INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION ON THE "LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965"

WRITTEN COMMENTS OF THE UNITED STATES OF AMERICA

MAY 15, 2018

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CHAPTER I
INTRODUCTION

1.1 In accordance with the Court's Orders of July 14, 2017, and January 17, 2018, the United States hereby presents its Written Comments in response to the written statements submitted by other States and organizations on and before March 1, 2018. The United States again conveys its appreciation to the Court for the opportunity to furnish its observations.

1.2 In its Written Statement of March 1, 2018, the United States identified the compelling reasons why the Court should decline to provide an advisory opinion in this case. Having carefully considered all of the written statements submitted to the Court, the United States reaffirms its position that the Court should decline to exercise its advisory jurisdiction over this matter.

1.3 This case presents fundamental challenges to the integrity of the Court's judicial function and invites the Court to delve into and reach conclusions on a wide range of legal issues related to an ongoing bilateral dispute between Mauritius and the United Kingdom.

1.4 To recall, in its resolution 71/292, the General Assembly requested the Court to render an advisory opinion on two questions:

(a) 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, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?

(*b*) 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?

1.5 Chapter II begins by highlighting important points of agreement among the written statements, including with respect to the circumstances that would warrant the Court's exercise of its discretion to decline to respond to the General Assembly's request. Those very circumstances are evident in this case, since the questions referred focus on a bilateral territorial dispute between Mauritius and the United Kingdom. Unless the Court can avoid addressing that dispute—which is difficult to imagine—responding to the request would circumvent the fundamental principle that a State is not obliged to submit its disputes for adjudication without its consent.

1.6 Chapter II then explains why none of the arguments in favor of responding to the questions referred dispense with the very serious concerns regarding the propriety of utilizing the Court's advisory jurisdiction in a case that is, at its core, about an ongoing bilateral sovereignty dispute. There does not appear to be any disagreement in the written statements

that this case bears directly on such a dispute. Indeed, many of the written statements affirm this reality, some going so far as to endorse the resort to the Court's advisory jurisdiction as an effort to resolve that sovereignty dispute. The United States and a number of other States, however, have underscored that the Court must proceed with great caution in the face of such an overt effort to circumvent the fundamental principle of consent to judicial settlement.[1] Some States, including the United States, also cautioned that doing so could have the effect of blurring the deliberate distinction that was created between the Court's consent-based contentious jurisdiction and its advisory jurisdiction.[2]

1.7 For these reasons, as the United States observed in its Written Statement, it is incumbent upon the Court to determine whether it could answer Question (a) in a manner consistent with the principle of consent to judicial settlement.

1.8 There is no doubt that answering Question (a) would embroil the Court in a bilateral dispute and that the United Kingdom has not consented to judicial settlement of that dispute by this Court. Of particular note, a number of the written statements acknowledge that the separation of the Chagos Archipelago would not have been unlawful if it reflected the free consent of the people of the territory.[3] For its part, Mauritius suggests that the agreement, which both parties reaffirmed after Mauritius's independence, and which an arbitral tribunal concluded gave rise to binding obligations between the two States, did not or could not reflect such consent.[4] But, as discussed in Chapter II, it would be inappropriate for the Court to conduct, in these advisory proceedings, an assessment of the validity of a bilateral agreement.[5]

1.9 The position of the United States thus remains that the Court should decline to respond to the questions posed. That said, should the Court choose to respond to Question (a), the answer should be that the process of decolonization of Mauritius was lawfully completed in 1968. In its Written Statement, the United States set forth its analysis as to why the historical record supports this conclusion.[6]

1.10 In Chapter III, the United States responds to arguments made in some of the written statements about whether international law supplied a rule at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory (BIOT).

1.11 Were it to answer Question (a), the Court would need to ascertain the law as it existed at the relevant time.[7] The written statements that addressed this issue generally agree that the relevant time would have been 1965 (when the United Kingdom established the BIOT) or, at

[1] *See infra* para. 2.3.

[2] *See, e.g.*, Australia Written Statement, paras. 40–44; Germany Written Statement, para. 37; United States Written Statement, para. 5.1.

[3] *See infra* para. 3.49 n. 137.

[4] Mauritius Written Statement, paras. 1.41(vi), 6.3(6).

[5] *See infra* para. 2.10.

[6] United States Written Statement, ch. IV.

[7] *Id.*, paras. 4.23–4.24; *infra* paras. 3.11–3.15.

the latest, 1968 (when Mauritius gained its independence),[8] but present a range of views as to the state of the relevant law and how the Court might determine it.

1.12 Most of those submissions either did not accurately describe how the Court would determine a relevant rule of customary international law or drew incorrect conclusions from the historical record about state practice and States' contemporaneous beliefs about the law. As such, the submissions failed to demonstrate that a specific legal obligation existed at the relevant time that would have made the establishment of the BIOT unlawful.

1.13 Implicit in the way the various written statements approach the questions referred is a common understanding that the answer to Question (b) is linked to Question (a).[9] This understanding supports the conclusion, as the United States explained in its Written Statement,[10] that if the Court either cannot, for reasons of propriety or otherwise, provide an answer to Question (a), or if its answers Question (a) in the affirmative (*i.e.*, that the decolonization of Mauritius was lawfully completed in 1968), there is no need to answer Question (b).

1.14 The United States therefore does not deem it necessary to address Question (b) in any detail. Instead, in Chapter IV, the United States offers several observations on others' written statements, including identifying some assumptions that present an overly simplistic or incomplete view of the complex set of issues involved.

1.15 Chapter V concludes by again urging that the Court, in order to preserve the integrity of its judicial function, decline to respond to the request for an advisory opinion. The written statements submitted to the Court differ on the appropriate response to this request. But there is no disagreement that the questions bear directly and significantly on an ongoing bilateral sovereignty dispute over territory. Attempts to present the legal questions that are at issue in this dispute as ones that might guide the General Assembly in the exercise of its decolonization mandate neither alters that reality, nor displaces the principle of consent to judicial settlement as an important constraint on the Court's advisory jurisdiction.

[8] *See infra* para. 3.3.

[9] *See, e.g.*, Mauritius Written Statement, para. 1.40 (noting that the response to the second question is "inextricably connected to the first question"); African Union Written Statement, para. 33 (describing the questions as "interdependent, complementary").

[10] United States Written Statement, paras. 4.17, 4.75.

CHAPTER II
THE COURT'S DISCRETION NOT TO RESPOND TO THE GENERAL ASSEMBLY'S REQUEST

2.1 As States acknowledged in their written statements, the Court's authority to issue an advisory opinion is discretionary,[11] and the Court has "a duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function."[12]

2.2 In those written statements that addressed the Court's exercise of its discretion, there was general agreement on three additional points:

(a) The Court, while mindful of its duties as the principal judicial organ of the United Nations, has nevertheless recognized that there may be "compelling reasons" that should lead it to decline a request for an advisory opinion.[13]

(b) One such compelling reason is when the circumstances disclose that to give a reply "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[14]

(c) The questions referred relate to an ongoing bilateral dispute concerning sovereignty over territory and one party to that dispute has not consented to judicial settlement of the dispute by this Court.[15]

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[11] *See, e.g.*, Australia Written Statement, para. 27; Brazil Written Statement, para. 9; China Written Statement, para. 16; Djibouti Written Statement, para. 19; France Written Statement, paras. 4–5; Germany Written Statement, para. 22; Guatemala Written Statement, para. 19; Israel Written Statement, para. 2.1; Liechtenstein Written Statement, para. 14; Mauritius Written Statement, para. 5.18; Republic of Korea Written Statement, para. 7; Russian Federation Written Statement, para. 11; Serbia Written Statement, para. 19; South Africa Written Statement, para. 50; United Kingdom Written Statement, para. 7.1.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 [hereinafter *Construction of a Wall*], para. 45.

[13] *See, e.g.*, African Union Written Statement, paras. 37, 53; Australia Written Statement, para. 28; Cyprus Written Statement, para. 19; Djibouti Written Statement, para. 19; France Written Statement, para. 5; Israel Written Statement, para. 2.3; Liechtenstein Written Statement, para. 15; Marshall Islands Written Statement, para. 14; Mauritius Written Statement, para. 5.19; Republic of Korea Written Statement, para. 7; Serbia Written Statement, para. 19; South Africa Written Statement, para. 54; United Kingdom Written Statement, para. 7.10; United States Written Statement, para. 3.3.

[14] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 [hereinafter *Western Sahara*], paras. 32–33. *See* African Union Written Statement, paras. 205–06; Argentina Written Statement, para. 26; Australia Written Statement, paras. 35–36; Brazil Written Statement, para. 11; Chile Written Statement, para. 5; China Written Statement, para. 16; Cyprus Written Statement, para. 24; Djibouti Written Statement, para. 23; France Written Statement, para. 7; Germany Written Statement, paras. 34–36; Guatemala Written Statement, para. 26; Israel Written Statement, para. 3.1; Mauritius Written Statement, para. 5.29; Republic of Korea Written Statement, para. 12; Russian Federation Written Statement, paras. 29–30; South Africa Written Statement, para. 43; United Kingdom Written Statement, para. 7.15(e); United States Written Statement, para. 3.3.

[15] *See, e.g.*, Argentina Written Statement, para. 23 (acknowledging that the dispute is "on matters directly related to the questions put by the General Assembly to the Court"); Australia Written Statement, para. 5 ("The request from the General Assembly in reality seeks to have the Court adjudicate upon a preexisting bilateral dispute between the United Kingdom and Mauritius … ."); Chile Written Statement, para. 5 ("Chile is aware of the fact that the request for an advisory opinion relates to a territorial dispute arising between Mauritius and the United Kingdom, which does not recognize the jurisdiction of the Court to settle it … ."); China Written Statement, para. 19 ("China encourages and calls upon States concerned to act in good faith, and seek appropriate

2.3 It is true that the present Court has not exercised its discretion to decline to answer a request for an advisory opinion from the General Assembly. But the circumstances of this case present the exact and compelling reasons that the Court has indicated in its prior opinions should lead it to decline to respond. It is difficult to see how the Court could respond to the questions referred without going directly to the crux of an ongoing bilateral dispute over territorial sovereignty. A number of States—namely Australia, Chile, China, France, Germany, Israel, the Republic of Korea, the Russian Federation, the United Kingdom, and the United States—all urged the Court to exercise caution so as to avoid responding in a manner that would be tantamount to adjudicating the underlying sovereignty dispute or prejudicing the legal positions of the parties to that dispute.

2.4 This chapter begins in Section A by describing the extent to which the written statements confirm the direct relationship between this request for an advisory opinion and the underlying territorial dispute between Mauritius and the United Kingdom. Section B then turns to the Court's jurisprudence as it relates to the application of the fundamental principle of consent to judicial settlement in the advisory opinion context, with a particular emphasis on the Court's opinion in *Western Sahara*. Section C explains that no other factor raised in the written statements—in particular the *erga omnes* character of obligations arising from self-determination or the General Assembly's purported interest in the bilateral dispute over the status of the Chagos Archipelago—justifies dispensing with the serious concerns of judicial propriety that this request presents. Section D reiterates that the principle of consent to judicial settlement commands particular respect where a request relates to a territorial sovereignty dispute.

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solution[s] to relevant issues through negotiation or any other peaceful means agreed to by both parties."); France Written Statement, paras. 15–19 (noting that the object of the request was to resolve a dispute between the two concerned parties); Germany Written Statement, para. 34 (noting that "the Court cannot decide on the bilateral dispute which forms the background of the request for an advisory opinion under its contentious jurisdiction, given the overarching principle of consent which governs the exercise of the Court's contentious jurisdiction"); India Written Statement, para. 8 (noting that Mauritius decided to refer its territorial dispute with the United Kingdom over the Chagos Archipelago through the General Assembly to the Court for an advisory opinion); Israel Written Statement, para. 3.8 ("Mauritius has openly acknowledged that the present advisory proceedings were sought precisely because the bilateral negotiations aimed at settling its dispute with the United Kingdom have, in its view, failed."); Marshall Islands Written Statement, para. 15 (noting that the issue is not limited to a "purely bilateral dimension—even as the overall political issue of the Chagos situation has important (if not key) bilateral aspects"); Russian Federation Written Statement, para. 32 (noting that the criteria for exercising discretion if a request for an advisory opinion involves a bilateral territorial dispute "must be even higher"); United Kingdom Written Statement, para. 7.16 (noting that the request "requires the Court to engage in … matters that have long been in issue as part of a bilateral dispute"); United States Written Statement, para. 1.2 (noting that "[t]he United States voted against the General Assembly's referral resolution because it concerns a bilateral territorial dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago").

A. The questions referred are directly related to a pending bilateral territorial dispute between Mauritius and the United Kingdom.

2.5 The submissions of other States—in particular those of Mauritius and the United Kingdom—make plain that the questions referred are directly related to core aspects of the underlying bilateral dispute concerning sovereignty over the Chagos Archipelago.[16]

2.6 The statements also reveal the degree to which the parties' legal positions in the current proceedings echo those previously presented by the same parties during contentious proceedings in the *Chagos Marine Protected Area Arbitration*.[17]

2.7 The direct relationship between the questions referred and the bilateral territorial dispute is particularly evident with respect to a central issue on which Mauritius and the United Kingdom disagree—the legal status of the bilateral agreement they reached in 1965 concerning the Chagos Archipelago, and which they subsequently affirmed by a series of statements and actions until at least 1980.

2.8 A key element of the ongoing bilateral dispute is whether that 1965 agreement and subsequent affirmations reflect the valid consent of Mauritius to the establishment of the BIOT, subject to certain negotiated conditions on the management and future disposition of the Chagos Archipelago. The written statements of Mauritius and the United Kingdom reveal the depth of their disagreement over this and related issues.[18]

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[16] *See, e.g.*, Mauritius Written Statement, p. 285 (seeking a finding from the Court that the process of decolonization of Mauritius was not lawfully completed, and that as a consequence Mauritius should be able to exercise sovereignty over the Chagos Archipelago); United Kingdom Written Statement, para. 1.2 (characterizing the dispute over the Chagos Archipelago, in particular as to sovereignty, as "the central issue behind the Request for an advisory opinion").

[17] *Compare* Mauritius Written Statement, para. 6.63 ("Thus, in the case of Mauritius, the unit of self-determination—in relation to which the administering power owed the duty to accord the right of self-determination—was the totality of the territory of Mauritius before independence. That territory included the Chagos Archipelago.") *with Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* [hereinafter *Chagos Marine Arbitration*], P.C.A. Case No. 2011-03 (Perm. Ct. Arb. 2015), Memorial of Mauritius, para. 6.16 ("Thus, in the case of Mauritius, the unit of self-determination in relation to which the UK as the administering power owed the duty to accord the right to self-determination was the whole of the territory of Mauritius before independence, including the Chagos Archipelago."); *compare* Mauritius Written Statement, para. 6.68 ("[T]he General Assembly recognised the undivided territory of Mauritius as the unit of self-determination in its Resolution 2066(XX) on the Question of Mauritius.") *with Chagos Marine Arbitration*, *supra*, Memorial of Mauritius, para. 6.20 ("The General Assembly recognised the *undivided* territory of Mauritius as the unit of self-determination in its resolution 2066(XX) on the Question of Mauritius."); *compare* Mauritius Written Statement, para. 6.96(2) ("[T]he so-called 'consent' [to detachment] which was given was extracted in circumstances of duress and on conditions that vitiated any notion that it was freely given") *with Chagos Marine Arbitration*, *supra*, Memorial of Mauritius, para. 6.29 ("It is clear that the 'freely expressed will' of the people of Mauritius was not obtained. The consent of the Mauritius Ministers was given in circumstances which amounted to duress … .").

[18] *Compare* Mauritius Written Statement, para. 6.3(6) (stating that the pressure placed on Mauritian representatives in 1965 "vitiated any purported consent on the part of the Mauritian people or their representatives") *with* United Kingdom Written Statement, paras. 8.13–8.15 (refuting arguments advanced by Mauritius in the *Chagos Marine Arbitration*, in which Mauritius argued that it had not given valid consent to the establishment of the BIOT) and para. 8.22 (stating that an "informed, free and voluntary choice was made by Mauritius in 1965, 1967, and 1968").

2.9 The issue of consent to the establishment of the BIOT is of central importance because, as Chapter III notes, many written statements acknowledged that the administrative boundaries of a non-self-governing territory could be adjusted with the consent of the people.[19] Whether valid consent was given, either through the 1965 agreement or by virtue of subsequent affirmations, is therefore directly relevant to the parties' legal positions in their territorial dispute.

2.10 At the same time, opining on the status of a bilateral agreement—especially when an arbitral tribunal has already interpreted and applied it in contentious proceedings between the parties—is the type of issue that is quintessentially unsuitable for the Court's review in the absence of mutual consent to the Court's adjudication by the parties.[20] That this issue lies at the heart of the territorial sovereignty dispute reinforces the views conveyed in the written statements of the United States and others that responding to the General Assembly's request would be "substantially equivalent to deciding the dispute between the parties."[21]

B. The Court's jurisprudence reaffirms the serious concerns inherent in rendering an advisory opinion about a bilateral territorial dispute absent the consent of the parties to the dispute.

2.11 Many States that addressed the Court's discretion with respect to the exercise of its advisory jurisdiction referenced the Court's opinion in *Western Sahara.*[22] The United States agrees that the principles discussed in that case are centrally at issue here. However, a close examination of *Western Sahara* shows that, rather than supporting a decision to respond as some have suggested, the application of the Court's approach in that case to the present matter demonstrates that to give a reply would have the effect of circumventing the principle of consent to judicial settlement.

2.12 Specifically, in reaching its decision in *Western Sahara* that giving an opinion would not circumvent the principle of consent to judicial settlement, the Court relied on several key elements that are notably absent here:

- First, the Court emphasized that responding to the General Assembly's request would "not affect the rights of Spain today as the administering Power …" and that "[i]t

[19] *See infra* para. 3.49.

[20] *See infra* paras. 2.18–2.21; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, para. 35 (concluding that it would be impermissible to adjudicate Portugal's claims against Australia, which related to a bilateral treaty between Australia and Indonesia, since doing so would require the Court to impermissibly rule on the lawfulness of Indonesia's conduct in the absence of its consent).

[21] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5* [hereinafter *Eastern Carelia*], pp. 28–29. As the United States noted in footnote 38 of its Written Statement, although the Court has since indicated that *Eastern Carelia* involved unique circumstances posed by Russia's non-membership in the League of Nations, that distinction does not undermine the continuing application of the principle as a constraint on the Court's advisory jurisdiction. *See also infra* paras. 2.14–2.15.

[22] *See, e.g.*, Australia Written Statement, para. 35; Chile Written Statement, para. 5; China Written Statement, para. 16; Cyprus Written Statement, para. 27; France Written Statement, para. 7; Israel Written Statement, para. 2.2; Mauritius Written Statement, para. 5.26; Namibia Written Statement, p. 2; Russian Federation Written Statement, para. 30; South Africa Written Statement, para. 42; United Kingdom Written Statement, para. 7.5.

follows that the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it.'"[23] The same cannot be said of the present request, which, if answered in the way Mauritius proposes,[24] could be seen as affecting the rights of the United Kingdom today. As the United States explained in its Written Statement, it would be difficult, if not impossible, for the Court to answer the questions posed without appearing to compromise the legal positions of the parties to the underlying bilateral territorial dispute.[25]

- Second, the Court in *Western Sahara* did not reject Spain's contention that state consent carries particular significance when a dispute concerns the attribution of territorial sovereignty.[26] Instead, the Court concluded that the absence of Spain's consent did not pose an obstacle to responding in that instance because "[t]he request for an opinion [did] not call for the adjudication upon existing territorial rights or sovereignty over territory."[27] In contrast, as Mauritius's Written Statement makes abundantly clear, Mauritius's purpose in pursuing this request through the General Assembly is to invite the Court to adjudicate its pending bilateral territorial dispute with the United Kingdom, at the heart of which is whether Mauritius or the United Kingdom possesses sovereignty over the Chagos Archipelago.[28]

- Third, the General Assembly requested the advisory opinion in *Western Sahara* at a time when the Assembly (including the Fourth Committee and the Special Committee on Decolonization) had been actively considering the situation in Western Sahara for over a decade.[29] The Court acknowledged the General Assembly's long and continuous involvement with Western Sahara in describing the resolution requesting the advisory opinion—Resolution 3292 (XXIX)—as "the latest of a long series of General Assembly resolutions dealing with Western Sahara."[30] The same cannot be said of the dispute underlying the present request. It is notable in this regard that the decolonization of Mauritius has not been debated by the General Assembly, its Fourth Committee, or the Special Committee on Decolonization for decades. In fact, a new

[23] *Western Sahara*, *supra* note 14, para. 42 (quoting *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion (First Phase), I.C.J. Reports 1950*, p. 65 [hereinafter *Interpretation of Peace Treaties*], p. 72).

[24] *See* Mauritius Written Statement, p. 285.

[25] United States Written Statement, paras. 2.16, 3.30, 5.3.

[26] *Western Sahara*, *supra* note 14, para. 43.

[27] *Id*.

[28] *See* Mauritius Written Statement, p. 285 (submitting that "international law requires that … the process of decolonisation of Mauritius be completed immediately, including by the termination of the administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, so that Mauritius is able to exercise sovereignty over the totality of its territory"); *see also* United States Written Statement, paras. 3.25–3.28.

[29] *See Western Sahara*, Written Statements and Documents, Volume I (1979), paras. 11–55, *available at* http://www.icj-cij.org/files/case-related/61/9467.pdf.

[30] *Western Sahara*, *supra* note 14, para. 53.

item had to be added to the General Assembly's agenda in order for it to consider the present request.[31]

- Fourth, in deciding that it could take up the case, the Court noted in *Western Sahara* that "the object of the General Assembly ha[d] not been to bring before the Court, by way of request for advisory opinion, a dispute or legal controversy in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy."[32] Here, in contrast, the object of the General Assembly's request—particularly when read in light of Mauritius's Written Statement—is precisely to seek the Court's involvement in the longstanding territorial sovereignty dispute as a means of advancing new efforts in the General Assembly or elsewhere to exert pressure on the United Kingdom to enable Mauritius to exercise immediate sovereignty over the Chagos Archipelago.[33]

2.13 Similarly, in contrast to the views expressed by some States,[34] the Court's decision in *Construction of a Wall* does not lend support to arguments that the Court could, consistent with its judicial function, respond to the General Assembly's request here. There, the Court acknowledged that "the question of the wall is part of a greater whole"[35] and decided it could respond without circumventing the consent principle because the question was "located in a much broader frame of reference than a bilateral dispute."[36] In contrast, as discussed in Section A above, the submissions here demonstrate that the questions referred go to the crux of the underlying bilateral sovereignty dispute, and it is difficult to see how the Court could answer the General Assembly's request without appearing to decide the dispute between the parties.

2.14 Furthermore, the effort by some States in their written statements to diminish the relevance of the Permanent Court of International Justice's advisory opinion in *Eastern Carelia* misses the point. Those submissions argue that *Eastern Carelia* hinged solely on the fact that Russia was not a member of the League of Nations at the time.[37] But, as the decision demonstrates, the Permanent Court's rationale was not so limited, and in fact clearly applies to pending disputes presented to this Court under the guise of a request for an advisory opinion. As the Permanent Court explained:

> The question put to the Court is not one of abstract law, but concerns directly the main point of controversy between Finland and Russia, and can only be decided by an

[31] Request for the Inclusion of an Item in the Provisional Agenda of the Seventy-First session, 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, Letter Dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations Addressed to the Secretary-General, U.N. Doc. A/71/142 (July 14, 2016).

[32] *Western Sahara*, *supra* note 14, para. 39.

[33] *See* Mauritius Written Statement, p. 285.

[34] *See, e.g.*, Djibouti Written Statement, para. 22; Guatemala Written Statement, para. 26; South Africa Written Statement, para. 35.

[35] *Construction of a Wall*, *supra* note 12, para. 54.

[36] *Id.*, para. 50.

[37] *See, e.g.*, Brazil Written Statement, para. 10 (arguing that the *Eastern Carelia* "finds no possible application here, since all States that might be concerned are parties to the Charter and to the Statute").

investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.[38]

2.15 This Court's application of this same analysis in *Interpretation of Peace Treaties* confirms the relevance of *Eastern Carelia*. There the Court did not dispense with the Permanent Court's reasoning in *Eastern Carelia*, but instead concluded that rendering an advisory opinion would not be impermissible precisely because the request "in no way touch[ed] the merits of [the underlying] disputes" and "[i]t follow[ed] that the legal position of the parties to these disputes [could not] be in any way compromised by the answers that the Court may give to the Questions put to it."[39]

2.16 In conclusion, none of the Court's prior advisory opinions can be read to suggest that the Court should respond to an advisory opinion request if doing so would be tantamount to adjudicating a bilateral territorial dispute, or would compromise the legal positions of the parties to that dispute. To the contrary, the Court's jurisprudence confirms that to give a reply in these circumstances would have the impermissible effect of circumventing the fundamental principle of consent to judicial settlement.

C. No other factor identified justifies dispensing with the serious concerns of judicial propriety implicated by this request.

2.17 A number of written statements argued that the existence of a bilateral dispute should not prevent the Court from responding to the General Assembly's request.[40] In support of this argument, several written statements noted the dispute could not be regarded as purely bilateral due either to: (1) the *erga omnes* character of self-determination;[41] or (2) the General Assembly's purported interest in the bilateral dispute over the status of the Chagos Archipelago.[42] Neither of these factors, nor any others presented in the written statements, justifies dispensing with the serious concerns of judicial propriety that the General Assembly's request presents.

1. Despite the erga omnes *character of self-determination, the principle of non-circumvention of consent still applies.*

2.18 To support their contention that the questions referred go beyond the pending bilateral dispute, some States in their written statements cite to the 1995 judgment in *East Timor*, in which the Court characterized self-determination as giving rise to obligations *erga omnes*.[43] The implication of this argument appears to be that the principle of consent to judicial

[38] *Eastern Carelia*, *supra* note 21, pp. 28–29.

[39] *Interpretation of Peace Treaties*, *supra* note 23, p. 72.

[40] *See, e.g.*, Liechtenstein Written Statement, para. 16; Marshall Islands Written Statement, para. 15; Serbia Written Statement, para. 25.

[41] *See, e.g.*, Djibouti Written Statement, para. 22; Mauritius Written Statement, para. 5.31.

[42] *See, e.g.*, African Union Written Statement, para. 62; Mauritius Written Statement, para. 1.15.

settlement is somehow less relevant to the question of judicial propriety if the request for an advisory opinion might implicate obligations that are of concern to members of the international community other than the parties to the dispute.

2.19 This reading of *East Timor* is incorrect. Rather, the Court in that case held that consent to judicial settlement remains a critical requirement even where *erga omnes* obligations may be involved:

> [T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[44]

2.20 Portugal had argued in that case that it should be permitted to challenge a treaty between Australia and Indonesia concerning East Timor, in part because self-determination related to obligations *erga omnes*. Although the Court agreed that self-determination had by that point achieved an *erga omnes* character, it held that it could not adjudicate the issue because it "would necessarily have to rule upon the lawfulness of Indonesia's conduct"—which was not a party to those proceedings—in a manner that "would run directly counter to the 'well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.'"[45]

2.21 This decision highlights that the substantive basis for a State's claim—even where the claim may rest on an alleged violation of an obligation *erga omnes*—is conceptually distinct from whether the Court can or should address a bilateral dispute absent the consent of a party to that dispute.[46] Therefore, although Mauritius asserts that it has a superior claim to the Chagos Archipelago because the decolonization of Mauritius allegedly did not conform to purported legal obligations arising from self-determination that had an *erga omnes* character, the consent principle remains an essential element in determining whether it would be appropriate for the Court to adjudicate a bilateral dispute. The asserted *erga omnes* character of obligations simply does not bear on this question. And where the very validity of a bilateral agreement is in dispute—in this case as it was in *East Timor*—it would be particularly inappropriate for the Court to act in the absence of the consent of both parties to the agreement.

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[43] *See, e.g.*, Djibouti Written Statement, para. 22.

[44] *East Timor*, *supra* note 20, para. 29. The Court held in *Armed Activities on the Territory of the Congo* that "[t]he same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character … cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties." *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, para. 64.

[45] *East Timor*, *supra* note 20, paras. 33–35 (citing *Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, 32).

[46] *See also* CHRISTIAN TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 166 (2005).

2. The General Assembly's purported interest in the bilateral dispute over the status of the Chagos Archipelago does not dispense with the principle of non-circumvention of consent.

2.22 In their written statements, many States noted the General Assembly's historic interest and active participation in promoting the decolonization process.[47] These submissions, however, did not agree on the propriety of the Court responding to the present request.

2.23 Several States, including the United States, pointed out that, in fact, the General Assembly had not addressed the decolonization of Mauritius or issues associated with the Chagos Archipelago for many decades.[48] As noted above, a new agenda item had to be created for the referral resolution to be considered.[49]

2.24 As a result, this is not a case where the requesting body has had a topic under active consideration and seeks the Court's advice through the advisory opinion procedure. Rather, it is a situation in which proponents of the referral are arguing for the Court to set aside its longstanding jurisprudence on non-circumvention of consent because of potential *future* consideration by the General Assembly.

2.25 But if such an approach were adopted, it would mean that a party to any bilateral dispute could have its dispute adjudicated through the advisory opinion procedure simply by recasting the claim as a matter that *could* be addressed by the General Assembly. This would severely undermine the non-circumvention principle, given the General Assembly's broad mandate. The Court has never suggested that the non-circumvention principle somehow loses its centrality because the General Assembly, despite having had no direct engagement on the matter for many decades, might add the matter to its agenda in the future.

2.26 Several States—including those that did not take a position on the merits of the dispute—emphasized the importance of upholding the consent principle even if the Court should decide to respond to the General Assembly's request. China, for example, stated that "[w]hile providing legal guidance to assist the General Assembly in fulfilling its function of decolonization, the Court should continue to uphold and respect the principle of consent when a purely bilateral dispute is involved, thus to ensure that its opinion should not have the effect of circumventing or prejudicing this principle."[50] Chile, while stating its support for the decolonization of Mauritius, also cautioned that "matters of a purely bilateral nature between

[47] *See, e.g.*, China Written Statement, para. 5 ("Decolonization has been an important function of the United Nations."); Cyprus Written Statement, para. 3 (recognizing the "critical role of the General Assembly in the decolonization process"); Germany Written Statement, para. 45 (noting that decolonization is "an issue that has been at the heart of the work of the [United Nations] ever since its inception"); India Written Statement, para. 27 (referring to the United Nations as "the chief world body to help achieve the object of decolonization"); Russian Federation Written Statement, paras. 23–25 (noting the General Assembly's institutional interest in the decolonization process).

[48] *See, e.g.*, Australia Written Statement, para. 54 (noting that, in contrast to prior requests for advisory opinions, "neither the Security Council nor the General Assembly have been actively considering matters relating to the Chagos Archipelago (whether in the context of decolonization or otherwise)"); United States Written Statement, para. 3.23.

[49] *See supra* text accompanying note 31.

[50] China Written Statement, para. 18.

two sovereign states[] should be handled by the appropriate means reflecting the consent of the interested parties."[51] Germany, for its part, stated that:

> [C]ertain aspects of the questions submitted to the Court, if too broadly interpreted, may touch upon issues that concern only the two States involved, namely Mauritius and the United Kingdom, or possibly third States. Bearing this in mind, Germany is of the opinion that a request for an advisory opinion ought not to be interpreted in a manner that would circumvent the fundamental principle that the Court's jurisdiction is based upon the consent of both States.[52]

2.27 These statements seem to contemplate—or at least do not appear to rule out the possibility—that the Court could somehow respond to the request without impermissibly adjudicating the bilateral territorial dispute between Mauritius and the United Kingdom. However, they do not provide substantive detail on how the Court might limit its advisory opinion to discrete non-bilateral aspects of the request that are of relevance to the General Assembly's functions related to decolonization.

2.28 Indeed, it is difficult to see how the purely bilateral matters at the heart of this request—in particular the dispute concerning the status of the 1965 agreement and related matters—could be isolated from any discussion of whether the process of decolonization of Mauritius was "lawfully completed" in 1968 or from the possible legal consequences for Mauritius and the United Kingdom arising out of the current status of the Chagos Archipelago. Moreover, when read in light of Mauritius's submission, it is plain that the request is improperly designed "to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy."[53]

2.29 While the United States acknowledges the importance of the Court's advisory function, and in particular its ability "to guide the United Nations in respect of its own action,"[54] the advisory function does not empower the Court to disregard its duty to uphold the consent-based system of dispute settlement on which its jurisdiction is based. Accordingly, unless the Court can avoid addressing the bilateral issues in dispute between Mauritius and the United Kingdom, it should decline to issue an advisory opinion.

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[51] Chile Written Statement, para. 9.

[52] Germany Written Statement, para. 151.

[53] *Western Sahara*, *supra* note 14, para. 39 (suggesting this would be an improper purpose for seeking an advisory opinion from the Court).

[54] *Id.*, para. 41 (quoting *Reservations to the Convention on Genocide*, *Advisory Opinion, I.C.J. Reports 1951*, p. 15, 19).

D. The principle of consent commands particular respect when the request relates to a dispute involving sovereignty over territory.

2.30 The United States was one of several States to point out in its Written Statement that where a dispute involves sovereignty over territory, the principle of consent commands particular respect.[55] Although these States addressed the issue in different ways, all highlighted the need for increased scrutiny where matters of territorial sovereignty are concerned.

2.31 The Republic of Korea, for example, noted that an advisory opinion directly related to the main point of a territorial sovereignty dispute "would be substantially equivalent to deciding the dispute between the parties" since disputes of this kind are "unsuitable to be determined by a majority vote at a political body such as the General Assembly."[56] This situation, the Republic of Korea argues, would present a compelling reason to decline to give an opinion.[57]

2.32 The Russian Federation, for its part, noted that when a request for an advisory opinion "transmits to the Court not just a dispute *but a bilateral territorial dispute*[,] the criterion [for exercising advisory jurisdiction] must be even higher."[58] The United States raised a similar point in its Written Statement in the context of the Court's exercise of its discretion,[59] and continues to consider the territorial nature of this dispute as a factor that the Court should weigh heavily when considering whether rendering a response would be compatible with the proper exercise of its judicial function.

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2.33 In light of the above and the views expressed in its Written Statement, the United States remains of the view that the Court should decline to respond to the General Assembly's request in order to avoid impermissibly adjudicating a dispute in the absence of the parties' consent. The United States continues to view the present request for an advisory opinion as an effort to circumvent the fundamental principle of consent to judicial settlement in what is—and which for decades has been understood as—a bilateral dispute between States concerning sovereignty over territory.

2.34 In accordance with the Court's jurisprudence and in order to protect the integrity of its judicial function, the United States therefore reiterates its request to the Court not to exercise jurisdiction over this matter.

[55] *See* Israel Written Statement, paras. 3.17–3.20; Republic of Korea Written Statement, paras. 23–24, Russian Federation Written Statement, paras. 29–32; United States Written Statement, paras. 3.29–3.31.

[56] *Id*.

[57] *Id.*

[58] Russian Federation Written Statement, para. 32 (emphasis added).

[59] United States Written Statement, paras. 3.29–3.31.

CHAPTER III
CONSIDERATIONS RELATING TO THE QUESTIONS REFERRED

3.1 In this Chapter, the United States offers some observations on those written statements that address the merits of the questions in the referral. The United States will focus primarily on the argument that a new rule of customary international law had emerged by 1965, or 1968 at the latest, that prohibited the United Kingdom from establishing the BIOT prior to Mauritius's independence. The Court would, of course, only need to examine such arguments if it determined that it can offer an opinion on the questions referred without contravening the principle of consent to judicial settlement.

3.2 The majority of written statements either did not address, or did not address in any detail, how the Court should answer the questions referred. In some cases, this was because the State believed it inappropriate for the Court to reach the questions, or suggested that the Court exercise caution if it were to do so.[60] In other cases, it was because the submissions were brief or consisted primarily of an expression of general support for Mauritius's position. But in those statements that did provide substantive observations on the questions referred, a few key points of agreement emerge.

3.3 These written statements appear to have conceded that the relevant law is the law applicable at the time—1965, or 1968 at the latest—and not the law as it may later have developed.[61] The statements also generally focused on whether a relevant rule of customary international law emerged in this period, as opposed to whether there was applicable treaty law. In addition, although only a few statements specifically discussed changes to territorial boundaries, those that did generally agreed that boundaries could be changed with the free consent of the people of the territory.

3.4 The written statements diverged on how the Court might answer Question (a). Of the statements that asserted that the decolonization of Mauritius was either not completed or was unlawfully completed, three issues merit attention and will be addressed in this Chapter.

3.5 Section A explains how the Court would need to assess whether a specific rule of customary international law existed at the relevant time. Most of the statements either did not describe in detail how the Court should ascertain that law, or did not rely on the methodology set out in the Court's Statute and jurisprudence. In this section, the United States will thus recall the Court's jurisprudence on the sources of international law, including what is required to establish the existence of a rule under customary international law—both state

[60] *See, e.g.*, Australia Written Statement, paras. 3–6; Chile Written Statement, paras. 4–5; China Written Statement, paras. 14–18; France Written Statement, paras. 4–19; Germany Written Statement, paras. 17, 30–48; Israel Written Statement, paras. 1.2–1.5; Russian Federation Written Statement, paras. 29–35.

[61] *See, e.g.*, African Union Written Statement, para. 70. On this "intertemporal" rule, *see, e.g.*, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, para. 16. As the United States explained in its Written Statement, and contrary to what the African Union has suggested, *see, e.g.*, African Union Written Statement, para. 71, it is for the Court—not the General Assembly in its referral resolution—to determine the applicable law. *See* United States Written Statement, para. 4.14 (citing *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403 [hereinafter *Kosovo*], para. 52).

practice and *opinio juris*—and the significance of General Assembly resolutions in ascertaining *opinio juris*.

3.6 Section B responds to several statements that argued that a right of self-determination had emerged in customary international law by 1965 (or 1968). A smaller number of statements asserted that this right imposed an obligation on the administering State to maintain the boundaries of the territory as they existed at some point prior to independence.

3.7 In addressing these arguments, the United States evaluates the nature of the sources that were cited by States as evidence that a relevant rule of customary international law had emerged by 1965 (or 1968), including: (1) General Assembly resolutions from the 1950s and 1960s, particularly Resolution 1514 (XV); (2) U.N. Security Council resolutions from the 1960s that referenced Resolution 1514; (3) the number of States that gained independence in the 1950s and 1960s; and (4) works by certain publicists regarding the state of international law in the 1960s.

3.8 As explained below, these sources fail to support the establishment of a relevant legal obligation. Even if one could conclude from the relevant sources that there was growing consensus around the existence of a right of self-determination in international law in the late 1960s, there was manifestly no consensus on specific obligations on administering States, much less consensus on an obligation to maintain territorial boundaries.

3.9 Section C addresses the few statements that acknowledged that territorial boundaries could be changed with the free consent of the people, but suggested that consent could only be ascertained through a plebiscite. This section explains that there was no legal obligation on administering States to hold a plebiscite to determine the freely expressed wishes of the people of a territory.

3.10 As the United States explained in its Written Statement, and will detail further in this Chapter, the historical, legally relevant materials do not support a claim that a new legal obligation had emerged at the relevant time that would have prohibited establishment of the BIOT. The answer to Question (a) is therefore that the decolonization of Mauritius was lawfully completed, obviating the need to answer Question (b).

A. The Court would need to examine the historical record through the lens of the established sources of international law, as set forth in its Statute and elaborated in its jurisprudence.

3.11 As the United States explained in its Written Statement, the Court would need to look to one (or both) of two sources of law under Article 38 of its Statute in order to ascertain the state of international law at the time the BIOT was established: (1) treaty law and (2) customary international law.[62]

3.12 For the reasons described in the U.S. Written Statement, the text and negotiating history of the U.N. Charter lend no support to the idea that the Charter contained

[62] United States Written Statement, para. 4.24.

requirements for an administering State to ascertain the wishes of the people of a non-self-governing territory as to the territory's ultimate political status or before making adjustments to administrative boundaries.[63] The only other potentially relevant multilateral treaties are the Human Rights Covenants, which did not come into force until a decade after the period in question.[64]

3.13 In the absence of a relevant treaty provision, any applicable rule of international law would thus need to have existed in customary international law.[65] The Court explained the two components of customary international law—both of which must be met—in *North Sea Continental Shelf*: (1) State conduct that "amount[ed] to a *settled practice*," that was (2) "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it [*i.e.*, *opinio juris*]."[66] The Court clarified that the practice must have occurred "within the period in question"; "been both extensive and virtually uniform"; and "occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[67]

3.14 Several written statements point to General Assembly resolutions on decolonization from the 1950s and 1960s and make a variety of different arguments about their relevance to determining the existence of a specific rule of customary international law, with some simply assuming that the resolutions set forth binding rules of international law.[68] But General

[63] United States Written Statement, paras. 4.26, 4.33–4.34. Other States' written statements also set forth this view. *See, e.g.*, South Africa Written Statement, para. 62; Netherlands Written Statement, paras. 3.1–3.2 (distinguishing the law under the Charter from the General Assembly's evolving policy in favor of independence for dependent territories). *See also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 111 (1994) (stating that in 1946, the duties of administering States "did not clearly include any duty to grant independence" and "[t]he common assumption that the UN Charter underwrites self-determination in the current sense of the term is in fact a retrospective rewriting of history").

Several written statements argue that it is legally significant that the French-language version of the Charter uses the word "*droit*" in Articles 1(2) and 55, in referring to the "*principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes*." African Union Written Statement, para. 81; Belize Written Statement, para. 2.3; Brazil Written Statement, para. 16; Djibouti Written Statement, para. 28; Mauritius Written Statement, para. 6.22. However, under Article 111 of the U.N. Charter, the Chinese, Russian, English, and Spanish texts are as authentic as the French text, yet none of those other texts uses the respective language's word for "right" with respect to self-determination. It seems especially difficult to conclude that the Charter established a legal right of self-determination, even discounting the absence of evidence of any such intention in the negotiating history, when "right" does not appear in four of the five equally authentic texts. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 33(3) ("The terms of [a treaty authenticated in two or more languages] are presumed to have the same meaning in each authentic text."); *id.*, art. 33(4) ("[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 [of this treaty] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.").

[64] *See* United States Written Statement, para. 4.26.

[65] None of the written statements suggests that the principle of self-determination constitutes a general principle of law, as set forth in Article 38(1)(c) and as interpreted by the Court, nor does the United States believe that source of law is relevant here.

[66] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3 [hereinafter *North Sea Continental Shelf*], para. 77 (emphasis added).

[67] *Id.*, para. 74.

[68] *See, e.g.*, Argentina Written Statement, paras. 48–49; Cuba Written Statement, p. 2 (United Kingdom failed to comply with "obligations contained in" several General Assembly resolutions); Djibouti Written Statement, para. 33 (arguing that repeated references to a "right" of self-determination in a series of resolutions meant that a

Assembly resolutions, even those styled as "declarations," are not themselves legally binding, except in rare circumstances not relevant here.[69] Such resolutions could only be relevant to this Court's inquiry to the extent they reflect *opinio juris* that was accompanied by the extensive and virtually uniform practice of States.[70]

3.15 In determining whether a particular General Assembly resolution provides "evidence important for establishing the existence of a rule or the emergence of an *opinio juris*," the Court has stressed that "it is necessary to look at its content and the conditions of its adoption."[71] The Court has further emphasized that deducing *opinio juris* from "the attitude of States toward certain General Assembly resolutions" must be done "with all due caution."[72] Statements made by States during negotiation of a particular resolution and before

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legal right "had already crystalized before" 1965); Guatemala Written Statement, para. 34; India Written Statement, para. 62 (referring to U.K. actions allegedly "in violation of obligations under" Resolution 1514, and asserting that Resolution 2066 (XX) "obligated the UK to complete the decolonization of Mauritius").

[69] *See* U.N. Charter, arts. 10, 11, 13, 14 (General Assembly's recommendatory powers). *See also, e.g.*, Letter from the U.N. Office of Legal Affairs to the Permanent Observer of an Intergovernmental Organization to the United Nations (May 9, 1986), *in* 1986 U.N. Jurid. Y.B. 274, 275, U.N. Doc. ST/LEG/SER.C/28 (General Assembly resolutions "other than those relating to the institutional framework and administrative and financial administration of the Organization are recommendatory in nature and are thus not legally binding even on those Members that vote in favour of the resolutions.").

[70] *North Sea Continental Shelf, supra* note 66, para. 77. *Accord, e.g.*, Robert Rosenstock, U.S. Representative, Address Before the U.N. General Assembly Sixth Committee (Legal) (Nov. 11, 1977), *in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 53, 54 (John A. Boyd ed., 1979) ("[A] General Assembly resolution may contribute to the development of international law … only if the resolution gains virtually universal support, if the Members of the General Assembly share a lawmaking or law-declaring intent—and if the content of that resolution is *reflected in general state practice*." (emphasis added)); U.N. Doc. A/C.6/32/SR.44 (Nov. 15, 1977), para. 19 (portion of Nov. 11, 1977 record summarizing Rosenstock's address); Letter from Stephen M. Schwebel, Deputy Legal Adviser, U.S. Department of State, to Marcus G. Raskin, Co-Director, Institute for Policy Studies (Apr. 25, 1975), *in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975 85, 85 (Eleanor C. McDowell ed., 1976) ("To the extent, which is exceptional, that General Assembly resolutions are meant to be declaratory of international law, are adopted with the support of all members, *and are observed by the practice of States*, such resolutions are evidence of customary international law on a particular subject matter." (emphasis added)); S. Prakash Sinha, *Self-Determination in International Law and Its Application to the Baltic Peoples*, *in* RES BALTICA: A COLLECTION OF ESSAYS IN HONOR OF THE MEMORY OF DR. ALFRED BILMANIS 256, 266 (Adolf Sprudzs & Armins Rusis eds., 1968) ("[E]ven if it is accepted that the specific norms asserted in the political organs [of the United Nations] may be legally authoritative on the basis of their acceptance and validity as interpretation[s] of the Charter … it is necessary that they influence actual behavior in order to secure an obligatory character which is more than nominal." (internal quotation marks omitted)).

It would not be enough, as the African Union argues, that the resolution in question enjoyed "near unanimous" support of Member States or even if the General Assembly "meant to establish a customary international law principle." African Union Written Statement, para. 76. These considerations cannot serve as a substitute for actual state practice undertaken out of a belief that the law requires it. *See, e.g.*, Report of the International Law Commission, 68th Sess., U.N. Doc. A/71/10 (2016), ch. V: "Identification of Customary International Law" [hereinafter ILC 2016 Conclusions on Customary International Law], p. 107, para. 4. While the United States has concerns about aspects of these draft conclusions, *see* Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading, Jan. 5, 2018 [hereinafter U.S. 2018 ILC Comments], *available at* http://www.ejiltalk.org/wp-content/uploads/2019/02/US-Views-on-ILC-Draft-Conclusions-on-CIL.pdf, it believes they properly describe many aspects of how customary international law is ascertained.

[71] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 [hereinafter *Nuclear Weapons*], para. 70.

[72] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 188.

or after its adoption provide key evidence of those States' contemporaneous attitude toward the resolution or the state of international law at the time.[73]

B. The sources cited by the written statements asserting that a rule of customary international law had emerged do not support that conclusion.

1. General Assembly resolutions from the 1950s and 1960s, including Resolution 1514, did not establish or reflect a relevant rule of customary international law.

3.16 Several written statements argued that certain General Assembly resolutions from the 1960s, or particular provisions thereof, reflected customary international law already in existence at the time of their adoption,[74] or that the resolutions themselves created customary international law.[75] Without question, nearly all States in this period voiced strong moral and political support for the principle of self-determination and praised its influential role in the postwar wave of decolonization.[76] Yet indications of moral and political support are not enough to establish *opinio juris*. Instead, States must believe that international law requires the conduct in question.

3.17 In this regard, as the United States explained in its Written Statement,[77] a significant group of States did not, at that time, accept that self-determination had become a rule of international law. States also disagreed sharply about the definition and scope of self-determination during the negotiations of Resolution 1514 and other decolonization resolutions.

3.18 The written statements arguing for the existence of a rule of customary international law by the early-to-mid 1960s also failed to take account of evidence demonstrating that this lack of agreement continued through the end of the 1960s. For example, one day after it adopted Resolution 1514, the General Assembly adopted Resolution 1541 (XV), which contains some provisions that are materially at odds with Resolution 1514.[78] Negotiations surrounding the creation of the Special Committee on Decolonization the following year likewise reveal persistent disagreement about key elements of Resolution 1514.[79]

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[73] *See* ILC 2016 Conclusions on Customary International Law, *supra* note 70, p. 108, para. 6.

[74] *See, e.g.*, African Union Written Statement, para. 77; Belize Written Statement, paras. 2.5–2.15; Mauritius Written Statement, paras. 6.23–6.33; Netherlands Written Statement, paras. 3.7–3.8.

[75] African Union Written Statement, para. 76.

[76] *See, e.g., infra* text accompanying notes 116–117.

[77] *See* United States Written Statement, paras. 4.35–4.60.

[78] *See id*., para. 4.52 (explaining differences such as Resolution 1541's various options available to the people of a territory, as contrasted with Resolution 1514's focus on independence).

[79] For example, in the context of the General Assembly's adoption of Resolution 1654 (XVI), which created the Special Committee, several States emphasized that an "immediate" grant of independence would not be appropriate in all circumstances, and that the particular situation of each territory should be considered. *See* United States Written Statement, para. 4.53 n. 148. States also rejected a Soviet amendment to Resolution 1654 that would have identified 1962 as the year of elimination of colonialism. U.N. Doc. A/PV.1066 (Nov. 27, 1961), paras. 59–71 (Soviet delegate explaining amendment); *id*., para. 147 (amendment rejected on a vote of

3.19 Perhaps the best evidence of the continued lack of consensus, however, is found in the negotiating records of the Friendly Relations Declaration, which States negotiated from the mid-1960s to 1970. When States initially gathered in 1962 to formulate a list of U.N. Charter principles to elaborate in the Friendly Relations Declaration, some asserted that self-determination was already part of international law.[80] Others, such as Thailand, took the opposite position: "Th[e] principle [of self-determination], despite the efforts made by the Organization [of the United Nations], was still a long way from having become a principle of international law."[81]

3.20 In further discussions about the Friendly Relations Declaration in 1965, States continued to disagree about whether self-determination constituted a legal right.[82]

3.21 The States that were members of the Special Committee established to draft the Friendly Relations Declaration continued to debate self-determination on the record through five annual sessions from 1966 to 1970. A number of States asserted that self-determination was a norm of international law.[83] By contrast, a significant number of States maintained that the principle of self-determination was not yet a right under international law, or even if it did form part of international law, the elements of such a right or any corresponding obligations had yet to be defined.[84]

46–19–36); *see also, e.g., id.*, para. 137 (El Salvador: "It may perhaps be going too far to want 1962 to be proclaimed the year of the elimination of colonialism … because it is an undeniable fact that not all the peoples of these territories are yet in a position to attain full self-government, and still less full independence.").

[80] *See, e.g.*, U.N. Doc. A/C.6/SR.769 (Nov. 29, 1962), para. 34 (Yugoslavia: "General Assembly had settled … once and for all by its Resolution 1514" "whether the principle of self-determination … was a legal principle."); U.N. Doc. A/C.6/SR.766 (Nov. 28, 1962), para. 8 (Cyprus stating that self-determination "might be fairly called [an] established norm[] of international law"); U.N. Doc. A/C.6/SR.765 (Nov. 23, 1962), para. 4 (Tunisia: "Since 1945, the principle of self-determination … had evolved into an obligation, incumbent upon all colonial countries, to free the populations still under their administration.").

[81] U.N. Doc. A/C.6/SR.763 (Nov. 20, 1962), para. 12. *Accord, e.g.*, U.N. Doc. A/C.6/SR.769, *supra* note 80, para. 3 (United Kingdom: "[T]he right to self-determination … was questionable and was not recognized anywhere in the Charter."); U.N. Doc. A/C.6/SR.759 (Nov. 14, 1962), para. 21 (Sweden stressing that, even though the principle of self-determination was "fundamentally important," "it would be extremely difficult, if not impossible, to define that principle in precise legal terms").

[82] *See, e.g.*, U.N. Doc. A/C.6/SR.891 (Dec. 6, 1965), para. 37 (Ceylon noting the persistence of "much disagreement on whether there was a legal right to self-determination or whether the provisions of the Charter were merely an expression of hope with no legal substance"); *id.*, para. 13 (France: "[T]he question arose … in respect of the principle of self-determination … whether [it] constituted, and had constituted ever since the adoption of the Charter, a positive rule of international law, or whether it was simply a question of a philosophical or political rule or a precept of international morality.").

[83] *See, e.g.*, U.N. Doc. A/AC.125/SR.92 (Oct. 21, 1968) (negotiations of Sept. 24, 1968), p. 122 (Madagascar); U.N. Doc. A/AC.125/SR.68 (Dec. 4, 1967) (negotiations of Aug. 3, 1967), p. 17 (Ghana); U.N. Doc. A/AC.125/SR.41 (July 27, 1966) (negotiations of Apr. 11, 1966), para. 3 (Kenya); U.N. Doc. A/AC.125/SR.40 (July 27, 1966) (negotiations of Apr. 7, 1966), para. 2 (Czechoslovakia); *id.*, para. 17 (Yugoslavia).

[84] *See, e.g.*, U.N. Doc. A/AC.125/SR.93 (Oct. 21, 1968) (negotiations of Sept. 25, 1968), pp. 145–46 (Canada noting "there were serious differences of opinion on the interpretation of self-determination," and thus the "aim" of the Special Committee's work on self-determination "must be to define the legal components of the principle, and, if possible lay down some guidelines as to the situations to which the formulation was to apply" (quotations respectively at pp. 145, 146)); U.N. Doc. A/AC.125/SR.92, *supra* note 83, p. 121 (United Kingdom: "[T]he United Kingdom had always believed that, in so far as self-determination was a legal, and not merely a political concept, it was properly expressed as a principle and not a right. However, … [it] was prepared … to participate in attempts to formulate the principle of self-determination in terms of a 'right.'"); U.N. Doc. A/AC.125/SR.70

3.22 It was widely understood that the members of the Special Committee were at odds over self-determination. As Venezuela observed in 1967,"[t]here appeared to be no agreement even on the question whether equal rights and self-determination of peoples constituted a recognized and universal principle of contemporary international law," or on the principle's possible elements, scope, or practical effects.[85]

3.23 States involved in the Friendly Relations Declaration negotiations also disagreed over whether Resolution 1514 could be regarded as reflecting international law. As the Special Committee noted in 1967, some delegations stated that General Assembly resolutions "should not be regarded as having a legally binding effect on the Special Committee in its formulation of the legal content of the principle" of self-determination.[86] These States recalled that Resolution 1514 (and another resolution, on the use of force) had not been "unanimously adopted or accepted as law by the General Assembly," and "it could not be said that they should be considered as reflecting a general practice accepted as law."[87]

(Dec. 4, 1967) (negotiations of Aug. 7, 1967), p. 5 (Australia: "In its task of working out the content of the principle [of equal rights and self-determination] in fuller detail, the Committee could find little help in the Charter itself, since that content was nowhere spelt out. … In dealing with the principle, the Committee was engaged on a genuine task of progressive development of international law."); U.N. Doc. A/AC.125/SR.69 (Dec. 4, 1967) (negotiations of Aug. 4, 1967), p. 17 (Japan: "In spite of the clear statement in the Charter of the principle of equal rights and self-determination of peoples, [the Japanese] delegation was not fully convinced that such rights could be called rights under international law in the same sense as the right of sovereign equality or other rights of States."); U.N. Doc. A/AC.125/SR.68, *supra* note 83, pp. 3–4 (United States asserting that the Charter principle of equal rights and self-determination was "a settled principle of modern international law" but calling on the Committee to "prescribe the legal conditions and consequences of the principle and not limit itself merely to reiterating its existence in a manner which shed[s] little light on its content") (quotations respectively at pp. 3, 4); U.N. Doc. A/AC.125/SR.44 (July 27, 1966) (negotiations of Apr. 13, 1966), para. 18 (Netherlands, on the idea of setting forth legal elements for self-determination, remarking that "it was not always easy to translate such fundamental concepts into a body of legal rules"); U.N. Doc. A/AC.125/SR.41 (July 27, 1966) (negotiations of Apr. 11, 1966), para. 15 (France: "If the Committee came to the conclusion that the principle of self-determination was a principle of international law … it would seem to be the Committee's duty to study and define the principle as such. Before one could lay down the particular obligations of States in pursuance of the principle it seemed important to define the principle itself.").

[85] U.N. Doc. A/AC.125/SR.70, *supra* note 84, pp. 19–20 (quotation at p. 19). *Accord, e.g.*, U.N. Doc. A/AC.125/SR.93, *supra* note 84, p. 142 (Venezuela repeating these concerns in 1968); *id.*, p. 139 (Syria acknowledging the "divergence of views [among Committee members] concerning the nature of the rights involved in the concept of self-determination, which led to further conflicts of opinion on the other aspects of the principle"); *id*., pp. 143, 149 (India and France noting the Committee's persistent inability to reach consensus on self-determination).

[86] 1967 Report of the Special Committee on Friendly Relations, U.N. Doc. A/6799 (Sept. 26, 1967) [hereinafter 1967 FRD Report], para. 185. *Accord, e.g.*, 1968 Report of the Special Committee on Friendly Relations, U.N. Doc. A/7326 (1968) [hereinafter 1968 FRD Report], para. 147 (reporting on continued disagreement over Resolution 1514); U.N. Doc. A/AC.125/SR.69, *supra* note 84, p. 10 (Canada stating that Resolution 1514 "was an important political document" but Canada "did not regard that declaration as a mandatory source."); U.N. Doc. A/AC.125/SR.70, *supra* note 84, p. 8 (Australia finding "unacceptable" the notion that Resolution 1514 had a legally binding effect even though it "recognized [its] historic significance … as a landmark in the General Assembly's efforts to expedite self-determination").

[87] 1967 FRD Report, *supra* note 86, para. 185. *Accord, e.g.*, U.N. Doc. A/AC.125/SR.92, *supra* note 83, p. 122 (United Kingdom recalling its "reservations about some of the provisions of resolution 1514"); U.N. Doc. A/AC.125/SR.44, *supra* note 84, para. 31 (in abstaining from Resolution 1514, Australia "had made clear that it did not regard that resolution as a whole as representing a formulation of international law"); *id.*, para. 34 (Canada: Resolution 1514 was "a political document which should have no more than persuasive force in the Committee's discussions regarding the legal element of the principle in question."). *See also* U.N. Doc.

3.24 Other delegations viewed Resolution 1514 as "the most authoritative pronouncement on the principle [of self-determination] since the adoption of the Charter, and represented a mandatory source with respect to the formulation of the principle by the Special Committee."[88] Yet several of the States that believed self-determination was an international legal right continued to express differing views on the scope of Resolution 1514's paragraph 6, on territorial integrity.[89]

3.25 It was not until 1969 that the Special Committee began to resolve some of these many differences.[90] Even at that late stage, as Cameroon observed, "while there seemed to be general acceptance of the principle that all peoples should enjoy equal rights and the inalienable right to self-determination, there was still a divergence of views as to the method of implementing that right."[91] Japan stated that "it might be impossible to unify the points of view, which were sometimes radically different, of all delegations."[92]

3.26 Most aspects of the self-determination provision remained unresolved until April 1970.[93] As a consequence, the Committee did not reach consensus on the principle of equal rights and self-determination of peoples until it finalized the Friendly Relations Declaration's

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A/AC.125/SR.107 (Nov. 5, 1969) (negotiations of Sept. 4, 1969), p. 78 (Yugoslavia: It "was aware that there was some difference of opinion as to whether [Resolution 1514] imposed obligations on Member States or whether [it] primarily expressed the political intentions of the States which had voted for their adoption.").

[88] 1967 FRD Report, *supra* note 86, para. 184. *Accord, e.g.*, UN Doc. A/AC.125/SR.93 (Oct. 21, 1968) (negotiations of Sept. 25, 1968), p. 140 (Poland considering Resolution 1514 as "the most valid expression, since the adoption of the Charter, of the principle under discussion which it equated with a universally recognized principle of international law"); U.N. Doc. A/AC.125/SR.69, *supra* note 84, p. 8 (Czechoslovakia: Resolution 1514 was "the most authoritative pronouncement on the principle … since the adoption of the Charter itself" and "a mandatory source for the purposes of the work now in progress.").

[89] *Compare, e.g.*, U.N. Doc. A/AC.125/SR.91 (Oct. 21, 1968) (negotiations of Sept. 23, 1968), p. 114 (Ghana asserting that the "sense of paragraph 6" seemed to be "that the principle of self-determination was limited to political units already defined as countries or colonies (or subdivisions thereof … [)]"); U.N. Doc. A/AC.125/SR.68, *supra* note 83, p. 10 (India: "Certain colonial and other Powers had attempted to distort the true meaning of the principle of self-determination and had endeavoured to use it as a pretext to subvert the independence and territorial integrity of established sovereign States. It was for that reason that the General Assembly, in operative paragraph 6 … had stressed that the principle of self-determination could not be invoked to justify 'the partial or total disruption of the national unity and the territorial integrity' of a sovereign State."); U.N. Doc. A/AC.125/SR.44, *supra* note 84, para. 40 (Guatemala reiterating its understanding of paragraph 6, *i.e.*, "that the principle of self-determination could not impair the right of territorial integrity or the right to the recovery of territory"); U.N. Doc. A/AC.125/SR.43 (July 27, 1966) (negotiations of Apr. 12, 1966), para. 19 (Argentina: Self-determination included "the right of a people to determine the national affiliation of the space which it inhabited and, consequently to demand territorial changes and oppose any cession of territory to which [a people] did not expressly consent.").

[90] *Compare, e.g.*, 1968 FRD Report, *supra* note 86, para. 192 (no progress by drafting committee on self-determination) *with* 1969 Report of the Special Committee on Friendly Relations, U.N. Doc. A/7619 (1969), para. 180 (setting forth a few paragraphs of agreed text, along with several other proposed paragraphs on which no agreement had yet been reached).

[91] U.N. Doc. A/C.6/SR.1160 (Nov. 26, 1969), para. 14 (remarks at meetings of the Sixth Committee to discuss progress made by the Special Committee on Friendly Relations in 1969).

[92] U.N. Doc. A/C.6/SR.1162 (Nov. 28, 1969), para. 13.

[93] *See* 1970 Report of the Special Committee on Friendly Relations, U.N. Doc. A/8018 (1970) [hereinafter 1970 FRD Report], para. 68 (summarizing an April 10, 1970 oral report from the Drafting Committee Chairman, which described persistent disagreement on key aspects of the draft resolution during informal negotiations).

text on May 1, 1970.[94] Upon finalizing the text, States on the Committee expressed general support for including the self-determination provision[95]—even though it departed in material ways from Resolution 1514.[96] In fact, the Friendly Relations Declaration did not even mention Resolution 1514. The General Assembly adopted the Friendly Relations Declaration—without dissent or, importantly, abstention by any State—on October 24, 1970.[97]

3.27 This historical record belies any assertion that an *opinio juris* existed in 1965 or 1968 about a norm of self-determination in international law that would have prohibited establishment of the BIOT. Even if one could conclude that there was a growing consensus regarding the existence of a right of self-determination in international law, there was manifestly no consensus as to the elements of a legal rule or its consequences, including specific obligations on administering States. These facts foreclose finding that a specific rule

[94] *Id.*, paras. 84–85 (noting that "[t]he draft declaration contained in the report of the Drafting Committee approved by the Special Committee" on May 1, 1970 "represents the consensus of the delegations," and should be read in conjunction with their statements for record included in the report and summary records (quotation at para. 85)).

[95] *See, e.g.*, *id.*, paras. 115, 118 (Venezuela); *id.*, para. 123 (Romania); *id.*, para. 140 (Italy); *id.*, para. 150 (France); *id*., paras. 161–62 (Yugoslavia); *id*., paras. 173–77 (Canada); *id*., paras. 202–03 (Australia); *id.*, para. 206 (Syria); *id.*, paras. 218–219 (India); *id.*, paras. 232–35 (United Kingdom); *id.*, para. 243 (United Arab Republic); *id*., paras. 265–70 (United States).

[96] For some of the key ways the Friendly Relations Declaration differed from Resolution 1514, *see* United States Written Statement, paras. 4.62–4.64. These differences included, for example, replacing the unconditional call for independence with language recognizing other valid political status choices; eliminating the call for immediate transfer of all powers to non-self-governing territories; and specifying that non-self-governing territories have a separate status from the territory of administering States. *Id.*, paras 4.62–4.63.

[97] U.N. Doc. A/PV.1883 (Oct. 24, 1970), para. 8.

Mauritius suggests that Resolution 1514 was so universally accepted and supported by contemporary practice that it constituted a law-declaring resolution. Mauritius Written Statement, paras. 6.31–6.32. Yet if any General Assembly resolution could be considered to reflect the settled law on self-determination, it would be the Friendly Relations Declaration. Unlike Resolution 1514, the self-determination section of the Friendly Relations Declaration was developed by delegations featuring international lawyers, Edward McWhinney, *The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-Operation Among States*, 60 AM. J. INT'L L. 1, 4 (1966), during debates that spanned five years. States negotiating the Friendly Relations Declaration strove for—and achieved—consensus, in the hope that the Declaration could thereby be regarded "as an authoritative statement of key principles of the Charter." Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714 n. 2 (1971); Rosenstock, *supra* note 70, at 54, (asserting that the Friendly Relations Declaration "may be an authoritative interpretation of international law, adopted as it was unanimously and stated as it was by many Members to be such—at any rate, if it is supported by state practice"); China Written Statement, para. 8 (Friendly Relations Declaration "clearly recognizes the principle of self-determination of peoples as an important principle of international law."). Some commentators later characterized it as an authoritative interpretation. *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 119 (1991); Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 236 (1993). *See also e.g.*, Robert Rosenstock, U.S. Representative, Address Before the U.N. General Assembly Sixth Committee (Legal) (Dec. 5, 1974), in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974 17, 18 (Arthur W. Rovine ed., 1974) ("Evolution has taken place in some of the most important provisions of the Charter. For example, if in 1945 or 1950 we had asserted that the Charter granted peoples the right to self-determination, most members would have disagreed. If in 1960 we had made the same assertion, many would have pointed out that all that existed as a matter of law was a principle, not a right. Today [in 1974] if anyone questions the interpretation that there exists a Charter right to self-determination, his views would be considered preposterous, or at least anachronistic and wrong."); U.N. Doc. A/C.6/SR.1517 (Dec. 9, 1974), pp. 16–20 (summarizing Rosenstock's address).

of customary international law existed at the time that would have prohibited the United Kingdom from establishing the BIOT.[98]

3.28 In light of arguments made in some of the written statements, two further considerations about *opinio juris* warrant clarification. First, despite suggestions by some States,[99] the absence of "no" votes on Resolution 1514 or other resolutions does not by itself demonstrate a general recognition among States that the resolution or particular paragraphs reflected international law.[100] For example, as the United States explained in its Written Statement, several States that voted for Resolution 1514 did so despite concerns with the text; abstaining States expressed support for the resolution's ideals but plainly stated that it was not a legal document; and even the resolution's sponsors emphasized its aspirational nature.[101] These conditions show that many States' votes on the resolution reflected a political decision, not a legal position.

3.29 Second, some written statements suggested that General Assembly resolutions' use of the term "right" meant they enshrined a legal right with corresponding obligations.[102] But it is not legally dispositive that the General Assembly included words such as "right" and "shall" in Resolution 1514 and other resolutions. In fact, the words "right" and "shall" appear in a

[98] *Cf. Nuclear Weapons*, *supra* note 71, paras. 64–73 (Court finding no rule of customary international law prohibiting any use of nuclear weapons, despite a large number of General Assembly resolutions "reveal[ing] the desire of a very large section of the international community" to prohibit nuclear weapons, where "some other States" continued to "assert the legality of the threat and use of nuclear weapons in certain circumstances … [and] recall[ed] that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defense against an armed attack threatening their vital security interests," even though no State had actually used such weapons since 1945 (quotations respectively at paras. 73, 66)).

[99] *See* African Union Written Statement, para. 90; Belize Written Statement, para. 2.12; Djibouti Written Statement, para. 31; Marshall Islands Written Statement, para. 18; Mauritius Written Statement, paras. 1.3, 6.27.

[100] As the United States has noted elsewhere, "States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law." John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REVIEW RED CROSS 443, 445 (2007). *Accord, e.g.*, U.S. 2018 ILC Comments, *supra* note 70, p. 17 ("[T]he choice of whether to support or oppose a resolution may be made for political or other reasons in lieu of a legal analysis of its content, or despite disagreement with the articulation or assessment of a purported rule of customary international law addressed therein."); ILC 2016 Conclusions on Customary International Law, *supra* note 70, p. 107, para. 5 ("[N]egative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law, and thus that there is no rule."); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301, 302 (1979) ("The members of the General Assembly typically vote in response to political not legal considerations. They do not conceive of themselves as creating or changing international law. … The issue often is one of image rather than international law: states will vote a given way repeatedly not because they consider that their reiterated votes are evidence of a practice accepted as law but because it is politically unpopular to vote otherwise."); Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, *in* 137 COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L LAW 419, 457 (1972) (explaining the importance of the "'image' factor" as a "driving force towards the proliferation of … resolutions," and stressing that "[w]hether members of the General Assembly really 'mean it' or not[] matters so much as to make *all* the difference").

[101] *See* United States Written Statement, paras. 4.42–4.44 and sources cited therein.

[102] *See, e.g.*, African Union Written Statement, paras. 82–93, 102; Djibouti Written Statement, para. 31; Mauritius Written Statement, para. 6.22.

number of General Assembly resolutions and declarations that are indisputably nonbinding, and did not otherwise reflect legal obligations. Prominent among these are the Universal Declaration of Human Rights (UDHR)[103] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[104] Numerous States have expressed their understanding that both Declarations are nonbinding and aspirational.[105]

[103] G.A. Res. 217 (III)–A, Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[104] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), Annex.

[105] With respect to the UDHR, *see, e.g.*, U.N. Doc. A/PV.182 (Dec. 10, 1948), p. 904 (Poland: UDHR was "an expression of principles with no legal force … and with only moral value."); *id.*, p. 905 (Poland: UDHR was not a treaty and "contained no legal obligations."); U.N. Doc. A/PV.181 (Dec. 10, 1948), p. 876 (Australia: "The declaration represented a common ideal to be attained by all peoples of the world; it had no legally binding character."); *id.*, p. 885 (Mexico: same); *id.*, p. 888 (New Zealand: UDHR "had moral force only" and "imposed no legal obligations."); Eleanor Roosevelt, Address Before the U.N. General Assembly on the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948), *reprinted in* U.S. DEPARTMENT OF STATE, HUMAN RIGHTS AND GENOCIDE: SELECTED STATEMENTS 24, 25 (1949) ("[The UDHR] is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms … ."); U.N. Doc. A/PV.180 (Dec. 9, 1948), pp. 860–63 (summarizing Roosevelt's address).

With respect to the UNDRIP, *see, e.g.*, U.N. Doc. A/61/PV.108 (Sept. 13, 2007), p. 3 (Nepal, voting in favor: The UNDRIP "do[es] not create any binding legal or political obligations."); *id.*, p. 5 (Turkey, voting in favor: "The Declaration is not legally binding" but that "it can constitute an important policy tool … ."); U.N. Doc. A/61/PV.107 (Sept. 13, 2007), p. 22 (United Kingdom, voting in favor: "[T]his Declaration is not legally binding" but "will be an important policy tool … ."); *id.*, p. 26 (Guyana, voting in favor: "[T]he Declaration is political in character, as opposed to being a legally binding document … ."); *id.*, p. 17 (Colombia abstaining and clarifying that "the Declaration is not a legally binding norm"); *id.*, p. 22 (Bangladesh abstaining and calling the UNDRIP a "political Declaration"); *id.*, p. 12 (Australia, voting "no": "It is the clear intention of all States that [the UNDRIP] be an aspirational declaration with political and moral force but not legal force."); *id.*, p. 13 (Canada, voting "no": UNDRIP is "not a legally binding instrument … and its provisions do not represent customary international law."). The four States that voted "no" on the UNDRIP later announced their support for it with the caveat that it is not legally binding. *See* U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2010 262, 264 (Elizabeth R. Wilcox ed., 2011) ("The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force."); Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (Nov. 12, 2010), *available at* http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142 (UNDRIP "is a non-legally binding document that does not reflect customary international law"); Pita Sharples, New Zealand Minister of Maori Affairs, Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples, Statement Delivered at the Ninth Session of the U.N. Permanent Forum on Indigenous Issues (Apr. 19, 2010), para. 7, *available at* http://www.beehive.govt.nz/sites/default/files/100420_UNDRIP.pdf (UNDRIP "expresses new, and non-binding, aspirations."); Jenny Macklin, Australia Minister for Families, Housing, Community Services, and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009), *available at* http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F418T6%22 (same).

2. Security Council resolutions that reference Resolution 1514 do not indicate that the Council Members considered it to reflect a relevant rule of customary international law.

3.30 In its Written Statement, Mauritius cited Security Council resolutions adopted between 1963 and 1968 that reference Resolution 1514 to suggest that the Council had endorsed a legal right of self-determination.[106]

3.31 A close examination of the content of these resolutions and the conditions of their adoption demonstrates that they, too, fail to provide evidence of *opinio juris*. Moreover, none of the Security Council resolutions support Mauritius's particular interpretation of Resolution 1514: that paragraph 6 of Resolution 1514 reflected a right to territorial integrity as a component of the right of self-determination,[107] and this right to territorial integrity specifically required a plebiscite to approve any changes to a territory's boundaries prior to independence.[108] None of the Security Council resolutions mentions territorial integrity or plebiscites, and, as far as the United States is aware, these subjects were not raised by any State during the discussions of these resolutions.

3.32 In fact, through its resolutions on the situations in Portuguese territories in Africa, Southern Rhodesia, and South West Africa, the Council sought to promote peaceful resolutions to political conflicts that were triggered by the antidemocratic actions of governing authorities. The resolutions reference Resolution 1514 for the general principle that the people of those territories should be able to decide their political status.

3.33 For example, Security Council Resolution 183 (1963) reiterated paragraph 2 of General Assembly Resolution 1514 in order to establish common terms for a peaceful resolution of the situation in the Portuguese territories.[109]

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[106] Mauritius Written Statement, paras. 6.34–6.37 (citing Security Council Resolutions 180, 183, 217, 232, 246, and 253). Mauritius also cited several Security Council resolutions adopted after 1968. *Id*., paras. 6.35, 6.37 & n. 640. Because these resolutions are not relevant to the determination of applicable law at the relevant time period—either 1965, or at the latest, 1968—the United States will not address them in these Written Comments.

[107] *Id.*, para. 6.50(3).

[108] *See id.*, para. 6.58. Section III.C *infra* discusses Mauritius's argument about plebiscites in detail.

[109] Portugal claimed that its territories in Africa were integral parts of Portugal and rejected calls to promote self-government or allow the peoples of those territories to choose their political status. *See* S.C. Res. 180, U.N. Doc. S/RES/180 (July 31, 1963), para. 2; U.N. Doc. S/PV.1045 (July 26, 1963), para. 11 (China summarizing Portuguese position). Specifically, in the context of discussions with African countries over the future of the territories, Portugal asserted that the populations in its territories had already achieved "self-determination," which it defined as participation in administration and political life. *See* Report by the Secretary-General in Pursuance of the Resolution Adopted by the Security Council at Its 1049th Meeting on 31 July 1963 (S/5380), U.N. Doc. S/5448 (Oct. 31, 1963), pp. 4–5 (quoting the Portuguese Foreign Minister's assertion that "'self-determination meant the consent of the people to a certain structure and political organization,'" and that the territorial population's participation in elections and political discussions "'represented the free expression of the wishes and will of the population and their participation in administration and in political life of the territory'"). African countries responded that they could only accept a concept of self-determination that included the right of the people of the territories to determine the future of their territories "and that they had the right to opt out of Portugal." *Id.*, p. 5. Several Security Council Members hoped that, by referring to the language on self-determination in Resolution 1514, further discussions between Portugal and African countries would take place. U.N. Doc. S/PV.1082 (Dec. 10, 1963), para. 98 (Ghana: "[I]t was Portugal's refusal to accept the United Nations interpretation of self-determination that brought about a break-off of the conversations.");

3.34 Similarly, the other Security Council resolutions cited by Mauritius reflect support for the general principle that the entire people of Southern Rhodesia and the people of South West Africa should be able to freely choose their political status.[110]

3.35 In addition, several Security Council members either abstained from or qualified their support for these resolutions, making it even more difficult to conclude that States intended to endorse a legal rule. For example, three of the permanent members of the Security Council abstained on Resolution 180 (1963).[111] Moreover, some of the States that voted for

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U.N. Doc. S/PV.1083 & Corr. 1 (Dec. 11, 1963), para. 95 (Brazil expressing support for further discussions, including on the concept of self-determination); *id.*, para. 105 (China: "The heart of the dispute … seems to lie principally in the interpretation and application of the right of self-determination."); *id*., para. 147 (United States expressing hope that, building upon the interpretation of self-determination set forth in Security Council Resolution 183, "we may move forward rapidly to bring about agreement on an early, peaceful, and full exercise of self-determination, with full freedom of choice in the Portuguese territories").

[110] The resolutions on Southern Rhodesia responded to the declaration of independence issued by the European settler minority and its establishment of a government. *See* S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965), para. 1. The resolutions invoked Resolution 1514 in various ways intended to promote an exercise of self-determination that reflected the freely expressed wishes of the entire people of Southern Rhodesia. None of these references suggests that the Security Council intended to invoke a *legal* right of self-determination. *See, e.g.*, *id.*, para. 7 (calling on the United Kingdom "to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future consistent with the *objectives* of General Assembly resolution 1514 (XV)" (emphasis added)); S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966), para. 4 (reaffirming "the inalienable rights of the people of Southern Rhodesia *to freedom and independence* in accordance with … resolution 1514 (XV)" (emphasis added)); S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968), pmblr. para. 8 (recognizing "the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the *objectives* of General Assembly resolution 1514 (XV)" (emphasis added)). Several States also emphasized the importance of participation by the entire people of the territory, not just the European settler minority. *See, e.g.*, U.N. Doc. S/PV.1340 (Dec. 16, 1966), para. 46 (Uruguay: "[T]here can be no democracy in Southern Rhodesia so long as the indigenous people does not exercise its inalienable power of self-determination … ."); *id.*, para. 74 (Argentina supporting measures "to put an end … to the state of rebellion existing in Southern Rhodesia and thus to allow the people of that Territory to exercise their right to self-determination in the immediate future, without racial inequality … ."); U.N. Doc. S/PV.1265 (Nov. 20, 1965), para. 57 (United States expressing its intent to implement relevant Security Council resolutions "to open the way for a process that will permit all of the people of Southern Rhodesia to determine their own future by principles of self-determination accepted by the United Nations").

Resolution 246 addressed the continued activities of the Government of South Africa in the Territory of South West Africa, including the detention and trial of several South West Africans. *See* S.C. Res. 246, U.N. Doc. S/RES/246 (Mar. 14, 1968). It referred to Resolution 1514 in a preambular paragraph with respect to the "right of the people and Territory of South West Africa *to freedom and independence*." *Id.*, pmblr. para. 3 (emphasis added). Several States condemned South Africa's attempts to interfere with political developments in South West Africa aimed at moving towards independence. *See, e.g.*, U.N. Doc. S/PV.1397 (Mar. 14, 1968), para. 9 (United Kingdom noting that its policy was "to enable all the people of South West Africa to proceed to free and full self-determination and independence"); *id.*, para. 28 (Soviet Union explaining that the Security Council debate considered "the fate of the group of South West African patriots fighting to free their home land from colonial and racist oppression, and against whom the Pretoria authorities have taken reprisals"); *id.*, para. 51 (Hungary, criticizing the South African government's activities because "[t]hey constitute a reckless suppression of the fight for national independence").

[111] U.N. Doc. S/PV.1049 (July 31, 1963), para. 17 (France, United Kingdom, and United States abstaining); *id.*, para. 27 (United States expressing support for a peaceful resolution of the situation in the Portuguese territories, but explaining that it "abstained on the resolution primarily because we do not believe that is drafted either in language or in form best calculated to achieve the results which we all seek as quickly and as harmoniously as possible"); *id*., para. 44 (United Kingdom stating that it could not vote for paragraph 1, referencing General Assembly Resolution 1514); *id.*, para. 52 (France, while supportive of the political goals of the resolution, explaining that "this resolution … is worded in such a way that in our opinion it exceeds the authority vested in

Resolution 183 (1963) explained that it reflected political recommendations rather than legal pronouncements.[112]

3.36 Further, several members of the Security Council supported a flexible approach to self-determination, recognizing that the specific procedures for reaching that goal were up to each administering State, and that the people of a territory were free to select any form of political status.[113] Thus, even those States that agreed on a general principle of self-determination did not necessarily agree on specific rules for its application.

3. Grants of independence to numerous territories do not support the existence of a rule of customary international law in the absence of opinio juris.

3.37 Although most of the written statements did not address state practice, a few suggested that the independence of a large number of States in the 1950s and 1960s was in itself evidence of then-existing legal obligations.[114] As the United States explained in its Written Statement, the historical record does not demonstrate extensive and virtually uniform state practice during this period.[115] Moreover, it must be shown that administering States, in granting independence to territories, acted out of a belief that a rule of customary international law required them to do so.

3.38 To be sure, several administering States decided in the late 1950s and early 1960s to make it their national policy to support decolonization.[116] These States frequently referred to

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the Organization by the Charter"). These States also abstained in a vote to add paragraph 4, referencing Resolution 1514, to Security Council Resolution 232. U.N. Doc. S/PV.1340, *supra* note 110, para. 93.

[112] *See* U.N. Doc. S/PV.1080 (Dec. 6, 1963), para. 14 (Madagascar encouraging Portugal to implement the "recommendations" contained in Resolution 180); U.N. Doc. S/PV.1083 & Corr. 1, *supra* note 109, para. 76 (United Kingdom: "We believe also that self-determination partakes in essence of politics, rather tha[n] of obligation in law."); *see also id*., para. 150 (United States explaining that its reservations on Resolution 180 continued to apply, and expressing hope that "Portugal will co-operate with the broad provisions of the resolution, and especially in achieving its main objective: a peaceful solution of the situation in the Portuguese territories, through the application of the principle of self-determination").

[113] *See* U.N. Doc. S/PV.1083 & Corr. 1, *supra* note 109, para. 52 (in the context of Resolution 183, "[t]he Philippine delegation realizes that only Portugal can decide on the procedure and the phasing of bringing about self-determination to its territories"); *id.*, para. 66 (United Kingdom: "[T]he timing and method of implementing self-determination is certainly the responsibility of the administering Power."). *See also* U.N. Doc. S/PV.1080, *supra* note 112, para. 31 (Sierra Leone: "What the African States wish to emphasize and would ask the Security Council in any resolution adopted to state precisely is that in the exercise of self-determination, no choice should be excluded … .").

[114] *See, e.g.*, African Union Written Statement, paras. 96–98; Belize Written Statement, para. 2.13; Brazil Written Statement, para. 18; Netherlands Written Statement, para. 3.7.

[115] United States Written Statement, paras. 4.65–4.72.

[116] *See, e.g.*, John F. Kennedy, President of the United States, Address in New York City Before the General Assembly of the United Nations (Sept. 25, 1961), *available at* http://www.presidency.ucsb.edu/ws/?pid=8352 (expressing U.S. support for the "continuing tide of self-determination" and the United States' intention "to be a participant and not merely an observer, in the peaceful, expeditious movement of nations from the status of colonies to the partnership of equals"); U.N. Doc. A/PV.945 (Dec. 13, 1960), para. 134 (French delegate discussing France's pro-decolonization policy and quoting President Charles de Gaulle's remarks in September 1960: "'Regarding the whole movement of decolonization which is taking place all over the world, … the emancipation of the peoples … is consistent both with the spirit of our country … and with the irresistible movement set in motion by the world war and its aftermath. I … directed French policy along this path—the path of emancipation—and for the past two years I have steered it in the same direction.'"); Harold Macmillan, Prime Minister of the United Kingdom, Address to the South African Parliament (Feb. 3, 1960), *reprinted in*

these policies during discussions surrounding Resolution 1514 and other U.N. resolutions.[117] The historical record suggests, however, that the States that granted independence in these years were motivated by non-legal considerations—such as political, financial, or humanitarian considerations.[118]

3.39 For example, in the early 1960s the Netherlands repeatedly expressed its desire that the people of West Irian, a Dutch non-self-governing territory, be permitted to decide whether they wished to merge with Indonesia or opt for some other status.[119] Yet in 1962, the Netherlands concluded an agreement with Indonesia under which the territory passed to Indonesia after less than a year of U.N. administration, without a prior determination of the West Irianese people's wishes.[120] Speaking before the General Assembly, the Netherlands explained that it had "resign[ed] itself to transfer of the territory to Indonesia without a previous expression of the will of the population" because "[w]ar would have meant exposing the Papuans and their country to death and destruction … ."[121]

HAROLD MACMILLAN, POINTING THE WAY 473, 475 (1972) ("The wind of change is blowing through this continent … . We must accept it as a fact, and our national policies must take account of it.").

[117] *See e.g.*, U.N. Doc. A/PV.1065 (Nov. 27, 1961), para. 203 (with respect to Ruanda-Urundi, Belgium declaring that "the final goal was the realization of the freely expressed wishes of the peoples concerned" and expressing its desire that the territory become independent in 1962); *id.*, para. 29 (France: "We did not wait for [Resolution 1514] to find out where we wanted to go and what we wanted to do, and to do it. In the case of both Trust and Non-Self-Governing Territories, we prepared for self-determination by granting self-government … ."); U.N. Doc. A/PV.937 (Dec. 6, 1960), para. 10 (United States: "No people supports the idea of freedom and national independence more eagerly or more proudly than the people of the United States."); U.N. Doc. A/PV.933 (Dec. 2, 1960), para. 66 (Australia discussing its "common policies" with respect to two territories administered by it, along with its "common aspiration of giving self-determination to the people in both territories"); U.N. Doc. A/PV.925 (Nov. 28, 1960), para. 47 (United Kingdom: "Every action of the United Kingdom in regard to these territories [under U.K. administration] is directed towards the building of new nations, nations which will be united and free, and through which the people can realize their aspirations for peace, independence, prosperity and individual freedom.").

[118] *See, e.g.*, Anthony Low, *The End of the British Empire in Africa*, *in* DECOLONIZATION AND AFRICAN INDEPENDENCE: THE TRANSFERS OF POWER, 1960–1980 33, 43–51, 70–72 (Prosser Gifford & Wm. Roger Louis eds., 1988) [hereinafter Gifford & Louis] (describing British motivations to grant independence to African colonies as stemming from numerous factors, including domestic political pressure, protests in the colonies, a desire to avoid another crisis like that in Suez in 1956 and, above all, pressure from African nationalist movements propelled by a "domino effect" of other States gaining independence); *id.*, p. 42 (discussing Belgium's motivations for acceding to Congolese independence, including a desire to avoid the "appalling cost" of suppressing the independence movement by force and domestic political pressure not to dispatch Belgian troops); Keith Panter-Brick, *Independence, French Style*, *in* Gifford & Louis, *supra*, p. 73, 101 (describing the decolonization of French Africa as "the combined handiwork of political forces within France and overseas").

[119] *See, e.g.*, Letter Dated 7 October 1961 from the Permanent Representative of the Netherlands Addressed to the President of the General Assembly: Memorandum on the Future and the Development of Netherlands New Guinea, U.N. Doc. A/4915 (Oct. 9, 1961), para. IV (explaining the Netherlands' policy as "aimed at the speediest possible attainment of self-determination by the Papuan people"); *The Question of West Irian (West New Guinea*), 1957 U.N.Y.B. 76, 78 (1958) (similar).

[120] Agreement (with Annex) Concerning West New Guinea (West Irian), Aug. 15, 1962, 437 U.N.T.S. 292. The General Assembly acknowledged the resolution of the Dutch–Indonesian dispute in G.A. Res. 1752 (XVII), Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), U.N. Doc. A/RES/1752(XVII) (Sept. 21, 1962).

[121] U.N. Doc. A/PV.1127 (Sept. 21, 1962), para. 188. As explained in United States Written Statement, para. 4.71 n. 180, West Irianese wishes would only be ascertained years later through a process criticized for its undemocratic elements.

3.40 Such non-legal motivations do not constitute *opinio juris*, a belief by "[t]he States concerned" that they were "conforming to what amount[ed] to a legal obligation."[122] Those States that claimed that the independence of many States was itself evidence of then-existing legal obligations have not provided the evidence needed to establish that administering States granted independence to non-self-governing territories generally, or to specific territories, based on a belief that international law required them to do so.[123]

4. The writings of publicists, particularly at the time, do not demonstrate the emergence of a relevant rule of customary international law.

3.41 Some written statements referred to the work of certain authors in support of arguments that the right of self-determination had become customary international law during the relevant period.[124] Their reliance on such sources is unavailing for at least two reasons.

3.42 First, views of publicists cannot serve as a substitute for the need to find support in the relevant direct sources of law under the Court's Statute—treaties and customary international law.[125] Under the Court's Statute, the teachings of the most highly qualified publicists are "a *subsidiary* means for the determination of rules of law."[126] The proponents of the emergence of a new rule of customary international law would need to identify adequate direct evidence of state practice, and of States' beliefs about what international law required at the time, and the citation of various publicists does not advance that purpose unless they provide such direct evidence.

3.43 Second, academic views about a right of self-determination in the 1960s were much more varied than some of the written statements have suggested. During the relevant period many publicists argued that the required elements for the creation of customary international law had not yet come into existence though the 1960s and even into the 1970s.[127] This

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[122] *North Sea Continental Shelf, supra* note 66, para. 77. As the Court warned, "[t]he frequency, or even habitual character[,] of the acts is not in itself enough." *Id*.

[123] *Cf., e.g., Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950*, p. 266, 277 (finding no customary rule on diplomatic asylum where, *inter alia*, state practice had been "so much influenced by considerations of political expediency … that it is not possible to discern in all this any constant and uniform usage, accepted as law").

[124] *See, e.g.*, African Union Written Statement, paras. 117–127; Belize Written Statement, para. 2.15; Djibouti Written Statement, para. 32; Mauritius Written Statement, para. 6.29.

[125] *See* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 854 (Andreas Zimmerman et al. eds., 2d ed. 2012) ("[I]n marked contrast to the sources listed in the previous sub-paragraphs, jurisprudence and doctrine are not sources *of law*—or, for that matter, of rights and obligations for the contesting States; they are *documentary* 'sources' indicated where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs."); OPPENHEIM'S INTERNATIONAL LAW 42-43 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (noting that reliance on the authority of writers as evidence of international law has diminished in part due to "the practice of states evidenced by widely accessible records and reports").

[126] Statute of the International Court of Justice, art. 38(1)(d) (emphasis added).

[127] *See, e.g.,* GEORG SCHWARZENBERGER, 1 A MANUAL OF INTERNATIONAL LAW 74 (5th ed. 1967) (indicating that self-determination is "a formative principle of great potency, but not part and parcel of international customary law"); GERALD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 485 (1st ed. 1965) (indicating that "[n]o decisive ruling appears to have been delivered" on self-determination); J.H.W. VERZIJL, 1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 323 (1968) (observing that "[n]ot only does the asserted right [of self-determination] lack a specified and even specifiable holder, but its substantive contents and the extent of its possible operation are also floating in the air").

disagreement among publicists paralleled that which was occurring among States during Friendly Relations Declaration negotiations and elsewhere.[128]

3.44 Many scholars, much closer to the events of the day than we are a half-century later, unequivocally disputed the establishment of a new principle of customary international law. For example, Sir Robert Jennings wrote in 1963 that although self-determination

> has legal overtones, it is essentially a political principle which may be a useful guide in the making of political decisions. It is not capable of sufficiently exact definition in relation to particular situations to amount to a legal doctrine; and it is therefore inexact to speak of a "right" to self-determination if by that is meant a legal right.[129]

3.45 Surya Prakash Sinha concluded in 1968 that "it is not possible to claim that a practice of states providing self-determination has been generally recognized by states as obligatory under international law."[130] Similarly, Sir James Fawcett acknowledged in 1968 the significant ongoing debate in the United Nations about whether self-determination was a political principle or a legal right.[131]

3.46 It is true, as certain written statements pointed out,[132] that Dame Rosalyn Higgins characterized self-determination as an "international legal right" in 1963.[133] But this

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[128] *See, e.g., supra* Section III.B.1.

[129] R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 78 (1963); *see also id.*, p. 83 ("Resolution 1514 is essentially a political document … [n]or are the 'rights' of which it speaks legal rights of the kind that could be vindicated before a court."); J.A. de Yturriaga, *Non-Self-Governing Territories: The Law and Practice of the United Nations*, 18 Y.B. OF WORLD AFFAIRS 178, 209–10 (1964) (emphasizing that most scholars have reached the conclusion that General Assembly resolutions such as Resolution 1514 "are not legally binding, but have a mere moral or political value" (quotation at p. 210)); Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, *in* INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873–1973: EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL 232–35 (1973) (acknowledging self-determination as a political principle but rejecting its existence as a legal right); Hollis W. Barber, *Decolonization: The Committee of Twenty-Four*, 138 WORLD AFFAIRS 128, 129 (1975) (observing that "[t]he term 'self-determination' has been on many a lip for many a year, but precise definition still eludes us").

[130] Sinha, *supra* note 70, p. 267; *see also* S. Prakash Sinha, *Has Self-Determination Become a Principle of International Law Today?*, 14 INDIAN J. INT'L L. 332, 361 (1974) (concluding that "it cannot be said that the principle of self-determination has acquired a general recognition by States as being obligatory"); L.C. Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. SOC'Y INT'L L. PROC. 40, 46 (1971) (noting that "there is still no right of self-determination in positive international law" and that "[i]t is insufficient for a non-binding document to declare that the right is inherent when practice shows that has never been regarded as the case"); M.C. Bassiouni, *"Self-Determination" and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31, 32–33 (1971) ("The actual practice of states, particularly colonial and neo-colonial states, does not demonstrate that the right [of self-determination], though recognized in principle, has been applied voluntarily or consistently. It is certainly conceded that 'self-determination' is not part of customary international law, since the custom and usage of member states of the world community do not evidence it by their practice.").

[131] J.E.S. Fawcett, *The Protection of Human Rights on a Universal Basis: Recent Experience and Proposals*, *in* HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 289, 291 (A. H. Robertson ed., 1968) (examining the experience of the Special Committee on Decolonization and noting that "even [self-determination's] political implementation is not untroubled"); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 484 (1966) ("[A] number of governments continue to deny that [the principle of self-determination] exists as a legal principle.").

[132] *See* African Union Written Statement, para. 117; Belize Written Statement, para. 2.15; Djibouti Written Statement, para. 32; Mauritius Written Statement, para. 6.29.

characterization must be viewed in context; notably, Dame Higgins accompanied that statement with a contemporaneous recognition that "the extent and scope of the right [was] still open to some debate."[134] As Professor D.J. Devine noted with respect to Dame Higgins's observation, "[s]elf-determination may certainly be a matter of international concern in that the United Nations and its organs may urge the observance of the principle of self-determination. But this is a very different thing from asserting that there is a *duty* to grant self-determination and a correlative *right* in certain popular entities to self-determination."[135]

3.47 Moreover, some four decades after her first observation, Dame Higgins herself acknowledged that "[w]hen the Court addressed this concept in the *South West Africa*, *Namibia* and *Western Sahara* cases, there were still many within the UN who insisted that self-determination was nothing more than a political aspiration."[136]

3.48 In sum, academic views about a right of self-determination in the 1960s cannot substitute for the kind of evidence necessary to establish a new rule of customary international law. In any event, many distinguished publicists concluded after reviewing the available evidence that no such rule had emerged. Against this backdrop, this subsidiary source cannot serve as a basis to conclude that a settled practice accompanied by *opinio juris* existed.

C. There was no rule of customary international law that would have required the United Kingdom to hold a plebiscite prior to Mauritius's independence.

3.49 Of the States to address the issue in their written statements, all agreed that the boundaries of a territory could be changed prior to independence with the consent of the people. In other words, in exercising self-determination, a people could freely choose a status that involved a change to the prior territorial boundaries.[137]

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[133] ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 103 (1963).

[134] *Id. Cf.* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 79 (Robert W. Tucker ed., 2d ed., 1967) ("That a right … has been transformed from a principle of political morality into a principle of law is not very significant if the ambiguities that marked the former principle continue to mark the latter principle as well.").

[135] D.J. Devine, *The Status of Rhodesia in International Law*, 1974 ACTA JURIDICA 109, 194 n. 88 (1974); *see also id.*, 195–96 (reviewing the work of numerous publicists and concluding that the balance of juristic opinion was against the existence of a right of self-determination); *id.*, 187 (in addressing Common Article 1 of the Human Rights Covenants, stating "[t]he fact that it was necessary to conclude a convention to provide for the existence of the right [to self-determination], that the convention in question is subject to ratification and that the number of States which have so far ratified it is minimal, all seem to eliminate any value which the Covenants might have as declaratory evidence of the existence of such a right and to suggest that such a right does not exist in customary law"); Robert A. Friedlander, *Self-Determination: A Legal-Political Enquiry*, DETROIT COLLEGE OF LAW REV. 71, 81 (1975) ("Whether or not self-determination has evolved by way of United Nations 'law' into an international legal right is still a matter of considerable debate.").

[136] Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 LEIDEN J. INT'L L.745, 747 (2007).

[137] *See, e.g.*, United Kingdom Written Statement, para. 8.22; Mauritius Written Statement, para. 6.58; Belize Written Statement, para. 3.9; Netherlands Written Statement, para. 3.18; *cf.* South Africa Written Statement, para. 76 (arguing that *uti possidetis* applies *before* independence to fix a territories boundaries, but acknowledging an exception where the parties agree otherwise).

3.50 A few states asserted that the consent of the people of a non-self-governing territory to changes to territorial boundaries could only be determined through a plebiscite.[138] Even assuming a requirement existed under customary international law in the mid-1960s to ascertain the wishes of the people to boundary changes, there was no requirement for this to be accomplished through a plebiscite.

3.51 As the Court has previously advised, an essential feature of self-determination decisions is that they take into account the freely expressed wishes of the peoples concerned.[139] U.N. pronouncements on the subject, as well as practice, demonstrate a variety of acceptable methods for determining the freely expressed wishes of the people.[140] Plebiscites and referenda are common mechanisms for determining the freely expressed wishes of the people, but not the only acceptable mechanisms. The General Assembly has itself taken the position that "referendums, free and fair elections and other forms of popular consultation play an important role in ascertaining the wishes and aspirations of the people."[141]

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[138] *See, e.g.*, Mauritius Written Statement, para. 6.58 (noting that the only circumstances in which a newly independent State was not formed from the totality of its prior territorial boundaries involved "an expression of free consent on the part of the people through the medium of a plebiscite" or where "[maintaining the same boundaries] proved impossible as a consequence of internal disturbances"); Djibouti Written Statement, para. 35 (arguing that consent to the establishment of the BIOT as a separate territory required a U.N.-supervised plebiscite).

[139] *Western Sahara*, *supra* note 14, paras. 55–59.

[140] U.N. General Assembly articulations of self-determination repeatedly emphasize that it be exercised "freely" and through "informed and democratic processes" without dictating a specific process for exercising self-determination. *See* G.A. Res. 637 (VII), The Right of Peoples and Nations to Self-Determination, U.N. Doc. A/RES/637(VII) (Dec. 16, 1952), para. 2; G.A. Res. 742 (VIII), Factors Which Should Be Taken into Account in Deciding Whether a Territory Is or Is Not a Territory Whose People Have Not Yet Attained a Full Measure of Self-Government, U.N. Doc. A/RES/742 (VIII) (Nov. 27, 1953), paras. 5–6; G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960), para. 2; G.A. Res. 1541 (XV), Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73 e of the Charter, U.N. Doc. A/RES/1541(XV) (Dec. 15, 1960), principles VII–IX; G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970), Annex, "The Principle of Equal Rights and Self-Determination of Peoples," para. 4. Furthermore, as the U.N. Office of Legal Affairs has explained, the history of U.N. practice "reveals that the General Assembly has acted on a case-by-case basis in determining whether the modalities for the attainment of self-government by the peoples concerned satisfied the requirements of the Charter and of the relevant Assembly resolutions." Letter to the Chairman of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Feb. 11, 1997), *in* 1997 U.N. Jurid. Y.B. 448, 450, U.N. Doc. ST/LEG/SER.C/41 [hereinafter Resolution 1514 Implementation Letter]. *See also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 73–74 (1995) ("[I]t was taken for granted that whenever it appeared that the people of a colonial territory wished to opt for independence, it was not necessary to establish this wish by means of a plebiscite or a referendum."); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 32 (1982) (noting that in U.N. practice, "independence, by whatever method arrived at, is generally not open to suspicion").

[141] G.A. Res. 54/90, Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, St. Helena, the Turks and Caicos Islands and the United States Virgin Islands, U.N. Doc. A/RES/54/90 (Feb. 4, 2000), pmblr. para. 15.

3.52 As a matter of state practice, general elections and other forms of "negotiations or agreements between the representative bodies of the peoples"[142] were used to exercise self-determination throughout the postwar wave of decolonization.[143] U.N. Member States did not appear to complain that these means of ascertaining the people's wishes were contrary to international law.

3.53 For example, throughout this period the "consistent practice" of the United Kingdom "was to ensure that independence had the support of the people of a territory either by referendum or by means of a general election at which independence formed part of the winning party's mandate. In this way the principle of self-determination was regarded as satisfied."[144] Notably, the States on the Special Committee on Decolonization, as well as the Special Committee itself, were supportive of the use of elections and constitutional conferences to transition British colonies to independence.[145]

3.54 The written statements of Mauritius and the United Kingdom described in detail the process that led to Mauritius's independence.[146] Independence was achieved not through a

[142] Resolution 1514 Implementation Letter, *supra* note 140, p. 449.

[143] For example, in The Gambia, Kenya, Zambia, and Zanzibar, self-determination was exercised through a combination of general elections (without U.N. participation) and negotiations and agreements between elected officials and the administering State. *See* Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5238 (1962), pp. 164, 167–68 (discussing the progress of constitutional conferences in Kenya); Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5446/Rev.1 (1963) [hereinafter 1963 Decolonization Committee Report], pp. 206–08 (discussing general elections in Kenya as well as a constitutional conference and general election in Zanzibar); Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/5800/Rev.1 (1965) [hereinafter 1964–65 Decolonization Committee Report], p. 10 (noting that Kenya and Zanzibar achieved independence); *id.*, pp. 320, 323 (discussing the process towards independence, including general elections and independence conferences, in The Gambia and Northern Rhodesia (Zambia)). With respect to French Africa, although Guinea achieved independence through a referendum, other French territories became independent following general elections, declarations of independence, and negotiations between elected officials and the French government. *See, e.g.*, RUPERT EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES 74–76 (1960); Yves Person, *French West Africa and Decolonization*, *in* THE TRANSFER OF POWER IN AFRICA: DECOLONIZATION 1940–1960 141, 168–70 (Prosser Gifford & Wm. Roger Louis eds., 1982).

[144] IAN HENDRY & SUSAN DICKSON, BRITISH OVERSEAS TERRITORIES LAW 280 (2011).

[145] *See e.g.*, 1964–65 Decolonization Committee Report, *supra* note 143, p. 324, para. 67 (Mali, speaking on behalf of a number of members of the Special Committee, "congratulated the United Kingdom Government for having taken the measures which were to culminate in the granting of independence to Zambia and soon to Gambia"); *id.*, p. 324, para. 72 (Cambodia: "The path [towards independence] followed by Northern Rhodesia, which was to become Zambia, had been in conformity with the recommendations of the Special Committee and the General Assembly. … A tribute should also be paid to the United Kingdom Government, and it was to be hoped that the example of Zambia would be followed by other Territories still under United Kingdom administration."); *id.*, p. 325, para. 77 (Ethiopia: Its representative "welcomed the forthcoming attainment of independence by Gambia; in his view, its political progress reflected the wishes of the Gambian people."); 1963 Decolonization Committee Report, *supra* note 143, p. 214, para. 154 (India stating that the United Kingdom "had displayed great wisdom" and hoped it "would use Kenya as a model in tackling similar problems in other colonial territories"); *id.*, p. 214, para. 161 (Iraq "was heartened by the fact that elections resulting in the formation of a truly representative Government had at last been held in Kenya and that Kenya was to attain independence"); *id.*, p. 215, para. 163 (Iraq "was glad that elections had been held in Zanzibar" and adding that "Zanzibar's example could be usefully followed by other colonial territories").

[146] *See* Mauritius Written Statement, ch. 3; United Kingdom Written Statement, ch. III.

popular plebiscite, but through decisions by the elected representatives of Mauritius following a general election in which the parties favoring independence achieved a clear majority.[147] After independence, Mauritius was admitted to the United Nations as a Member State without dissent.[148] No State at the time contended that Mauritius's independence was somehow incomplete or that its decision to become independent did not reflect the wishes of its people. It would therefore be highly unusual for the Court to advise now, fifty years later, that a different process should have been used. Such a conclusion would have no basis in law.

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3.55 Without question, the process of decolonization proceeded rapidly and successfully during the 1950s and 1960s and enriched the international community immeasurably. But to conclude that customary international law relevant to this case had crystallized by that time, sufficient evidence of state practice accompanied by *opinio juris* would have to be convincingly demonstrated.

3.56 Resolution 1514, and the other General Assembly resolutions cited by those who argue in favor of a rule of customary international law, did not establish new law. They do not reflect the actual settled practice of States or *opinio juris* about what the law required, and references by the Security Council to these resolutions similarly do not reflect *opinio juris*.

3.57 Moreover, the fact that many States gained independence during this period is not dispositive, but requires evidence—which is lacking—that administering States believed that customary international law required them to grant independence to non-self-governing territories that desired it. Publicists' writings from the relevant time do not support the conclusion that a specific rule of customary international law then existed that would have prohibited the establishment of the BIOT. Finally, the historical record does not support the assertion that a plebiscite was required before granting independence when other procedures were commonly used to ascertain the wishes of the population.

3.58 Having considered the views of other States in their written statements, the United States thus continues to believe that there was no international legal obligation based in treaty or customary international law that would have prohibited the establishment of the BIOT. As such, should the Court decide to address the questions in the General Assembly's referral, its answer to Question (a) should be that the process of decolonization of Mauritius was lawfully completed. This result, in turn, would obviate the need to answer Question (b).

[147] *See* Mauritius Written Statement, para. 4.2; United Kingdom Written Statement, para. 3.8(f).

[148] *See* U.N. Doc. S/PV.1414 (Apr. 18, 1968); U.N. Doc. A/PV.1643 (Apr. 24, 1968).

CHAPTER IV
FURTHER OBSERVATIONS

4.1 For the reasons described in these Written Comments and in its Written Statement, the United States does not deem it necessary to address Question (b) in any detail.[149] Instead, in this Chapter, the United States offers several observations on certain of the written statements that do address this question.

4.2 Of particular note, Mauritius has asked the Court to opine on the relief to which it should be entitled in the event its claim were upheld.[150] This provides further evidence that Mauritius pursued the referral as a means to adjudicate its sovereignty claim to the Chagos Archipelago against the United Kingdom.

4.3 Because the specific assertions that Mauritius has made regarding its requested relief rest on doubtful or erroneous assumptions, the United States wishes to bring to the Court's attention several points. Specifically, this chapter addresses three claims made by Mauritius and others: (1) that it is the present-day people of Mauritius who hold any unexercised right of self-determination; (2) that the transfer of the Chagos Archipelago to Mauritius must take place immediately; and (3) that the current arrangements for the military facility on Diego Garcia could readily continue under Mauritian sovereignty.

4.4 First, several statements assumed that any unexercised right of self-determination with respect to the Chagos Archipelago would belong to the present-day people of Mauritius.[151] If, however, the Court were to determine that any right of self-determination exists in these circumstances and remains to be exercised, the holder of that right may not be the modern people of Mauritius.[152] As the Republic of Seychelles highlighted in its submission, a significant Chagossian population is present in the Seychelles.[153] Chagossians are also living in the United Kingdom.[154] As such, determining who may hold the right of self-determination with respect to the Chagos Archipelago today would be an exceedingly complicated undertaking.

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[149] *See supra* para. 1.13; United States Written Statement, paras. 4.17, 4.75. Many other States did not address Question (b) in their written statements, including those that believed that it would be inappropriate for the Court to exercise its discretion to issue an advisory opinion, or urged the Court to exercise caution if it were to do so. *See, e.g.*, Australia Written Statement; Chile Written Statement; China Written Statement; France Written Statement; Germany Written Statement; Israel Written Statement; Republic of Korea Written Statement; Russian Federation Written Statement.

[150] *See, e.g.*, Mauritius Written Statement, paras. 7.42–7.61.

[151] *See, e.g.*, African Union Written Statement, paras. 66, 224; Argentina Written Statement, para. 51; Belize Written Statement, para. 4.2; Djibouti Written Statement, para. 42; Mauritius Written Statement, para. 6.3(5); Namibia Written Statement, pp. 3–4; Serbia Written Statement, para. 50; South Africa Written Statement, para. 85.

[152] *See, e.g.*, STEPHEN ALLEN, THE CHAGOS ISLANDERS AND INTERNATIONAL LAW 286 (2004) ("The Chagos Islanders … qualify as the beneficiaries of the entitlement to self-determination in relation to the BIOT.").

[153] Seychelles Written Statement, paras. 4, 6 (noting that "a significant number of the Chagossians were brought to the Seychelles" and requesting "that the unique perspectives and legitimate concerns of the Seychellois Chagossian community be taken into due consideration").

[154] United Kingdom Written Statement, para. 1.5 n. 7; *id.*, para. 4.38.

4.5 Second, Mauritius argues that, if decolonization was not lawfully completed, it should occur now through the immediate transfer of sovereignty over the Chagos Archipelago to Mauritius.[155] This argument presumes, incorrectly, not only that the decolonization of Mauritius was not completed in 1968, but also that international law sets forth legal standards for the timing of the decolonization process.[156] This proposition is doubtful in light of actual state practice. Rather, it is an issue that would be for Mauritius and the United Kingdom to address bilaterally. It is not a suitable subject for the Court in the present proceedings.

4.6 Third, Mauritius devotes several pages to documenting its assurances that it recognizes the existence of the military facility on Diego Garcia and is prepared to accept its continued operation.[157] Mauritius neglects, however, to mention how the United States has responded to such assurances. In the lead-up to the General Assembly debate regarding the referral resolution, for example, the U.S. Permanent Representative to the United Nations sent a letter to the Permanent Representatives of all of the other U.N. Member States informing them that the United States has no interest in entering into an arrangement with Mauritius for this purpose.[158] In the event it may be of interest to the Court, the United States offers some context for this position.

4.7 The specific arrangement involving the facilities on Diego Garcia functions as a partnership between the United Kingdom and the United States, two close and longstanding allies. This is evinced by the absence of any "lease" or payment by the United States to the United Kingdom,[159] by the fact that both countries contribute to the management of the joint facility, and by the fact that the United States and the United Kingdom consult on an annual basis on all matters related to the facility, including on joint objectives and policies in the region.[160]

4.8 While the relationship between the United States and Mauritius is cordial, it cannot replicate the special relationship between the United States and United Kingdom. The United States and United Kingdom are friends and allies with a particularly deep and strong bond, grounded in a long history of cooperation, and cemented by shared goals and values. The militaries of the two countries, and in particular their navies, work closely together. As U.S.

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[155] Mauritius Written Statement, paras. 7.10–7.41.

[156] *See, e.g.*, 1970 FRD Report, *supra* note 93, para. 266 (United States, commenting on the Friendly Relations Declaration's call for a "speedy" end to colonialism: "[R]easonable men might differ as to the pace of development and how fast was 'speedy.'"); *see also supra* note 79 and sources cited therein.

[157] Mauritius Written Statement, para. 7.22.

[158] Letter from Amb. Nikki Haley, U.S. Permanent Representative to the United Nations, to All Permanent Representatives of the United Nations (June 16, 2017), *available at* https://usun.state.gov/sites/default/files/organization_pdf/letter_to_prs_.pdf.

[159] Agreement Concerning the Availability of Certain Indian Ocean Islands for the Defense Purposes of Both Governments [hereinafter 1966 Agreement], United States–United Kingdom, Dec. 30, 1966, 18 U.S.T. 28, T.I.A.S. 6196, 603 U.N.T.S. 273, para. 4.

[160] *See, e.g.*, U.S. Department of State, Military Exercises and Operational Coordination, *at* https://www.state.gov/t/pm/iso/c21539.htm. *See also* Agreement Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory, Feb. 25, 1976 , 27 U.S.T. 315, T.I.A.S. 8230, 1018 U.N.T.S. 372 (superseding 1966 Agreement, *supra* note 159, and containing a regular consultation requirement at para. 3).

Secretary of Defense James Mattis said recently:

> [T]he U.K. and U.S. maintain an unmatched, enduring special relationship that is not an artificial or historical artifact. In fact, it's a pathway for our future … . Our countries have more than 200 years of shared history, over a century of shared battlefield experiences, and a robust record of diplomatic cooperation in support of our security interests.[161]

4.9 BIOT's status as a U.K. territory is therefore central to the value of the joint facility for the United States. The United Kingdom and the United States have jointly operated this facility for decades.[162] It plays a critical role in the maintenance of peace and security, both in the Indian Ocean littoral region and beyond, and is a cornerstone of the close U.S.–U.K. defense cooperation. During the June 2017 General Assembly debate on the advisory opinion referral resolution, a number of States highlighted security issues, and explicitly referred to the role of the facility in the region. These included not only the United States and United Kingdom, but also the Indian Ocean littoral states of Australia, India, and Mauritius.[163]

4.10 The joint facility enables the United States and the United Kingdom to address a variety of security challenges in the Indian Ocean together. Security concerns in the region include not only the traditional threats of regional conflict, but other threats such as terrorism and piracy, natural disasters, and various types of maritime crime, including trafficking in persons and illicit drugs, as well as illegal, unreported, and unregulated fishing.[164] The joint base is well positioned to support efforts to address such threats. Prepositioned aircraft and ships enable a rapid and flexible response to regional crises and conflicts. The base provides

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[161] James Mattis, U.S. Secretary of Defense, and Gavin Williamson, U.K. Secretary of State for Defense, Remarks in London (Nov. 10, 2017), *available at* https://www.defense.gov/News/Transcripts/Transcript-View/Article/1369834/remarks-by-secretary-mattis-and-secretary-williamson-in-london-uk/. In a subsequent meeting between the two Secretaries in February 2018, Secretary Mattis again emphasized the value of the special U.S.–U.K. relationship and reaffirmed the importance of credible defense capabilities. Dana W. White, Chief Spokesperson, U.S. Department of Defense, Readout from Secretary James Mattis' Bilateral Meeting with U.K. Secretary of State for Defense Gavin Williamson (Feb. 1, 2018), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/1430290/readout-from-secretary-james-mattis-bilateral-meeting-with-uk-secretary-of-stat/.

[162] *See* United States Written Statement, para. 2.7 (noting that the joint facility is operated pursuant to a series of international agreements that have been registered with the United Nations Treaty Office).

[163] *See, e.g.*, U.N. Doc. A/71/PV.88 (June 6, 2017), p. 12 (United Kingdom: "[The facilities] make an essential contribution to regional and global security and stability. Moreover, they contribute to guaranteeing the security of the Indian Ocean itself, from which all neighboring states benefit, including Mauritius. The facilities play a critical role in combating some of the most difficult and urgent problems of the twenty-first century, such as terrorism, international criminality, piracy and instability in its many forms."); *id.*, p. 13 (United States: The base contributes "considerably to regional and international security."); *id.*, p. 18 (Australia: "[T]he Diego Garcia military base plays a pivotal role in the global fight against terrorism. We consider that it is in the interest of all members of the General Assembly to ensure that there is no uncertainty about the status of that base that could jeopardize its contribution to international peace and security."); *id.*, p. 14 (India: "India shares the international community's concerns about security in the Indian Ocean."); *id.*, p. 8 (Mauritius: "Mauritius is also very much concerned about security in the world. That is why we have repeatedly said that we do not have any problem with the military base … . Mauritius is committed to the continued operation of the base in Diego Garcia under a long-term framework … .").

[164] *See, e.g.*, Alice G. Wells, Acting Assistant Secretary of State for South and Central Asian Affairs and Acting Special Representative for Afghanistan and Pakistan, Address at Indian Ocean Conference, Colombo, Sri Lanka (Sept. 1, 2017), *available at* https://www.state.gov/p/sca/rls/rmks/2017/273825.htm.

logistical support for the U.K. and U.S. navies, and for U.S. and Allied missions in the Indian Ocean and North Arabian Sea and beyond. In short, the arrangement involving the facilities on Diego Garcia is grounded in the uniquely close and active defense and security partnership between the United States and the United Kingdom.

CHAPTER V
CONCLUSION

5.1 For the reasons set forth in its Written Statement and herein, the United States remains firmly of the view that the Court should exercise its discretion to decline to issue an opinion in this case.

5.2 The Court has been presented with divergent views as to how it should respond to the request before it. There is, however, clear convergence both on the fact that the Court has discretion to decline a request and on the criteria for when it would be appropriate for the Court to do so. Further, there is broad recognition that it would not be appropriate to provide an advisory opinion that would have the effect of circumventing the fundamental principle of consent to judicial settlement.

5.3 In its Written Statement, the United States submitted that the very circumstances the Court has previously indicated may be compelling enough to withhold an advisory opinion are manifestly present in this case. None of the statements submitted to the Court by other States or organizations call into question the presence of these circumstances. In fact, the vast majority affirm that the legal questions really in issue are directly related to the main point of an ongoing bilateral dispute concerning sovereignty over territory. Indeed, that is the fundamental reason for the referral.

5.4 As the Court has recognized, its discretion to decline to respond to a request for an advisory opinion "exists so as to protect the integrity of the Court's judicial function."[165] The request presently before the Court illustrates precisely why the Court was granted such discretion.

[165] *Kosovo*, *supra* note 61, para. 29.