

In the wake of the ICJ's Opinion in Chagos: Britannia waives the rules

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The United Kingdom recently [reacted](#) against the International Court of Justice's Advisory Opinion on the separation of the Chagos Archipelago from Mauritius. Has the UK abandoned the international rule of law?

A unanimous verdict sows division

On 25 February 2019, the ICJ handed down its [Advisory Opinion](#) on the UK's separation of the Chagos Archipelago from Mauritius on 8 November 1965. The Opinion stated clearly that the excision of Chagos from Mauritius, which at that time had been a British colony, amounted to a violation of the customary right of self-determination of Mauritius (paras 170-174 of the Opinion). The UK's retention of the Archipelago to this day constituted an unlawful act of continuing character which engaged the UK's international state responsibility (para. 177). The Court's substantive decision enjoyed near unanimous support in the Court. The secondary opinions solely disagreed on procedural matters, notably discretion, or the extent of the ruling (*Declaration of Judge [Tomka](#), Dissenting Opinion of Judge [Donoghue](#), and Declaration of Judge [Gevorgian](#)*). The United Nations General Assembly subsequently endorsed the Court's Opinion in [Resolution 73/295](#) and demanded that the UK withdraw its administration from Chagos until 22 November 2019. The Resolution was [adopted](#) with 116 votes in favour, 6 against (Australia, Hungary, Israel, Maldives, the US, and the UK), and 56 abstentions.

Much has been written on the Court's Opinion, both before and after it was delivered (see [Questions of International Law Zoom Out](#) or [Stephen Allen, Jan Klabbers, and Kanad Bagchi](#)). Even more remains uncertain and controversial: sovereignty over the Chagos Archipelago and the US' complicity in the wrongful act and the consequences thereof, to name but two such instances. A variety of these open issues will be addressed in an edited volume which Jamie Trinidad of Cambridge University and I myself currently compose. However, the UK's reaction to the Court's Opinion and the GA's Resolution calls for an immediate response.

British imprudence and inaccuracy

Whereas it [hesitated](#) initially, the UK finally [came out](#) against the Court's Opinion. Three aspects of the UK's reaction are particularly striking.

It is one thing (i) for the UK to say that it continues to enjoy sovereignty over the Chagos Archipelago (statement in the GA, [p. 10](#)). That may be true, irrespective of Judge Xue's declaration to the contrary ([para. 14](#); for more nuance, see Thomas Dale Grant in [Allen/Monaghan](#)). Even after the Court's Opinion, the UK could still hold territorial title over Chagos. An opinion of the Court could, in any case, not

transfer sovereignty, even if it were binding, and neither could a GA or a Security Council resolution – see only [Kosovo](#) or [South West Africa](#). Sovereignty the UK thus may have – *but* comply with its obligations it must. Notably, it should have complied with the obligation under decolonization to hand over the islands to Mauritius. The failure to do hand them over engages the UK’s responsibility for violation of an international obligation. In order to end this breach, the UK must transfer sovereignty over Chagos to Mauritius “as rapidly as possible” (para. 178 of the Opinion). The obligations the UK owes to the US with regard to the joint military facility on Diego Garcia cannot possibly transmute the law in this regard (see the UK allegation in the GA on [p. 11](#)).

It is, of course, also true (ii) that the Court’s Opinion is not binding. It is, however, not a prudent decision for the UK to adopt this defence (in the GA on [p. 11](#)). Doing so consigns it to a camp with the likes of Russia and China – which at one point felt compelled to [declare](#) their continuing faith in international law – along with the apartheid regime in [South Africa](#). It is a formalist position that lays bare ignorance of the subtleties of international law. International law consists of more than binding obligations (see Judge Simma’s [declaration](#) in *Kosovo*). “Soft law”, including the Court’s Opinion, cannot simply be ignored – unless one wishes to resurrect the 1920s (as in [Lotus](#)). Such a stance also undermines the strength of an Opinion adopted with near-unanimity as well as the will of an overwhelming majority in the GA. There is no doubt that this posture, if maintained, will lie heavy on the UK in years to come.

It is an entirely different thing (iii), though, that some of the statements the UK made on the law are misleading, if not downright wrong. The UK stated that the UNCLOS Arbitral Tribunal, which had dealt with the UK’s establishment of a marine protected area in Chagos, found that the understanding which the UK had arranged with Mauritius on 5 November 1965 was legally binding (see the UK’s statement in the GA, [pp. 10 and 11](#), and the statement of the Minister of State in a Westminster Hall [Debate](#), para. 3). This is inaccurate. The Tribunal in its [Award](#) held the understanding only to be binding on the *United Kingdom* (paras 421-448). Neither is the UK’s complaint correct that the International Court of Justice “did not take account of the 1965 agreement with Mauritius or the numerous affirmations of that agreement made by Mauritius since independence” ([para. 7](#) of the Minister’s statement). In fact, the Court after a detailed review of the situation stated in para. 172: “Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.” The Court then concluded: “the UK, as the administering Power, [is required] to respect the territorial integrity of that country, including the Chagos Archipelago” (para. 173) and “the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968” (para. 174). Finally, it remains unclear why the Court should have addressed “the fact that the UK and US have entered into a binding treaty obligation to maintain UK sovereignty over the whole territory until at least 2036” (para. 7 of the Minister’s [statement](#); similar in

the GA, [p. 11](#)). After all, how could an obligation between the UK and the US alter anything with regard to the obligation owed to Mauritius under international law?

There is further spin in the UK's statements. For instance, the UK points to how "Mauritius had circumvented the principle that the ICJ should consider bilateral disputes only with the consent of the states" (para. 9 of the Minister's [statement](#)). But was it not the General Assembly, rather than Mauritius, that requested the advisory opinion from the Court?

For all intents, one cannot help but be struck by what the UK's Minister asserted towards the end of a statement: "I say very clearly that the UK continues to be seen as one of the most prominent international champions of the rule of law across the globe" ([para. 12](#)). Who, at present, sees such a champion in the UK, but for the UK itself? Its government is manifestly prone to illusions of grandeur. But in truth, Britannia no longer rules the waves – it waives the rules, as Patrick Grady aptly put it ([para. 23](#) of his statement).

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