

ISAS Brief

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Chagos at the International Court of Justice – Implications for India and the International System

The International Court of Justice will hold public hearings from 3 to 7 September 2018 on the legality and consequences of British control over Chagos. Also known as the British Indian Ocean Territory, the Chagos Archipelago includes Diego Garcia, a major American military base in the Indian Ocean. Twenty-two nations and the African Union are slated to give statements, including India, which will cast its position carefully, calibrating support for the Chagossian cause with the need to build security in the Indian Ocean.

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Acquisition of an Archipelago and its Aftermath

In 1965, three years before Mauritius gained independence, Britain decided to “detach” the Chagos Islands (with a land area of 60 square kilometres and 54,400 square kilometres of ocean) from the rest of what was then its Indian Ocean colony. This became the British Indian Ocean Territory (BIOT) and, in 1966, the largest island in the archipelago, Diego Garcia, was leased to the United States (US) as a military base. At the time of the separation, Britain paid Mauritius US\$3.8 million (S\$5.2 million) and pledged to cede the islands when

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they were no longer needed for defence purposes.² In fact, Britain's acquisition of Chagos occurred during a process of de-colonisation, later argued by Mauritius and African states to have been illegal, given the United Nations (UN) General Assembly Resolution 1514 of 1960 banning the break-up of colonies prior to independence.

The BIOT is today one of 14 far-flung British overseas territories, the 'remnants of the Empire', that have become strategic outposts for Britain and its allies. The most notable among them is Diego Garcia, described to have been of vital strategic importance for defence purposes to the US and the United Kingdom (UK), including in support of operations in Iraq and Afghanistan.³ However, the past continues to haunt the present, kept alive by a decades-long dispute over what exactly had been the terms of the Chagos 'detachment' in 1966, the pressure tactics, which Mauritius alleged were used by Britain at the time, and the subsequent forcible removal of the local population and their inhumane treatment.

In 2010, the case was back in the international limelight when the UK, with the support of environmentalists, declared the archipelago and most of its exclusive economic zone, a Marine Protected Area (MPA), off-limits to all fishing. Comprising more than a quarter-million square miles, this was to be the largest MPA in the world. A Wikileaks cable revealed the assurances that had been given personally by the Foreign and Commonwealth Office's (FCO) Director for Overseas Territories to the Americans over exemptions for Diego Garcia's military activities and the explosive assertion that, "establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents".⁴ On 20 December 2010, Mauritius instituted arbitral proceedings against the UK under the UN Convention on the Law of the Sea and, in 2015, a legally-binding arbitration tribunal found the UK's declaration of the MPA had disregarded Mauritius' rights, rendering it unlawful. The fate of the MPA remains under negotiation but in 2016, the FCO announced that the Chagossians would not be allowed to return "on the grounds of feasibility, defence and security interests, and cost to the British taxpayer" and that a renewal of the lease would allow the US to use its base until the end of 2036.

² These details were codified in a provisional understanding between the British Secretary of State and the Premier of Colonial Mauritius in a series of documents known as the Lancaster House Understandings.

³ "Naval Support Facility Diego", CNIC, Garcia https://www.cnic.navy.mil/regions/cnrj/installations/nsf_diego_garcia/about/history.html. Accessed on 27 August 2018.

⁴ "HMG Floats Proposal for Marine Reserve Covering the Chagos Archipelago (British Indian Ocean Territory)", Public Library of US Diplomacy", https://wikileaks.org/plusd/cables/09LONDON1156_a.html. Accessed on 25 August 2018.

Involvement of the ICJ and India's Advisory Stand

On 22 June 2017, a plenary session of the UN General Assembly considered the draft resolution submitted by Mauritius and co-sponsored by the Group of African States and six South American states.⁵ The resolution,⁶ which sought to refer the legal status of the Chagos Islands, including Diego Garcia, to the International Court of Justice (ICJ) at The Hague was backed by 94 countries, 15 against and 65 abstentions. Only two permanent members of the UN Security Council (the UK and the US) and one non-permanent member, Japan, four European Union members (Bulgaria, Croatia, Hungary and Lithuania), Australia, New Zealand and six others voted against it. Although the ICJ's decision is non-binding, the resolution was widely seen as a humiliating defeat for Britain. This, combined with the fact that the UK does not have a judge on the bench of the ICJ for the first time in its 71-year history, have been seen as indicators of Britain's waning diplomatic standing and influence.⁷

India was one of the 94 countries to vote in favour of the resolution and is one amongst 22 countries to participate in the September 2018 public hearing of the ICJ on the matter of the "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965". Two aspects of India's participation are noteworthy. To begin with, the September 2018 hearing marks the first time since 1996 that India is contributing to advisory proceedings of the ICJ. It has been a party to six cases at the ICJ, most of them with a Pakistan angle but the only other time India provided a written statement was in 1995/1996 on the Nuclear Weapons Advisory Opinion. This time, India will additionally give an oral statement at the public hearings on 5 September 2018. The second aspect worth watching will be to see how India straddles the identity and interests as a leader amongst developing countries, institutionalised in the coalition of Group of 77, and as a major power faced with a complex geo-strategic environment in the Indian Ocean. India has deep economic and ethnic ties to Mauritius and, while India has in the past objected strongly to the American presence on Diego Garcia, today, it recognises the value of having the US in the region. In August 2016, India signed the Logistics Exchange Memorandum of Agreement with the US, implicitly suggesting

⁵ "General Assembly, 88th plenary meeting, 71st Session", The United Nations Live & On Demand, <http://webtv.un.org/search/general-assembly-88th-plenary-meeting-71stsession/5480373432001/?term=chagos&sort=date>, Accessed on 24 August 2018.

⁶ The text of the resolution can be found at <https://www.un.org/en/ga/71/resolutions.shtml>.

⁷ See for example, "Britain loses its judge on the world court for the first time ever", *The Economist*, 23 November 2017. <https://www.economist.com/britain/2017/11/23/britain-loses-its-judge-on-the-world-court-for-the-first-time-ever>. Accessed on 25 August 2018.

reciprocal use of each other's military bases through "access" rights to military forces for logistic supplies and services comprising "food, water, billeting, transportation, petroleum, oils, lubricants, clothing, communication services, medical services, storage services, training services, spare-parts and components, repair and maintenance services, calibration services and port services".⁸ As has been pointed out by an expert on the subject, some of these supplies and services would be available only in the military base of the host country.⁹

Implications for the International System

Advisory judgements by the ICJ have typically taken up to two years in the past. It is probable that the UK and Mauritius will come to an agreement during this time, especially given Mauritius' close economic ties with the UK. Mauritius has also indicated that it would be willing to allow Diego Garcia to continue as an American base. One option that has been considered is the possibility of co-managing the outer islands of the Chagos archipelago, excluding Diego Garcia. A similar arrangement has been agreed to (though not yet ratified) between France and Mauritius over Tromelin Island, a French overseas territory.

However, the Chagos resolution in the UN General Assembly is significant for having been cast in terms of the unfinished business of decolonisation. This squarely revives questions about the behaviour, past and present, of former colonial powers and the validity of their current possessions. It also implies a failing on the part of the UN General Assembly in not having addressed the Mauritian question over the last 50 years. Finally, it also highlights the challenges and strains facing international institutions. As the Australian permanent representative put it during the UN General Assembly debate, the vote was also a vote on whether or not the ICJ was the appropriate body to render an advisory opinion on a bilateral territorial dispute, especially when one party did not agree to involvement of the ICJ. In his statement, Ambassador Matthew Rycroft, the UK Permanent Representative to the UN, warned, "how many other bilateral disputes left over from history could be brought before the

⁸ "India Signs Defense Logistics Pact with U.S.", Neelam Mathews, *AIN Online*, 6 September 2016. <https://www.ainonline.com/aviation-news/defense/2016-09-06/india-signs-defense-logistics-pact-us>. Accessed on 26 August 2018.

⁹ "Indo-US Logistics Agreement LEMOA: An Assessment" Gurpreet S Khurana, *National Maritime Foundation*, 8 September 2016. <http://www.maritimeindia.org/View%20Profile/636089093519640938.pdf>. Accessed on 27 August 2018.

General Assembly in this way? The present draft resolution could set a precedent that many of you in this hall could come to regret.”¹⁰

The Chagos case is also a litmus test for the changing geopolitical context of our times. It is noteworthy that, despite the resolution dealing with an Indian Ocean country and potentially implicating the future of a major American Indian Ocean naval base, there was no mention of the old aspiration to establish the Indian Ocean as a Zone of Peace (ZOP).¹¹ Instead, references were made, both by former proponents of the ZOP idea, notably India, and abstainers on the matter such as Australia, to the fundamental importance of collective security arrangements in the Indian Ocean. This was done implicitly in the case of India and explicitly by Australia, when referring to the importance of the Diego Garcia base for the Global War on Terror. The ICJ public hearing will, thus, be an opportunity to hear a variety of perspectives from the Global South and the West. While the votes and positions of those providing an oral statement are already known, the proceedings will showcase the grey areas between moral compulsion and expediency that drives international politics.

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¹⁰ “Questions on the British Indian Ocean Territory have long been a bilateral matter between the UK and Mauritius”, *Gov UK*, 22 June 2017. <https://www.gov.uk/government/speeches/questions-on-the-british-indian-ocean-territory-have-long-been-a-bilateral-matter-between-the-uk-and-mauritius>. Accessed on 28 August 2018.

¹¹ See the UN Indian Ocean Zone of Peace (IOZP) Resolution (adopted in 1971) calling for the demilitarization of the region: <https://www-jstor-org.libproxy1.nus.edu.sg/stable/pdf/20690864.pdf?refreqid=excelsior%3A045fbc222980879ab2e282b46de925ea>. Accessed on 25 August 2018.