
13
14 On its terms, resolution 1514 set out "the basis for the process of decolonization".
15 Eighty-nine Member States voted in favour; not one voted against. There were nine
16 abstentions, including the United Kingdom. In the years that followed, in the 1960s, a
17 further 28 non-self-governing territories exercised the right to self-determination.[13]
18 One of those was Mauritius. Another, we thought, was the Maldives.
19
20 Six decades later, the International Court of Justice, in the *Advisory Opinion on the*
21 *Chagos Archipelago*, noted that resolution 1514 represented, as it put it, "a defining
22 moment in the consolidation of State practice on decolonization", and that it
23 "clarifie[d] the content and scope of the right to self-determination."[14] The Court also
24 made clear, at paragraph 160 of its Opinion, that the maintenance of territorial
25 integrity is a key element of the right to self-determination and the law on
26 decolonization – a "key element" – and that "any detachment … is contrary to the
27 right of self-determination". In other words, self-determination, territorial integrity,
28 decolonization and independence with territorial integrity are part of a seamless
29 process, at the end of which an independent State emerges with undisputed
30 sovereignty over the entirety of its territory.
31
32 As resolution 1514 was being debated in 1960, the situation of South West Africa
33 came into view. Colonized by Germany in the late nineteenth century, South West
34 Africa – which, of course, today is known as Namibia – was occupied by South Africa
35 in 1915. The League of Nations conferred a mandate for the territory upon "His
36 Britannic Majesty to be exercised on his behalf by the Government of the Union of
37 South Africa."[15]
38
39 After 1945, South West Africa could, and some say should, have become a trust
40 territory under Chapter XII of the UN Charter. But South Africa stopped that and
41 insisted that it would "continue to administer the Territory … [under] the Mandate",[16]
42 and also "to seek international recognition for the Territory of South-West Africa as
43 an integral part of the Union." The UN General Assembly turned to the Court, which

[12] Letter to President of the General Assembly (A/4501, 23 September 1960). See: https://digitallibrary.un.org/record/1304736?ln=en (last accessed 15 September 2020).
[13] *Advisory Opinion on the Chagos Archipelago*, para. 150.
[14] Ibid.
[15] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 (hereinafter "*International Status of South-West Africa*") at p. 132.
[16] Ibid., pp. 134-135.

1 gave three advisory opinions on the matter, in 1950, 1955 and 1956.[17] The Court
2 found that South Africa's obligation to submit to supervision had not disappeared,
3 that the supervisory functions should be exercised by the United Nations, and that
4 the status of that territory could only be modified "with the consent of the United
5 Nations."[18]
6
7 In November 1960, at the precise moment that resolution 1514 emerged, Ethiopia
8 and Liberia filed two cases at the International Court, alleging violations by South
9 Africa of its obligations to the UN under the mandate. The focus was South Africa's
10 practice of apartheid and the suppression of the rights and liberties of inhabitants of
11 the territory essential to their orderly evolution towards self-government.[19]
12
13 The International Court joined the two South West Africa cases.[20] South Africa filed
14 preliminary objections. It argued that Ethiopia and Liberia had no legal interest in the
15 rights of the population of South West Africa. "Stop this case", they said.[21] But, in
16 1962 the Court rejected the preliminary objections of South Africa.[22] Then things
17 changed. The composition of the Court changed. In 1966, on the casting vote of the
18 President, Percy Spender, an Australian, supported by Sir Gerald Fitzmaurice, from
19 the United Kingdom, the Court totally unexpectedly revisited its earlier decision,
20 departed from it, and rejected the claims of Ethiopia and Liberia. Colonialism was
21 back, it might be said, with a vengeance. The Court ruled that Ethiopia and Liberia
22 had no standing to bring the cases that only the League had standing.[23] The Court
23 had no jurisdiction to exercise. The judgment was widely seen as an outrage, and it
24 plunged the Court into a controversy. I commend to you in particular the dissenting
25 opinion of Judge Jessup. It is the only dissenting opinion that he ever wrote. It
26 castigates the Court for, as he put it, "stopping at the threshold of the case" and
27 "avoiding a decision" on a "fundamental question".[24] In this case, our case, at this
28 stage, the "fundamental question" is analogous. The effect of the Advisory Opinion is
29 centre stage. Will the International Tribunal for the Law of the Sea depart from the
30 determination of the International Court of Justice? Is the Special Chamber of the
31 Tribunal going to give effect to the Opinion or is it going to ignore the Opinion, as the
32 Maldives asks you to do? Is the Special Chamber going to recognize and give effect

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[17] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *South-West Africa – Voting Procedure*, *Advisory Opinion, I.C.J. Reports 1955,* p. 67; *Admissibility of hearings of petitioners by the Committee on South West Africa*, *Advisory Opinion, I.C.J. Reports 1956*, p. 23.
[18] *International Status of South-West Africa*, p. 144.
[19] Application Instituting Proceedings by the Government of Ethiopia (4 November 1960), available at: https://www.icj-cij.org/files/case-related/46/9261.pdf (last accessed on 20 September 2020); Application Instituting Proceedings by the Government of Liberia (4 November 1960), available at: https://www.icj-cij.org/files/case-related/47/10723.pdf (last accessed on 20 September 2020).
[20] *South West Africa Cases (Ethiopia* v. *Union of South Africa; Liberia* v. *Union of South Africa), Order of 20 May 1961*, *I.C.J. Reports 1961*, p. 13.
[21] Preliminary Objections filed by the Government of the Republic of South Africa (30 November 1961), available at: https://www.icj-cij.org/files/case-related/46/9267.pdf (last accessed 20 September 2020), para. 49.
[22] *South West Africa Cases (Ethiopia* v. *Union of South Africa; Liberia* v. *Union of South Africa), Preliminary Objections*, *Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319.
[23] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.
[24] *South West Africa, Second Phase*, Dissenting Opinion of Judge Jessup, available at: https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-07-EN.pdf (last accessed 20 September 2020), p. 1.

1 to Mauritius' right to self-determination or is it going to stop at the threshold, as the
2 Maldives asks you to do?
3
4 As you ponder that question, it is perhaps worth recalling what happened after the
5 Court made its fateful judgment in 1966. The UN General Assembly adopted
6 resolution 2145. You can see it on the screen; it is figure 5 at tab 12. By 114 votes to
7 two, the Assembly reaffirmed "the inalienable right of the people of South West
8 Africa to freedom and independence" in accordance with the UN Charter and
9 resolution 1514.[25] It declared that "South Africa has failed to fulfil its obligations", and
10 it terminated the mandate, putting South West Africa under the "direct responsibility
11 of the United Nations."[26] The following year the Assembly created the UN Council for
12 South West Africa (later renamed the Council for Namibia).[27] In 1973 the Council
13 began to represent Namibia in the negotiations for the Law of the Sea Convention.[28]
14 It did so despite South Africa's continued unlawful administration of the territory.
15
16 In 1970, the Security Council requested an advisory opinion from the Court on the
17 legal consequences of the occupation.[29] You can see that at figure 6 of tab 12. By a
18 large majority, and with a changed composition, the Court confirmed that South
19 Africa's continued presence in Namibia was illegal, that South Africa "is under
20 obligation to withdraw its administration from Namibia immediately" – I pause there
21 to ask whether those words are familiar to you – and that all Member States were
22 obliged to refrain from any acts "implying recognition of the legality of, or lending
23 support or assistance to, such presence and administration".[30] Again, as you will
24 see, those are very familiar words. The Court also decided that the termination of the
25 mandate by the Assembly was binding and dispositive. Again, we are dealing here
26 with an advisory opinion. You may wish in due course to remind yourselves of
27 Sir Gerald Fitzmaurice's bitter dissent because, I have to say, in terms and in tone it
28 sounded remarkably similar to what we heard on Tuesday from Counsel for the
29 Maldives.[31]
30
31 Mr President, Members of the Special Chamber, contrary to what Professor Boyle
32 told you,[32] the case before you today does raise analogous issues to those faced by
33 the International Court in the *South West Africa* cases: the law of self-determination
34 and decolonization, the dispositive effect of an ICJ advisory opinion, and the fact of
35 an unlawful or illegal occupation or administration not being treated in any way that it
36 could give rise to any legal rights whatsoever. We say, not with any happiness, that
37 the situation of the United Kingdom in relation to the Chagos Archipelago today is

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[25] United Nations General Assembly, resolution 2145 (XXI), *Question of South West Africa* (27 October 1966), preamble.
[26] Ibid., paras 3 and 4.
[27] United Nations General Assembly, resolution 2248, *Question of South West Africa* (19 May 1967).
[28] See e.g. Report of the United Nations Council for Namibia, Official Records: Twenty-Eighth Session, Supplement No. 24 (A/9024) (April 1974), at pp. 35 and 82, available at: https://digitallibrary.un.org/record/724946/files/A_9624%5EVol-I%5E-EN.pdf (last accessed 20 September 2020).
[29] United Nations Security Council, resolution 284 (29 July 1970).
[30] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 46.
[31] Ibid., at p. 220.
[32] ITLOS/PV.20/C28/2, Prof. Boyle, pp. 1-6.

1 akin to that of South Africa in relation to South West Africa after the 1971 Advisory
2 Opinion. Back then, one might ask oneself the question: would South Africa have
3 had a right under international law to be engaged in the delimitation of Namibia's
4 maritime boundary with, let us say, Angola? You only have to pose the question for
5 the obvious answer to appear. Having decided that Britain's administration in
6 Chagos was unlawful and that it must be ended forthwith, do we really think that the
7 Court was saying that the unlawful administrator nevertheless had a right under
8 international law to delimit the maritime boundary between Chagos and the
9 Maldives? Is that really what the Court said in February 2019, as we are being told
10 here? Again, you only have to pose that question to recognize the implications –
11 and, frankly, the absurdity – of the path that the Maldives is inviting you to take.
12 When the Court says that a State has no right to administer a territory, it follows
13 inexorably, as night follows day, that it can have no right to be involved in the
14 delimitation of the maritime boundaries of that territory.
15
16 Any other conclusion risks casting this Tribunal into a wilderness, just as the
17 International Court, after 1966, in failing to exercise jurisdiction in a matter of
18 decolonization, was cast for many years into a legal wilderness. It took two decades
19 for the Court in The Hague to regain the trust of many States. The Maldives urges
20 you on a path that leads to the wilderness. We have trust in the International Tribunal
21 for the Law of the Sea and for its respect for the rule of law, for the law on
22 decolonization and self-determination and for its wisdom.
23
24 Mr President, if I may, I will move to the circumstances in which Mauritius obtained
25 its independence – again something that the Maldives chose to ignore completely. I
26 hope you might forgive me this short discursus into history. However, since the
27 Maldives invites you to ignore history and since history is important, we have no
28 choice. Mauritius was initially a French colony, and after 1810 a British colony.[33]
29 Throughout colonial rule, and for as long as there was human settlement, the
30 Chagos Archipelago was always governed as an integral part of the territory of
31 Mauritius.[34] That is a finding of law and fact by the International Court.
32
33 By the early 1960s, the process of decolonization of Mauritius was firming up.
34 A series of constitutional conferences reflected a gradual move towards internal
35 autonomy. But, unknown to Mauritius' elected representative at the time, the United
36 Kingdom was devising a secret plan to detach a part of the territory of Mauritius – the
37 Chagos Archipelago – to keep certain islands for defence purposes.[35] Against the
38 background of resolution 1514 – you can see the relevant internal documents from
39 the United Kingdom on your screen was and at figure 7 - the British Government
40 recognized nevertheless that it would be, as it put it, "desirable to secure [Mauritian
41 Ministers'] positive consent, or failing that, at least their acquiescence", to the
42 detachment of the Chagos Archipelago.[36] These secretive minutes of the British

[33] Written Statement of the Republic of Mauritius (1 March 2018), *Advisory Opinion on the Chagos Archipelago* (hereinafter "Written Statement of Mauritius ICJ"), para. 2.13.
[34] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom*), PCA Case No. 2011-03, (hereinafter "Chagos MPA Award"), paras 58-60.
[35] Written Statement of Mauritius ICJ, para. 3.15 et seq.
[36] UK Foreign Office, Colonial Office and Ministry of Defence, US Defence Interests in the Indian Ocean, DO (O)(64)23, FCO 31/3437 (23 Apr. 1964), at p. 4 (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-01-EN.pdf). Judges' Folder, Tab 8.

1 Government proceed to state that "it would suit us better to confront the Mauritians
2 with a *fait accompli* or at most tell them at the last moment what we are doing."[37]
3
4 As Mauritius moved closer to independence, the secret plan to detach the Chagos
5 Archipelago proceeded. In June 1964, Dr Ramgoolam, the then Premier of Mauritius,
6 was first told about the plan to detach the Chagos Archipelago. The British Governor,
7 Sir John Rennie, reported that Premier Ramgoolam had "reservations on
8 detachment".[38] The locally elected Mauritian Council of Ministers was consulted in
9 July 1965 and strongly objected to detachment.[39]
10
11 In September 1965, as a fourth Constitutional Conference was held in London, the
12 prospects for the independence of Mauritius remained uncertain.[40] The International
13 Court's Advisory Opinion sets out in very considerable detail what happened next.[41]
14 In short, the British Government made the independence of Mauritius conditional on
15 Mauritian Ministers "agreeing" to detachment, linking "both matters in a possible
16 package deal".[42] On the penultimate day of the Conference, Premier Ramgoolam
17 was invited to a one-on-one meeting with the British Prime Minister, Harold Wilson.
18 A note was prepared by Mr Wilson's Private Secretary, which you will be able to find
19 at figure 8 of tab 12. This sets out in the starkest possible terms what colonialism
20 means and what the object of that meeting was, and I will read it full.
21
22 PRIME MINISTER
23
24 Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow
25 morning. The object is to frighten him with hope: hope that he might get
26 independence; Fright lest he might not unless he is sensible about the
27 detachment of the Chagos Archipelago.[43]
28
29 The British Prime Minister received advice: "make some oblique reference" he was
30 told "to the fact that [Her Majesty's Government] have the legal right to detach
31 Chagos by Order in Council, *without* Mauritius' consent ...".[44] This Harold Wilson did,
32 and in this way procured the supposed but reluctant "agreement" of Premier
33 Ramgoolam and two of his colleagues to the detachment of the Chagos Archipelago.
34 You will be aware that, in the later Annex VII Arbitration, Judges Kateka and Wolfrum
35 of this Tribunal described the "agreement", if it can be called that, as having been
36 obtained by "duress".[45]
37
38 Back in 1965 the Mauritians returned home and the British turned to the timing and
39 modality of detachment. At figure 10 of tab 12 you will find a note from the British
40 Colonial Secretary warning the Prime Minister, Harold Wilson, in the following terms:

[37] Ibid.
[38] Written Statement of Mauritius ICJ, para. 3.21.
[39] Ibid., para. 3.36.
[40] Ibid., para. 3.40.
[41] *Advisory Opinion on the Chagos Archipelago*, paras 94-131.
[42] Ibid., para. 102.
[43] UK Colonial Office, Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, PREM 13/3320 (22 Sept. 1965) (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-01-EN.pdf). Judges' Folder, Tab 9.
[44] *Advisory Opinion on the Chagos Archipelago*, para. 106 (emphasis in the original).
[45] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom*), PCA Case No. 2011-03, Dissenting and Concurring Opinion (18 March 2015), para. 77.

1
2 From the United Nations point of view the timing is particularly awkward. …
3 We shall be accused of creating a new colony in a period of decolonization …
4 The Fourth Committee of the United Nations has now reached the item on
5 Miscellaneous Territories and may well discuss Mauritius and Seychelles next
6 week. If they raise the question of defence arrangements on the Indian Ocean
7 Islands before we have detached them, the Mauritius Government will be
8 under considerable pressure to withdraw their agreement to our proposals.
9 Moreover we should lay ourselves open to an additional charge of dishonesty
10 if we evaded the defence issue in the Fourth Committee and then made the
11 Order in Council immediately afterwards. It is therefore important that we
12 should be able to present the U.N. with a *fait accompli*.[46]
13
14 And so, create a new colony is exactly what the British purported to do. Just three
15 days later, on 8 November 1965, the Privy Council passed an Order in Council which
16 purported to detach the Chagos Archipelago from Mauritius, to create what it called
17 the "British Indian Ocean Territory", or BIOT. The Order in Council also amended the
18 Constitution of Mauritius and deleted the words "Chagos Archipelago" from the
19 definition of "Mauritius".[47] There is here one important point to make: the British
20 claim to create the colony, and the supposed rights over the territory of the Chagos
21 Archipelago, of which our friends from the Maldives make so much, were premised
22 exclusively on that moment in 1965, on that supposed "agreement" of the Mauritians.
23 Strip that away and there is no other basis for a claim. With its preliminary
24 objections, the Maldives, which claims to be so committed to decolonization and
25 self-determination, is actually in effect saying that what happened in 1965 was either
26 lawful, plausible or arguable. The ICJ found otherwise, with no dissent on the merits.
27 I can be crystal clear: what the Maldives is asking you to do is to set yourselves
28 apart from the prior determination of the International Court of Justice.
29
30 Britain's actions in 1965 were immediately criticized by the international community,
31 which saw straight through the subterfuge. In December 1965 – this is figure 10A –
32 the UN General Assembly adopted resolution 2066. It expressed "deep concern"
33 about the detachment and invited the United Kingdom "to take no action which would
34 dismember the territory of Mauritius and violate its territorial integrity".[48] The British
35 simply ignored the resolution.
36
37 On 30 December 1966, by a secret exchange of notes, the UK and the US
38 concluded an agreement providing for the Chagos Archipelago to be made available
39 for an initial period of 50 years to "meet the needs of both Governments for
40 defense."[49] Shortly thereafter, between 1967 and 1973, the British Government
41 forcibly removed and deported the entire population of the Chagos Archipelago,
42 approximately 1,500 men, women and children, many of whom had spent their entire
43 lives living on the islands of the Archipelago. To deal with that, the British
44 Government would assert in the UN and in its own Parliament – directly contrary to

[46] UK Foreign Office, Minute from Secretary of State for the Colonies to the Prime Minister, FO 371/184529 (5 Nov. 1965) (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-02-EN.pdf). Judges' Folder, Tab 10.
[47] Written Statement of Mauritius ICJ, para. 3.96.
[48] United Nations General Assembly, resolution 2066 (XX), *Question of Mauritius* (16 December 1965). Judges' Folder, Tab 2.
[49] Written Statement of Mauritius ICJ, para. 3.98.

the facts that were known to it – that there was no “permanent population” in the Chagos Archipelago.[50]

Let us look at a note of a senior British official dating to that time – figure 11 of tab 12:

> We must surely be very tough about this. The object of the exercise is to get some rocks which will remain *ours*; there will be no indigenous population except seagulls.[51]

It continues with a response:

> Unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done, I agree we must be very tough.[52]

Many Chagossians have expressed a desire to return to their homes ever since then, and that wish remains unfulfilled. The forcible removal by the United Kingdom has been followed by a continuing denial of their right to return, and that continues even after last year’s Advisory Opinion.

In the decades after the purported detachment, there has been sustained criticism directed at the UK, from Mauritius and around the world, including at the UN. As early as December 1966 the General Assembly adopted resolution 2232. That resolution reiterated that:

> any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories … is incompatible with the purposes and principles of the Charter of the United Nations and … resolution 1514 (XV).[53]

Over the intervening 50 years, five decades of international condemnation, you will find at figure 12 of tab 12 a list of all the resolutions condemning what has happened – from the African Union, before that the OAU, the non-Aligned Movement, the Group of 77 and China, the Africa-South America Summit and the Africa, Caribbean and Pacific Group of States.[54]

Mr President, that brings me to the circumstances that led to us to being before you today. In April 2010, the British Government purported to create a new “marine protected area” around the Chagos Archipelago, spanning some 640,000 square kilometres of Indian Ocean, on which there would be no activity and no right for

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[50] Ibid., para. 3.102.
[51] Ibid., para. 3.103 (emphasis in the original).
[52] Ibid.
[53] United Nations General Assembly, resolution 2232 (XXI), *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands* (19 December 1967), para. 4. Judges’ Folder, Tab 3.
[54] Written Statement of Mauritius ICJ, para. 4.42 et seq. The Africa, Caribbean and Pacific Group of States is now known as the Organisation of African, Caribbean and Pacific States (OACPS).

1 anyone to return. Mauritius learned about the “MPA” from a newspaper article. In
2 December 2010, it began proceedings under UNCLOS, seeking declarations on two
3 points: first, that the UK had no right to create the MPA because it was not a coastal
4 State; and, second, that the MPA was fundamentally incompatible with the rights and
5 obligations provided for by the Convention.
6
7 Unanimously, the Annex VII tribunal ruled that the MPA was indeed illegal, and that
8 its creation violated numerous provisions of the 1982 Convention. By a narrow
9 majority, the Annex VII tribunal declined to exercise jurisdiction in relation to the first
10 request. It made no findings on the question of who was the coastal State. But, two
11 of the five arbitrators, ITLOS Judges Kateka and Wolfrum, concluded that the
12 majority had fallen into error, that the tribunal could and should have concluded that
13 under the applicable law of self-determination and decolonization, Mauritius was
14 indeed “the coastal State” within the meaning of the Convention, so that the UK had
15 no right to create an MPA.[55] They made clear that their view was limited to the
16 exercise of jurisdiction in a case concerning decolonization: it went no further than
17 that. The majority expressed no view on the merits of this question. The fact is that
18 no other international judge, court or tribunal has ever expressed any disagreement
19 with the views of Judges Kateka and Wolfrum. Their Dissenting Opinion is at tab 4 of
20 your folders.
21
22 But let me be clear, as Ambassador Koonjul said: Mauritius is not inviting the Special
23 Chamber to revisit the matter or to express any views on the conclusion of the
24 majority; nor are we asking you to express any views on the questions that arose in
25 *Ukraine* v. *Russia*, which is entirely distinguishable from this case because, as I said,
26 it was not about decolonization, and because there was no prior judicial
27 determination of the underlying issues. There is therefore no need for you at all to
28 reconsider the Annex VII tribunal’s Award: the Advisory Opinion is an intervening
29 legal fact; it postdates that Award, and it has definitively identified and applied the
30 relevant rules of international law, and concluded that Chagos is an integral part of
31 the territory of Mauritius, and only Mauritius.
32
33 The ICJ Advisory Opinion could be said to have its roots in the joint opinion of
34 Judges Kateka and Wolfrum, which offered clear support for Mauritius’ position on
35 self-determination, decolonization and territorial integrity. Two judges of ITLOS – a
36 body whose history is steeped in the law and practice of decolonization – catalysed
37 the inclusion of an item on the agenda of the 71st session of the UN General
38 Assembly in 2017, under the heading “Promotion of justice and international law”.
39 Agenda item 87 was titled “Request for an advisory opinion of the International Court
40 of Justice on the legal consequences of the separation of the Chagos Archipelago
41 from Mauritius in 1965.”[56] The General Assembly debated the item on 22 June 2017,
42 and it adopted resolution 71/292, which you will find at tab 5 of your folders. One of
43 the very few States to vote against the resolution was the Maldives, which, as I have
44 said, is a curious act indeed for a State that claims to be so deeply committed to
45 decolonization. The resolution referred two questions to the ICJ: first,

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[55] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom*), PCA Case No. 2011-03, Dissenting and Concurring Opinion (18 March 2015), paras 92-94. Judges’ Folder, Tab 4.
[56] United Nations General Assembly, *Agenda of the seventy-first session of the General Assembly: Adopted by the General Assembly at its 2nd plenary meeting on 16 September 2016*, A/71/251 (16 September 2016). Judges’ Folder, Tab 5.

> was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law…?

And secondly:

> What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?[57]

Thirty-one UN Member States, as well as the African Union speaking on behalf of the entire continent – 55 African States - filed written statements with the International Court. The UN Secretariat furnished the Court with a dossier of 6,150 pages, "documents likely to throw light upon" the General Assembly's two questions.[58] In September 2018 the Court heard oral arguments from 22 UN Member States and the African Union. On 25 February 2019, the Court delivered its Advisory Opinion. Its conclusions were absolutely crystal clear. Not a single judge – not one – dissented from the substance of the findings of the Court. Judge Donoghue declined to address the merits, but for reasons entirely related to jurisdiction; he did not dispute the findings on the merits. You will find the Advisory Opinion at tab 6 in your Judges' folder.

The Court unanimously concluded that it had jurisdiction to give the Advisory Opinion.[59] By 12 votes to two it concluded that there was no reason to decline to exercise its discretionary power to give the Opinion. It rejected the argument that the General Assembly's questions raised complex and disputed factual issues which were not suitable for determination in advisory proceedings.[60] It rejected the argument that an Advisory Opinion would not assist the General Assembly.[61] It rejected the argument that the Advisory Opinion "would reopen the findings of the [Annex VII] arbitral tribunal"[62] as the principle of *res judicata*, it concluded, did not preclude it from proceeding, and the issues determined by the UNCLOS Annex VII arbitral tribunal were "not the same as those before the Court".[63] And, most significantly for our purposes, it rejected the argument, led by the United Kingdom – and which you have heard repeated *ad nauseam* by the Maldives – that, "there is a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and that this dispute is at the core of the advisory

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[57] United Nations General Assembly, resolution 71/292, *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* (22 June 2017).
[58] See Introductory Note, List of Documents and Parts I-III (Documents received from the Secretariat of the United Nations) (30 November 2017), available at: https://www.icj-cij.org/en/case/169/request-advisory-opinion (last accessed 20 September 2020).
[59] *Advisory Opinion on the Chagos Archipelago*, paras 59, 62.
[60] Ibid., para. 69 (Australia, Israel and the United Kingdom).
[61] Ibid., para. 75 (Australia and the United States).
[62] Ibid., para. 79 (Australia, France, the UK and the US).
[63] Ibid., para. 81.

proceedings."[64] No, said the Court: the Opinion requested was "on the matter of decolonization which is of particular concern to the United Nations", and the issues raised by the request were, as it put it, "located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable".[65] In other words, on this last point, the Court recognized, as Mauritius, the African Union and virtually every State that had participated had argued, that once the matter of decolonization is resolved, any issues about territorial sovereignty simply melt away. Even the United Kingdom recognized that reality. It accepted that if the Court was able to answer the General Assembly's questions, it would, in effect and *de facto*, be making a determination on sovereignty over the Chagos Archipelago. This is because the matter of sovereignty is inextricably embedded in the issue of decolonization. Once decolonization is resolved, the former issue just disappears. In its written statement to the Court, the United Kingdom recognized this:

> If the current Request could be answered without *de facto* determining the longstanding bilateral dispute over sovereignty and related matters, the United Kingdom could and would have no objection. However, this does not appear to be possible (or intended).[66]

So the Court did answer the Request, and it did "*de facto* determine" that the United Kingdom claim was, as the United Kingdom expected, entirely without merit. The Court engaged in a detailed and thorough examination of the historical and legal record. Thousands of pages of contemporaneous documents, put before it by participating States as well and the UN Secretariat, legal pleadings from nearly three dozen countries, and more if you include the African Union, the Court was nothing if not thorough. The judges affirmed that "[i]t is for the Court to state the law applicable to the factual situation".[67] That is what it did: it gave the right to self-determination centre stage, the foundation of the law of decolonization. It is "a fundamental human right" that "has a broad … application", the Court stated.[68] And it made clear that one key aspect of the right of self-determination, in assessing whether the decolonization of Mauritius had been completed, was the matter of territorial integrity and whether that had been maintained. The Court emphasized that resolution 1514 (XV) provides that – you can see it now on the screen, figures 14 and 15 of your folder at tab 12 -

> the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory … . Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-

[64] Ibid., para. 83 (the UK, Australia, Chile, Israel, France and the United States).
[65] Ibid., para. 88.
[66] Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 February 2018), *Advisory Opinion on the Chagos Archipelago*, para. 7.15.
[67] *Advisory Opinion on the Chagos Archipelago*, para. 137.
[68] Ibid., para. 144.

> governing territory is a key element of the exercise of the right to self-determination under international law.[69]

You did not hear a word from our friends about that passage in the Advisory Opinion; they just would prefer to ignore it. It was a key element of the Court's approach, which then turned to the application of the law to the facts. A first and decisive question was whether the Chagos Archipelago was, in 1965, an integral part of Mauritius – figure 15 at tab 12. Yes, the Court concluded, without ambiguity or dissent: "At the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory." Mauritius included Chagos, which was at that time "a colony, under the authority of the United Kingdom."[70]

The Court then turned to the question of whether the people of Mauritius had given their consent to the detachment of a part of their territory. The Court concluded, without ambiguity, that they did not. It was, the Court found,

> not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter.[71]

From this it followed that "heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony."

The Court then engaged in heightened scrutiny. It reviewed the contemporaneous evidence from the time, the internal papers and documents – some of which I have taken you to. It "reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago". What did the International Court of Justice conclude? Without dissent, "[T]his detachment was not based on the free and genuine expression of the will of the people concerned."[72] That is a finding of law and fact by the principal judicial organ of the United Nations.

So the Court found that the detachment was unlawful in 1965, and continued to be unlawful in 1968, and at all times thereafter. The *dispositif* reads:

> As a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.[73]

Mr President, Members of the Special Chamber, there is here not a hint of any ambiguity whatsoever. There is no dissent on the substance, and it is simply not possible to read the Advisory Opinion in any other way than to conclude that the purported detachment of the Chagos Archipelago was unlawful and without legal

[69] Ibid., para. 160.
[70] Ibid., para. 172.
[71] Ibid.
[72] Ibid.
[73] Ibid., para. 174.

effect on the territorial integrity of Mauritius. It follows from this that the Chagos Archipelago was part of Mauritius in 1965, in 1968, and at all times thereafter, including, for your purposes, today. It follows from this, as the Court concluded, that the United Kingdom is in unlawful occupation of the territory, as it has been since 8 November 1965. Mr Reichler will take you to the text of the Court's Opinion on this – again, something which the Maldives failed to do in its rather selective approach to the Advisory Opinion, an Opinion which we say deserves to be treated with considerable respect.

I turn to the second question addressed by the Court, the consequences under international law arising from the continued administration by the United Kingdom of Chagos. On this the Court made three findings that we say are absolutely central to this case. You will find this material at figure 17 of tab 12.

First, the Court declared that because

> the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.

And the Court went further, stating that the United Kingdom's illegal administration "is an unlawful act of a continuing character".[74] It is plain from this that the Court concluded that the purported detachment of the Archipelago was without legal effect on the territorial integrity of Mauritius *ab initio*. It was unlawful in 1965, and at no point since 1965 has that unlawfulness disappeared – not a single dissent in the Opinion to that view.

Second, the Court declared that it followed from its conclusions that

> 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.[75]

You will note, Mr President – and let us go slowly through this – that the Court used the present tense. It did not refer to the obligation as one that was limited to a past moment; it spoke of "enabling Mauritius to complete the decolonization of its territory". "Its territory" encompasses the Chagos Archipelago. It is part of the "territorial integrity" of Mauritius, not of the United Kingdom, not of any other State, the Court has stated – again, without any dissent on the merits. You will note that the Court did not say that, having ended its administration, the United Kingdom was under an obligation to cede back the territory it had taken. The only reasonable reading of the *dispositif* is that Chagos remains today, and has always been, a part of the territory of Mauritius, and that what is needed is only an end to British "administration" and the start of Mauritian "administration". The territory, its territory, is part of Mauritius.

[74] Ibid., para. 177.
[75] Ibid., para. 178.

1 And third, the Court found that the right to self-determination is an obligation *erga*
2 *omnes*, and because of this "all States have a legal interest in protecting that right"
3 and
4
5 [e]very State has the duty to promote … the principle of … self-determination
6 of peoples … and to render assistance to the United Nations in carrying out
7 the responsibility entrusted to it by the Charter regarding the implementation
8 of the principle.[76]
9
10 Mr President, "all States" includes the Maldives. By making these preliminary
11 objections, the Maldives is manifestly failing in its duty to promote the self-
12 determination of the people of Mauritius. It is wilfully failing to respect the territorial
13 integrity of Mauritius. This is deeply regrettable. Professor Klein will have more to
14 say on the consequences for this Special Chamber of what the Maldives is trying to
15 do. Again, across more than four hours of statements on Tuesday, you heard not a
16 word about any of this material.
17
18 With the authoritative, definitive and unambiguous Advisory Opinion handed down by
19 the Court, the legal status of the Chagos Archipelago admits of no ambiguity
20 whatsoever. It is a part of the territory of Mauritius. Period. And as a part of the
21 territory of Mauritius, to Mauritius and Mauritius alone, falls the responsibility of, and
22 the right to, administration, which includes the delimitation of the maritime
23 boundaries pertaining to the entirety of its territory, including the Chagos
24 Archipelago. As they say, the land dominates the sea. Mauritius is the coastal State
25 in respect of the Chagos Archipelago, for the purposes of articles 74 and 83 of the
26 Convention. It is the only coastal State. As noted, the United Kingdom today has no
27 more right to delimit the maritime boundary between Mauritius and the Maldives than
28 would South Africa, back after 1971, to seek to delimit the maritime boundary
29 between Namibia and Angola.[77]
30
31 The Court's Advisory Opinion is, of course, not the end of the story. Three months
32 later, in May 2019, the General Assembly adopted resolution 73/295.[78] It did so by
33 an overwhelming majority, with 116 in favour, just six against. A copy of that
34 resolution is at tab 7 of your folders. Somehow, the United Kingdom was joined by
35 the Maldives, in circumstances that evidently raise questions beyond any of our
36 mandates; but it may be that you, like us, noted Professor Akhavan's closing words
37 on Tuesday, his expression of fear of being "used as a pawn in someone else's
38 chess game".[79]
39
40 After the vote, the Permanent Representative of the Maldives told the General
41 Assembly: "We fully respect the ICJ Advisory Opinion."[80] Really? So what on earth

[76] Ibid., para. 180.
[77] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 16.
[78] UNGA Res. 73/295, (22 May 2019).
[79] ITLOS/PV.20/C28/2, p. 36, line 22 (Professor Akhavan).
[80] See:
http://maldivesmission.com/statements/statement_by_the_maldives_at_the_general_assembly_plenary_meeting_on_advisory_opinion_of_the_international_court_of_justice_on_the_legal_consequences

1 are they doing here? Perhaps the respect is not so full – partial respect. Well, it is
2 plain that they do not. The representative continued that it “prejudged” the 2010
3 submission by the Maldives to the Commission on the Limits of the Continental
4 Shelf, and “does not provide clarity”. Really? No clarity? Let’s take a quick look at
5 resolution 73/295, yet another thing the Maldives simply failed to take you to. You
6 can see it on your screen. This is figure 19 of tab 12.
7
8 The General Assembly welcomed and affirmed the findings of the Court. It confirmed
9 that “[t]he Chagos Archipelago forms an integral part of the territory of Mauritius.”[81]
10 Again you will note the use of the word “forms”, in the present tense, not “formed”, in
11 the past tense, or “will form”, in the future tense. The words are crystal clear. The
12 Assembly demanded that the UK
13
14 withdraw its colonial administration from the Chagos Archipelago
15 unconditionally within a period of no more than six months … thereby enabling
16 Mauritius to complete the decolonization of its territory as rapidly as possible.
17
18 In other words, the administration must end by November 2019 - and to “pose no
19 impediment” to “the resettlement of Mauritian nationals … in the Chagos
20 Archipelago.”[82] We ask the question: where is the lack of clarity there? There is no
21 requirement, again, to transfer title, cede sovereignty, because all this is totally
22 unnecessary: sovereignty inevitably pertains to the State of which the territory is an
23 integral part. The Assembly called on all Member States to “cooperate with the
24 United Nations to ensure the completion of the decolonization of Mauritius as rapidly
25 as possible”. That looks pretty clear to us. As a matter of international law, the
26 Maldives is under an obligation to cooperate.
27
28 The General Assembly also addressed the obligations of other entities, the UN and
29 its Specialized Agencies, and, in the resolution, all other international, regional and
30 intergovernmental organizations, including those established by treaty. We would
31 submit that the International Tribunal for the Law of the Sea is one such
32 organization. It too is asked to do that which is laid out at paragraphs 6 and 7 of the
33 resolution, namely:
34
35 to recognize that the Chagos Archipelago forms an integral part of the territory
36 of Mauritius, to support the decolonization of Mauritius as rapidly as possible,
37 and to refrain from impeding that process by recognizing, or giving effect to
38 any measure taken by or on behalf of, the “British Indian Ocean Territory”.[83]
39
40 On Tuesday we heard nothing from the Maldives to explain its view as regards the
41 ambiguity of those words. They didn’t tell us why they believe that the Special
42 Chamber and ITLOS should not be required to – or should not – “recognize that the
43 Chagos Archipelago forms an integral part of the territory of Mauritius”. Perhaps they
44 will tell us on Saturday. Nor did the Agent or Counsel explain how their submissions

_of_the_separation_of_the_chagos_archipelago_from (last accessed 30 August 2020). See also: https://www.un.org/press/en/2019/ga12146.doc.htm (last accessed 20 September 2020).
[81] United Nations General Assembly, resolution 73/295, para. 2(b).
[82] Ibid., paras 3 and 4.
[83] Ibid., paras 6 and 7.

1 could be said to be supportive of the completion of the decolonization of Mauritius.
2 Again, we look forward to hearing that on Saturday.
3
4 If we go back to 1971 and the Court's Advisory Opinion on Namibia, was there any
5 doubt, any lack of clarity, as to the rights of South Africa in respect of the territory of
6 Namibia? There was none. Could South Africa, which continued to occupy the
7 territory, negotiate Namibia's boundaries with its neighbours? Of course it could not.
8 Could South Africa negotiate the Law of the Sea Convention on behalf of Namibia?
9 Of course it could not, and it did not. Those negotiations were conducted by the UN
10 Council for Namibia, on behalf of Namibia. Was the Law of the Sea Convention
11 signed by South Africa? It was, on 5 December 1984. Was it signed in respect of the
12 territory of Namibia that it continued to occupy unlawfully? No, it was not because
13 two years earlier, on 10 December 1982, the Convention was signed for Namibia by
14 the UN Council for Namibia.[84]
15
16 Following the adoption of resolution 73/295, and in application of the ICJ Advisory
17 Opinion, the practice of the United Nations has conformed to its requirements. In his
18 report to the General Assembly on the implementation of resolution 73/295, the UN
19 Secretary-General noted a change in the "designation of the Chagos Archipelago …
20 on the maps produced by the Secretariat".[85] Earlier UN maps (this is from figure 22
21 of tab 12) depicting the Chagos Archipelago contained an accompanying footnote,
22 which stated - as you will see on the screen - that "this appears without prejudice to
23 the question of sovereignty." Here is the map from June 2018, a year before the
24 International Court's determination and the General Assembly resolution – you can
25 see the footnote next to the Chagos Archipelago – the two stars, Chagos
26 Archipelago, Diego Garcia – and it states, as appears on the map "without prejudice
27 to the question of sovereignty".[86] Now let us look at the new UN map issued in
28 February 2020, where the Chagos Archipelago is depicted, as it must be, as part of
29 the territory of Mauritius.[87] The two stars are gone; the accompanying words have
30 gone, they have been removed; and instead, the words have been replaced with the
31 following designation: "Chagos Archipelago (Mauri.)", Mauritius.
32
33 In the coming months and years all the Specialized Agencies and other bodies are
34 expected to continue to take steps, as they are doing, to implement the conclusions
35 of the ICJ and the decisions of the General Assembly.
36
37 Mr President, the findings of the Court have been affirmed by the subsequent
38 practice of the UN General Assembly, the Secretariat, the vast majority of its
39 Member States and several Specialized Agencies. The response is reflective of the
40 crystal clarity of the matter; further confirmation, although none is needed, of the
41 *erga omnes* obligation to respect the territorial integrity of Mauritius. In proceeding to
42 delimit the overlapping maritime zones of Mauritius and the Maldives, the

[84] See UNCLOS, article 305(1)(b).
[85] United Nations General Assembly, Seventy Fourth Session, Item 86 of the Agenda, Advisory Opinion of the International Court of Justice on the separation of the Chagos Archipelago from Mauritius in 1965, Report of the Secretary General, UN doc. A/74/834 (18 May 2020), para. 6.
[86] United Nations, *The World* (June 2018), available at: https://digitallibrary.un.org/record/3810838?ln=en (last accessed 20 September 2020).
[87] United Nations, *The World* (February 2020), available at: https://www.un.org/Depts/Cartographic/map/profile/world.pdf (last accessed 20 September 2020).

1 International Tribunal for the Law of the Sea is asked to do no more than respect the
2 territorial integrity of Mauritius, as confirmed by the Court. The Court has stated what
3 the law is, and it has applied the law to the facts. A Special Chamber of ITLOS too is
4 required to apply that same law, under article 293 of the 1982 Convention. For it to
5 apply that law and then reach a different conclusion from the International Court, or
6 no conclusion, as the Maldives wishes, would sow the seeds of discontent. It would
7 mean turning a blind eye to the continued colonization of Mauritius. It would mean
8 perpetuating an administration that should have ended last November. It would
9 mean failure to allow Mauritius to enjoy its territorial integrity. It would mean
10 divergence from the International Court of Justice. There is no way around that.
11 Legal harmony would be replaced by legal discord.
12
13 That raises some obvious questions. Is ITLOS, an institution created in the aftermath
14 of the Court's disastrous 1966 judgment, and itself existing as an expression of the
15 world's commitment to decolonization, really going to accede to the arguments of the
16 Maldives? Is it really imaginable that a special chamber of ITLOS, applying the law
17 which the drafters of UNCLOS directed it to apply, could, as Judge Jessup put it,
18 stop at the threshold?
19
20 The legal status of Chagos has been definitively settled by the principal judicial
21 organ of the United Nations. Thirteen of the Court's judges supported the conclusion
22 explicitly. A fourteenth dissented only on the matter of jurisdiction, not on the merits.
23 A fifteenth, the author of *The Creation of States Under International Law*, could not
24 sit on the case because he was conflicted. Mr President, 19 international judges and
25 arbitrators have now had an opportunity to consider the question of decolonization,
26 territorial integrity and Mauritius. Fifteen of them – including a majority of the ITLOS
27 judges who have expressed a view on the matter – have concluded that the Chagos
28 Archipelago was, is and has always been a part of the territory of Mauritius. Not a
29 single judge or arbitrator out of the 19 – not at the ICJ, not at ITLOS, not anywhere
30 else – has reached a different conclusion – not one judge.
31
32 In its written and oral pleadings, the Maldives has offered a selective and partial
33 account of history, of the facts, of the ICJ Advisory Opinion and of the UN General
34 Assembly resolutions. To reach the conclusion it seeks – that ITLOS does not have
35 jurisdiction to delimit the maritime boundaries of Mauritius and Maldives – would
36 undermine and frustrate the decolonization of Mauritius. It would amount to a
37 decision that the Court got the law of self-determination wrong, or that its findings
38 can be ignored. It would open the door to an unlawful administering power continuing
39 to claim that the Chagos Archipelago is not a part of the territory of Mauritius, or that
40 Mauritius is not entitled to delimit its maritime boundaries in respect of a part of its
41 territory, namely the Chagos Archipelago. The Court's judgment in 1966 in South
42 West Africa offers a salutary reminder of the consequences of what happens when
43 an international court embraces the perpetuation of unlawful colonial
44 administration.[88]
45
46 Mr President, Members of the Special Chamber, that concludes my presentation.
47 I thank you for your kind attention. It may be that this is a good moment for a well-

[88] *South West Africa, Second Phase*, *Judgment, I.C.J. Reports 1966*, p. 6.

1 deserved coffee break, after which you may wish to invite Mr Reichler to beam in
2 from Washington DC to address the first two of the Maldives' preliminary objections.
3
4 I thank you very much for your kind attention.
5
6 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Sands. At this
7 stage the Special Chamber will withdraw for a break of thirty minutes. We will
8 continue the hearing at 4.05 – five past four.
9
10 (*Break*)