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Public sitting

held on Tuesday 4 September 2018, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***on the* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le mardi 4 septembre 2018, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***sur les* Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian
Salam
Iwasawa, juges

M. Couvreur, greffier

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Ms T. Steenkamp, State Law Adviser (International Law), Department of International Relations and Co-operation,

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M. Bill Campbell, Q.C., conseil,

Mme Alicia Lewis, juriste hors classe par intérim, services de l'*Attorney-General*,

Mme Christina Hey-Nguyen, conseillère juridique, ambassade d'Australie au Royaume des Pays-Bas,

Mme Annika Wilson, stagiaire (politiques et recherche), ambassade d'Australie au Royaume des Pays-Bas,

M. Lewis Casey, chargé des politiques et de la recherche à l'ambassade d'Australie au Royaume des Pays-Bas.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this morning to hear South Africa, Germany, Argentina and Australia on the questions submitted to it by the United Nations General Assembly. Each of the delegations, as I said yesterday, has 40 minutes for its presentation. I hope that that time will not be exceeded by any of the delegations. I would like to make two procedural points.

First, in the interest of conducting these proceedings in an efficient and expeditious manner, I shall introduce only the first speaker of each delegation. Some delegations have more than one speaker; I will leave it to the first speaker to invite the other speaker to the podium, so that each delegation can make its presentation without my intervention.

The second point is that we will have a short coffee break of 15 minutes after the first two participating delegations have spoken and then we will proceed to the next two delegations. With that, I shall now give the floor to the first speaker and I understand the only speaker from the delegation of South Africa, Ms de Wet. You have the floor, Madam.

Ms de WET:

I. Introduction

1. Mr. President, Madam Vice-President, distinguished Members of the Court, it is an honour to appear before this honourable Court this morning, to present the oral submission of the Republic of South Africa. South Africa is here today due to the importance of this advisory opinion to the issue of decolonization. The issue has been on the agenda of the United Nations and the African Union for decades. It is, therefore, appropriate for this Court to hear what the General Assembly asked it to do. The General Assembly of the United Nations agreed to request its principal judicial organ***, of*** this Court, in its resolution 71/292 of 22 June 2017, for an advisory opinion in respect of the decolonization process of Mauritius. This Court, as the principal judicial organ of the United Nations needs to look at that.

2. The issue of decolonization is not limited to Mauritius and to the Chagos Archipelago. Decolonization has affected, and continues to affect, many Member States of the United Nations in profound ways, even in 2018. This was confirmed by the United Nations Secretary-General, Mr. António Guterres, as recently as 10 May 2018 in his message to the Pacific Regional Seminar

on decolonization that took place in Saint George's, Grenada, where he acknowledged that decolonization is still incomplete[1].

3. South Africa, itself a former colony, knows first-hand that the effects of colonization continue long after a State has obtained its independence. South Africa has suffered under ~~*the*~~ subsequent waves of colonization and apartheid, as a form thereof. Forced removals of civilian populations caused terrible human and economic harm, the effects of which are still being felt today. Indigenous communities were subjugated by military force with devastating effects on their social and economic structures. Thousands of forcibly displaced people died in concentration camps in South Africa as a result of the scorched-earth policy employed as a military strategy by the United Kingdom during the South African War. Subsequent apartheid policies resulted in the forced removal of entire communities from their places of residence solely on the basis of their race.

4. In addition, South Africa was also a beneficiary of the Court's landmark decision in the *South West Africa* case, which paved the way for Namibian independence and the closure of another chapter in the colonial history of Africa. Therefore, by our participation today, South Africa hopes to contribute towards the further elimination of colonialism in all its forms and the right*s* of all people*s* to the realization of their right to self-determination.

5. Despite the shared history between South Africa and other former colonized peoples, the case of Mauritius and the Chagos Archipelago differs from South Africa's experience in one key aspect, which is also why South Africa is duty-bound to participate in this hearing today. The decolonization of Mauritius was never completed. The United Nations and the African Union continue to be seised with this matter after more than 50 years. In the words of the former South African President, Nelson Mandela, whose centenary South Africa celebrates this year: "there is no such thing as part freedom"[2].

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[1] "Secretary-General, in Message to Pacific Regional Seminar, Stresses Need for Political Will in Completing Decolonization Agenda", UN doc SG/SM/19045-GA/COL/3322, 21 May 2018, available at https://www.un.org/press/en/2018/sgsm19045.doc.htm.

[2] "In the words of Nelson Mandela — a Little Pocketbook" Jennifer Crwys-Williams (ed.) (Penguin Books, 1997), p. 26.

6. In its written submission, South Africa responded to the two questions before the Court. South Africa indicated its views on jurisdiction and on the substantive legal standards that are applicable in this matter. South Africa supports those States that argue that the Court may indeed exercise jurisdiction in this matter.

7. We do not intend to deal in detail with all aspects addressed in our written submission or to unnecessarily repeat arguments presented by other States. These arguments are already before the Court. Rather, we intend to focus on why the Court *has* to assume jurisdiction; what legal principles apply; how this process will impact internationally; and more specifically, and ***most*** importantly, what an advisory opinion will mean for those most affected.

II. Jurisdiction and appropriateness of the Court assuming jurisdiction

8. Mr. President, Members of the Court, we now turn to the jurisdiction of the Court to give an advisory opinion in ***this*** matter and the appropriateness of the Court to assume such jurisdiction. The Court's consideration of jurisdiction and the appropriateness of exercising jurisdiction, referred to by some as "judicial propriety", can be summed up, in our view, in two questions, namely: may the Court exercise its jurisdiction to hear the matter; and if so, should the Court do so?

9. South Africa submits that the General Assembly is empowered to request an advisory opinion from the Court in terms of the Charter of the United Nations on a matter that falls within the General Assembly's competence and responsibility; the questions raised are legal questions; and the International Court of Justice, as the principal judicial organ of the United Nations, is competent to give an advisory opinion that will assist the General Assembly to deal with this issue[3].

10. The issue of decolonization falls squarely within the mandate of the General Assembly in accordance with Article 16, Chapters VI, VII and VIII of the Charter. The competence of the General Assembly to request advisory opinions from the Court on any legal question, and the possibility that a request may involve the determination of the legality of their own actions, has implicitly been accepted by all Member States upon becoming a party to the Statute. Judge Lauterpacht indicated that there seems to be "no decisive reason why the sovereignty of

[3] Written Statement by South Africa (StZA), para. 27.

States should be protected from a procedure to which they have consented in advance as Members of the United Nations, of ascertaining the law through a pronouncement which, notwithstanding its authority, is not binding on them"[4].

11. The Statute of the Court foresees that requests for advisory opinions may arise as part of ~~***the***~~ bilateral and multilateral disputes between States and it may be an element of a question put to the Court[5]. Thus, realizing that the advisory opinion procedure will inevitably also ***concern*** disputes between States, the Statute and the Rules of the Court provide for flexibility in the procedures to be followed in such instances. This Court has given advisory opinions on questions that have arisen from situations that include bilateral disputes on a number of occasions[6]. In particular, in the 1971 *South West Africa* case, the Court noted that the purpose of the request for an advisory opinion was not to settle a dispute, but to assist the United Nations to make decisions on legal issues where the political organ requesting the opinion was concerned with its own functions[7]. The same circumstances in the present matter should logically lead to the same conclusion.

12. In any event, decolonization, self-determination and territorial integrity cannot be regarded as a mere "bilateral dispute" by any measure. These are issues with which the international community has been grappling for decades and the mere fact that these questions are put before the Court in the context of the Mauritian situation, does not detract from the broader frame of reference that form***s*** part of the test set down by the Court in the *Western Sahara* and *Construction of the Wall* cases[8].

13. As regards the argument that the Court should refuse to exercise jurisdiction on the basis of ***the*** political nature of a legal question, the Court itself in the *Legality of the Threat or Use of Nuclear Weapons* case rejected this argument and stated that the fact that the question also has political aspects — as is the case in many questions which arise in international relations — is not

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[4] Lauterpacht, Hersch, *The Development of International Law by the International* Court (London: Stevens and Sons Ltd., 1958), p. 358.

[5] StZA, paras. 50-53.

[6] StZA, paras. 40-45.

[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, pp. 23-24.

[8] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004 (I)*, p. 159.

sufficient to deprive it of ***its*** character as a legal question, or to deprive the Court of a competency expressly conferred on it by its Statute[9].

14. The possible existence of ***a*** political dispute between two States in this present matter does not justify a refusal to exercise jurisdiction.

15. What is requested ***of*** the Court by the General Assembly is for it to exercise its judicial function to provide an advisory opinion and not to resolve a dispute.

16. Mr. President, Members of the Court, South Africa emphasizes that there could hardly be a situation where it will be more appropriate for the Court to exercise its jurisdiction than the situation that presents itself before the Court this week. The propriety of the present Request for an advisory opinion calls for consciences to be stirred, decency to be outraged, morality to be mobilized, the spirit of humanity to be honoured and an injustice to be recognized. This is because the situation of the Mauritian people who are, in 2018, still subjected to the inhumane and cruel yoke of colonialism, and its resultant inequality is an injustice that remains unresolved. Under these circumstances, South Africa is of the view that judicial propriety must move the Court to exercise its jurisdiction. Given the decades that have passed since the Chagos Archipelago was separated from Mauritius, the present matter is truly one worthy of urgent action.

17. This Request for an advisory opinion presents a critical opportunity to clarify and reconfirm the international legal rules that would assist the General Assembly to promote justice — a key element of judicial propriety.

18. Any arguments that the Court does not have jurisdiction, or that it should apply its discretion against considering the merits thereof, would merely undermine the role of the Court. If the Court does not discharge its responsibility to provide advice to the General Assembly at this crucial moment, it will be an opportunity lost to reinforce international law and the rule of law on an international level.

19. The Court finds itself at a significant point in history, as the completion of decolonization must be seen as an essential step for the international community to finally realize the right to self-determination of all peoples. What is at stake is the restoration of ***the*** dignity, sovereignty and

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[9] *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13.

territorial integrity of Mauritius and the concomitant possibilities that it will open up for the Chagossians to restore their own dignity in the very territory that forms the subject of the present matter.

III. The failure to complete decolonization and the effects thereof

20. Mr. President, Madam Vice-President, Members of the Court, there can be no doubt that decolonization has not yet been universally achieved. This burning issue still remains on the agenda of the General Assembly and of the African Union. South Africa, a country whose population suffered ~~***high***~~ human rights abuses as a result of unjust political systems, both under colonialism and apartheid, must underscore that the human rights element of this case cannot be denied. The questions put before the Court are not merely theoretical or academic in nature, but affects peoples across the globe who still have not been afforded the opportunity to effectively exercise their right to self-determination.

21. At the heart of all decolonization matters is the cold fact that it directly affects people and specifically indigenous communities who are often the most vulnerable groups in society. In the present case, the disadvantaged group whose fate depends on the findings of this Court is the indigenous peoples of the Chagos Archipelago. Before 1973 the Chagos Archipelago was a populated territory. As acknowledged by the United Kingdom, the population was forcefully removed from the Islands between the late 1960s and early 1970s as part of the process to prepare the Chagos Archipelago for the establishment of a military base, ~~***that***~~ in direct contravention of contemporaneous United Nations resolutions, such as resolution 2266 (XX) of 16 December 1965, resolution 2232 (XXI) of 20 December 1966 and resolution 2357 (XXII) of 19 December 1967, as well as the principles that have been confirmed over decades by the African Union and its predecessor, the Organization of African Unity.

22. The Chagossians yearn to return to their homes and to rebuild their society, as evidenced by the statements of individual Chagossians placed before the Court. These statements are a salient reminder not only of the will of the Chagossians, but of the Mauritian people as a whole. They echo similar calls of other colonized peoples whose situations have also not yet been resolved by the General Assembly. Many other disenfranchised peoples that have not yet attained

self-determination would gain hope for their future through legal certainty and direction that the Court should provide in this instance.

23. In the written submissions and written comments presented by some States, much time is devoted to the argument of *when* self-determination and territorial integrity could first be considered as enforceable "rights" in terms of international law. South Africa's position in this regard is fully set out in our written submission and can briefly be summarized as follows:

23.1. Firstly, at the time of the decolonization of Mauritius, there was already an established *jus cogens* right in international law in favour of decolonization and self-determination, which includes, as an integral part thereof, the obligation to respect customary international law right to territorial integrity of ***the*** colony that is attaining self-determination[10].

23.2. Secondly, the right to self-determination has been recorded in numerous African Union and United Nations resolutions over the decades, and by 1960, the Colonial Declaration resolution 1514 in unequivocal terms stated that "All peoples have the right to self-determination" and subsequently had the right to determine their own status.

23.3. Thirdly, Mauritius should have been decolonized in accordance with the principle of *uti possidetis juris*, which requires colonial boundaries to be respected[11]. Therefore, the detachment of the Chagos Archipelago in 1965 before Mauritius became independent was unlawful.

24. The arguments presented to the Court on whether the right***s*** to self-determination and territorial integrity existed at a particular point in time almost negates the continuing human rights violations that have been taking place. These arguments seek to justify what has happened in the incomplete decolonization process of Mauritius and the Chagos Archipelago.

25. The rights in question are some of the most fundamental of ***the*** international legal order. The Court has stated in the Advisory Opinion concerning the *Construction of a Wall* ~~***case***~~ that the right to self-determination is an obligation of *erga omnes* character[12] and both the *Barcelona*

[10] StZA, paras. 63-67.

[11] StZA, paras. 70-75.

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

Traction and the *Western Sahara* cases refer to the right to self-determination as being a *jus cogens* norm[13].

26. That the right to self-determination was also recognized as a right through State practice, is clearly illustrated by the decades that followed since 1950 when colony upon colony attained independence. The fact that independence was granted to these colonies, whilst maintaining their colonial boundaries, confirms that even the colonial Powers already at that time accepted that the right to self-determination and territorial integrity were indeed enforceable rights in terms of customary international law.

27. Mr. President, Members of the Court, the Court must unequivocally confirm that the violation of *jus cogens* norms and obligations *erga omnes* are not allowed by international law. In the current, unpredictable international environment it is incumbent upon this Court to uphold the rule of law and ***so*** strengthen a rule-based international order.

28. In addition to the fact that these rights already existed at the time of the separation of the Chagos Archipelago from Mauritius, the United Kingdom, as ***the*** administrating Power, ~~***or an administering Power,***~~ was under an international legal obligation in terms of Article 73 of the United Nations Charter to recognize the principle that the interests of the inhabitants of these territories are paramount. As the administering Power, the United Kingdom had to "accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories".

29. Article 73 ***(a)*** further requires the United Kingdom to have "respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses". Clearly there was no respect for the interests of the Mauritians and the inhabitants of the Chagos Archipelago when it was separated from Mauritius, nor when the Chagossians were forcibly removed from their territory. The interests of the Chagossians are still not being respected.

30. Despite this, the United Kingdom recognizes Mauritius as the only State that has the right to eventually exercise sovereignty over the Chagos Archipelago. Somewhat ironically, the

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[13] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 90, sep. op. of Vice-President Ammoun; *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3; but see the sep. op. of Judge Ammoun, pp. 301-304, para. 11.

United Kingdom's undertaking to return the Chagos Archipelago at its sole discretion and only when it is ready to relinquish control over the territory, whether that would be in 2036 or at such unspecified later date when it no longer required for defence purposes, is vague and elusive, and has a hollow ring to it.

31. It is also quite instructive to compare the actions of the United Kingdom vis-à-vis the Seychelles, to the actions vis-à-vis Mauritius and the Chagossians. It appears that at the time when the British Indian Ocean Territory was created, the islands of Aldabra, Desroches and Farquhar were similarly separated from the Seychelles and colonized as part of the British Indian Ocean Territory. These islands were, however, rightfully returned to the Seychelles upon its independence in 1976. This stands in sharp contrast with what happened in the case of Mauritius.

32. The only difference between the islands that were returned to the Seychelles and the Chagos Archipelago is the strategic location and the defence value to the United Kingdom of the latter. And therein lies the true reason for the continued unlawful and incomplete decolonization process of Mauritius and the violation of *jus cogens* rights to self-determination as well as the ongoing human rights violations. The *jus cogens* right to self-determination, sovereignty and territorial integrity of a nation cannot be disregarded for the sole purpose of protecting the defence interests and military ambitions of another.

33. Mr. President, Members of the Court, let us for a moment consider the position presented by some States, which we strongly contest, namely that the rights to self-determination and territorial integrity did not exist at the time when the Chagos Archipelago was separated from Mauritius and at the time when Mauritius achieved independence.

34. These arguments presuppose that the Court must find that the decolonization of Mauritius was lawfully completed by 1968, despite the separation of the Chagos Archipelago in 1965. Such a finding would lead to a number of inconceivable consequences, and I only highlight a few:

— the separation of the Chagos Archipelago from Mauritius was lawful, despite the lack of respect for the territorial integrity of Mauritius, its colonial boundaries and the expressed will of the Chagossian people, who will not be able to return to their homes until the United Kingdom eventually approves thereof;

— it would also mean that the obligation of the United Kingdom as an administering Power in terms of Article 73 of the Charter of the United Nations would be invalidated and the forcible removal of the entire civil population from the Chagos Archipelago would be condoned as being in compliance with international law; and

— it would create the untenable situation where Mauritius would be an independent State, but unable to exercise any sovereign rights over part of its territory.

35. A finding by this Court that the decolonization of Mauritius was lawfully completed in 1968, based on the fact that the rights of self-determination did not exist at that time, would have adverse implications for the remaining colonized people***s*** around the world. It would deal a serious blow to any hopes these people***s*** have of being free and of being the masters of their own futures.

36. In addition, a finding by the Court that decolonization of Mauritius was lawfully completed in accordance with international law as it stood in 1968, will not resolve the vexing question of the status of the Chagos Archipelago in 2018 as it still remains under the control of the United Kingdom.

37. There can be no doubt that the right***s*** to self-determination and territorial integrity are today well established in international law[14]. Even those States that argue that no such rights existed in 1968 cannot dispute that it has become established right***s*** since. Therefore, international law in 2018 requires the completion of ***the*** decolonization of the Chagos Archipelago as a matter of urgency.

38. The violation of human rights in relation to the failure to complete the decolonization process of Mauritius are of a continuing nature and the Court's direction will be essential to eradicate such violations and to enable the United Nations to protect peoples left vulnerable by colonialism.

39. The United Kingdom is today under a legal obligation to respect the right of self-determination and the fundamental human rights of the Mauritians and the Chagossians. The continued violation of the *erga omnes* international law obligations must have consequences, the

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[14] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, sep. op. of Judge Ammoun, pp. 301-304, para. 11.

[14] See, *inter alia, East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102.

least of which should be for the United Kingdom to immediately return the Chagos Archipelago to Mauritius.

IV. Conclusion

40. Let me conclude. South Africa respectfully submits that the core issue in these proceedings is the question of the completion of decolonization, and more particularly, whether the process of decolonization of Mauritius has lawfully been completed. It is indefensible that there still exists situations of incomplete decolonization processes today that prevent States and their peoples from exercising the full spectrum of their sovereignty and human rights.

41. Colonialism is an archaic remnant of a previous world order that considered some peoples more worthy than others, and that has left a lasting stain on the conscience of humanity. The completion of decolonization is one of the most pressing and fundamental challenges facing the present international legal order. Decolonization will remain on the agenda of the General Assembly and the African Union for as long as there are people who do not enjoy freedom in their own territories and who are unable to determine their own futures[15]. This honourable Court has the duty to assist the General Assembly in order for it to play its part in permanently removing all vestiges of colonialism from amongst the family of nations.

42. Mr. President, Madam Vice-President, distinguished Members of the Court, in echoing the spirit of the words of the late President Nelson Mandela quoted at the start of our submission, the time is long overdue for Mauritius to enjoy complete freedom. Not freedom in part, but full freedom that comes from the realization of the right to self-determination throughout its territory.

43. This brings to an end the oral submission of the Republic of South Africa. I wish to thank the Court for your attention. Thank you.

The PRESIDENT: I thank Ms de Wet for her statement on behalf of the Republic of South Africa. I invite the next participating delegation, the Federal Republic of Germany, to address the Court. The first speaker is Mr. Eick. You have the floor, Sir.

[15] See UNGA resolution A/RES/72/110 of 7 Dec. 2017 and the work under the Special Political and Decolonization Committee (Fourth Committee).

Mr. EICK:

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur pour moi de me présenter devant votre Cour durant cette procédure orale concernant la demande d'avis consultatif qui vous a été soumise par l'Assemblée générale des Nations Unies dans sa résolution du 22 juin 2017.

Avec votre aimable permission, j'aimerais faire quelques remarques introductives avant que le professeur Andreas Zimmermann expose plus en détail les arguments juridiques de l'Allemagne.

2. Members of the Court, let me first and foremost underline that Germany continues to fully support the process of decolonization. Throughout its history, the United Nations, and specifically the General Assembly, has played a paramount role in this regard. We believe that even today the completion of the decolonization process continues to be a central concern of the United Nations as a whole.

3. While both Mauritius and the United Kingdom have encouraged us to present our argument in these oral proceedings, Germany would not wish to be perceived as appearing in favour of any particular side or position as to the merits of the issues presented to the Court. Instead, our interest lies solely in the integrity of this Court as the principal judicial organ of the United Nations — a matter whose importance extends far beyond these current proceedings.

4. Acceptance of the International Court of Justice by States rests on the fundamental assumption that any adjudication on a bilateral dispute between sovereign States presupposes consent by the parties involved. Consent, as this Court has rightly reiterated time and again in its jurisprudence[16], constitutes the pivotal foundation of the Court's jurisdiction and ought not to be circumvented. In the present case, the States involved have not given their consent to have their bilateral dispute settled by the Court. We therefore appear before this Court to respectfully submit that the General Assembly's intention must have been, and only has been, to ascertain the guidance

[16] On this foundational principle cf., *inter alia*, *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53; *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. 36, para. 88; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 423, para. 33; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 124-126, para. 131.

necessary for the exercise of its own competences with regard to the decolonization process as far as the Chagos Archipelago is concerned.

5. This leads to two conclusions.

6. Firstly, it is not Germany's position that the Court ought not to render an advisory opinion at all. The weight of the question of decolonization and the important role to be performed by the United Nations General Assembly in the process undoubtedly merit thorough consideration by the Court. An advisory opinion by the Court can contribute greatly to the work of the General Assembly in the exercise of *its* powers and functions.

7. Secondly, however, with a view to the competences of the organs of the United Nations involved, the questions put before the Court must rightly be interpreted so as to provide guidance to the United Nations itself — and not touch upon a contentious question pending between two States.

8. As the Court is aware, Germany has already stated its position in its detailed Written Statement. Furthermore, we carefully considered all other written submissions, as well as the oral arguments presented by Mauritius and the United Kingdom yesterday. In light of this, we will limit our further oral argument to those points that Germany deems particularly relevant in this regard.

9. For this, Mr. President, with your permission, I would now call on Professor Zimmermann. Thank you very much for your kind attention.

Mr. ZIMMERMANN:

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, may it please the Court. Let me start by saying what an honour it is to appear once again before the Court.

2. The feeling of honour, but also I might add, responsibility, is reinforced by the fact that these current proceedings are of the utmost relevance for the Court's role as the principal judicial organ of the United Nations, and its judicial function.

3. Mr. President, at first glance, the current proceedings deal primarily, if not exclusively, with the legal status of the Chagos Archipelago.

4. In the long term there is, however, an even more fundamental question before this Court: namely the question as to the proper role and function of the Court when advising the political organs of the United Nations.

5. Germany therefore submits to you at the outset that it is the reply to *this* underlying question that might have consequences well beyond the current proceedings.

6. Germany therefore further submits that the Court ought to approach the current Request for an advisory opinion in the light of this overarching fundamental question — and that the Court should accordingly interpret the question put to it in that sense.

II. Role of the Court in advisory proceedings

7. Mr. President, any advisory opinion, as you have put it in your jurisprudence, "is given not to the States, but to the organ which is entitled to request it . . ."[17].

8. Any advisory opinion thus possesses a serving and supporting function: "The object of [such a] request for an Opinion [is] to guide the United Nations *in respect of its own action*."[18]

9. Any advisory opinion can thus only be meant to "enable[] United Nations entities to seek guidance from the Court *in order to conduct their activities in accordance with law*"[19].

10. Hence, the sole and exclusive purpose of the Court's advisory jurisdiction "is to enable organs of the United Nations . . . to obtain opinions from the Court *which will assist them* [the organs of the United Nations] *in the future exercise of their functions*"[20].

11. It is this overall function of the Court's advisory jurisdiction to enable the requesting organ — the General Assembly in the case at hand — to exercise *its respective competences* that must guide the Court in interpreting any request submitted to it.

12. And this must also hold true accordingly when it comes to the current Request.

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[17] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

[18] Cf. *mutatis mutandis Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; emphasis added.

[19] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 188, para. 31; emphasis added.

[20] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 421, para. 44; emphasis added.

13. It has now nevertheless been claimed by Mauritius that "it would be curious for the Court not to set out the legal consequences *for States* should it determine that the decolonisation process of Mauritius has not been lawfully completed"[21]. ~~***It would be curious for the Court.***~~

14. Mr. President, taking into account the overall purpose of advisory proceedings — which I have just outlined to you — the burden lies on those who argue in favour of a broad interpretation of the request to prove that the General Assembly had indeed wanted the Court to also address legal consequences *for States* arising from the continued presence of the United Kingdom on the Chagos Archipelago.

15. In doing so, attempts have been made to rely on the Court's *Namibia* 1971 Advisory Opinion[22]. Such reliance is, however, I am afraid to say, misplaced.

16. In the request leading to the Court's *Namibia* Opinion, the General Assembly had — unlike in the case at hand — *explicitly* requested the Court to make a finding as to the legal consequences *for States* of the continued presence of South Africa in Namibia.

17. Obviously, therefore, as Mauritius has again put it yesterday[23], in the *Namibia* proceedings the Court would indeed have undermined its judicial functions, had it refrained from setting out the legal consequences for States.

18. Yet, the crucial question is whether *in the case at hand* the General Assembly's Request also encompasses this very question.

19. Germany submits that, if properly interpreted, the Request can only have been meant to encompass those issues that are mandatory in order for the General Assembly to be able to exercise its own competencies in the field of decolonization.

20. And this means that the General Assembly's Request has to be understood as asking the Court to provide legal guidance as to how the General Assembly should, in legal terms, perceive the prevailing situation.

21. Otherwise, the General Assembly would have run the risk of having requested the Court to at least implicitly decide the underlying bilateral dispute between Mauritius on the one hand and

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[21] Written Comments of the Republic of Mauritius (CoMU), para. 4.65; emphasis added.

[22] CoMU, paras. 4.63-4.65.

[23] CR 2018/20 (Reichler), p. 63; see also CoMU, para. 4.66.

the United Kingdom on the other. Yet, it cannot be assumed~~— *it cannot simply be assumed* —~~ that the General Assembly, by submitting its Request, had indeed wanted to *thereby* endanger the judicial function of the Court.

22. Having said this, this does not mean that States would not have to draw appropriate conclusions from the Court's eventual findings as to the question of whether the process of decolonization of Mauritius has been lawfully completed or not. Contrary to what has been implied yesterday morning[24], Germany does not dispute this.

23. Given the limited scope of the question submitted, the Court itself ought not, however, to itself take a position as to the legal consequences *for States* of any such finding it may make under applicable rules of State responsibility.

24. The situation would be different if the requesting organ had, either explicitly — as the Security Council had done in the *Namibia* proceedings — or implicitly — as the General Assembly had done, as I will show, in the *Wall* case — if the General Assembly had asked the Court to also provide guidance as to the extent of possible legal consequences *for States*. But, Germany submits that it did not.

25. Any such determination as to whether or not the General Assembly sought such guidance in the proceedings at hand necessarily requires the Court to interpret the Request laid before it. Accordingly, it is such matters of interpretation to which I will now turn.

III. The Court's power to interpret the request of the General Assembly

26. Members of the Court, there seems to be consensus by now among the Participants in the proceedings that the Court is in a position to interpret the Request submitted to it[25].

27. Indeed, how could it be otherwise, given the Court's consistent jurisprudence on the matter[26]?

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[24] CR 2018/20 (Reichler), p. 63.

[25] See *inter alia* CoMU, paras. 4.28 *et seq.* and Written Comments of the African Union on Other Written comments (CoAR), paras. 130 *et seq*.

[26] See already *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J, Series B, No. 16*, p. 4.

28. There also seems to be consensus that the Court is called upon to identify the true legal question, or the true legal issue, underlying the Request[27], taking into account, apart from its wording, the intention of the main sponsors, as reflected in their *contemporary* statements[28].

29. For that purpose, as the Court has confirmed, it may "even reformulate the question"[29], indeed "depart from the language of the question"[30], even if that were to "affect the answer to the question" asked[31].

30. Most importantly, however, the Court has underlined that, whenever the requesting organ expects the Court to provide guidance on the broad set of issues, it must do so expressly[32]. Accordingly, and in line with the Court's consistent jurisprudence, the General Assembly would have needed to make it clear that it requests the Court to also provide guidance as to the legal consequences *for States*, had it truly wanted to do so in the current proceedings.

31. There is no doubt that the Court has been "expressly asked for legal consequences . . . of a failure to complete decolonization[33]" — to quote counsel from Mauritius — but the Request left open whether that would encompass legal consequences *for States*. ***~~That's not what the Court said.~~***

32. That leads me to the interpretation of the current request.

IV. Interpretation of the Request

1. Wording of the Request

33. Members of the Court, what you see in front of you is noticeably, obviously, *not* the question the General Assembly put to you in the current proceedings. Rather, it is *mutatis mutandis* — as you will see now —

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[27] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para. 35. See also, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 1980*, p. 425, para. 50; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956, I.C.J. Reports 1956*, p. 25; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46.

[28] CoMU, para. 4.88.

[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 153, para. 38; references omitted.

[30] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 423, para. 50.

[31] *Ibid*., para. 52.

[32] *Ibid*., para. 51.

[33] CR 2018/20 (Reichler), p. 62, para. 23.

[Slide on]

> "What are the legal consequences *for States* of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

the question the Security Council had asked the Court in 1970.

34. The General Assembly, as well as the sponsoring States, when submitting the *current* Request for an advisory opinion, were certainly aware of this earlier request. This is due to the fundamental importance of the Court's 1971 Opinion on the development of international law generally, and on the law of decolonization specifically.

35. Further, the General Assembly must have also been well aware of the striking similarities between the two situations, Namibia and Chagos. On both occasions, i.e. when addressing the legal status of Namibia in 1971, and when addressing the status of the Chagos Archipelago now,

— *first*, the requesting organ had to deal with a situation of decolonization;

— *second,* the request dealt with a continued, allegedly illegal, presence by a State in a colonial territory;

and finally

— *third*, the Court was asked on both occasions to address the possible legal consequences of a continued administration of such territory.

Three striking similarities.

[Slide off]

36. Yet, despite these striking similarities, the General Assembly nevertheless decided to formulate the current Request significantly differently from the 1970 Namibia request.

[Slide on]

> "What are the *legal consequences for States* of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"

> "What are the *consequences under international law* . . . arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago . . ."

37. In particular, as you can see, the 1970 request had *specifically* asked the Court to provide the requesting organ with legal guidance as to possible legal consequences *for States*, be it South Africa itself, be it third States, of the continued presence of South Africa in Namibia.

38. In sharp contrast thereto, the 2017 Request makes no reference whatsoever to such legal consequences for States, be it for the United Kingdom itself, be it for third States, of the continued presence of the United Kingdom on the Chagos Archipelago.

39. Germany respectfully submits to you that this striking difference is telling.

40. It thus follows that the claim brought forward by Mauritius that the request by the General Assembly "*by its express terms*, seeks an Advisory Opinion that addresses *all* legal consequences"[34] including legal consequences for States, is, to say the least, doubtful.

[Slide off]

41. This brings me to the next point brought forward in favour of an expansive interpretation of the Request, namely, the reliance on the use, by the General Assembly in the English version of the resolution, at least, of the definite article "*the* consequences" in its Request allegedly "indicating comprehensiveness"[35].

42. It is, however, hard to see how the General Assembly could have avoided the use of the definite article in at least the French and the Spanish versions of the Request for mere linguistic reasons. This means that no conclusion can be drawn from such use.

43. Besides, omitting the definite article in the English version would at least have cut the natural flow of the phrase. What is more, the Russian language does not know articles at all. Accordingly, the Russian version of the Request does not contain any reference to the equivalent of "*the* consequences". It ought also to be noted that the Arabic language only knows a definite article. This means that the usage of a definite article in the Arabic version cannot be interpreted either way. Finally, the Chinese version refers generally to consequences, rather than to the equivalent of *"the"* legal consequences.

44. On the whole, therefore, the use of the definite article in the English version of the Request is not indicative of any intention to also encompass legal consequences for States.

45. If, however, one were to follow the argument based on the use of the definite article in the English version of the Request, and be it only *arguendo*, it would cut both ways. As a matter of fact — as you can now see on the screen — the General Assembly, in the very same sentence

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[34] CoMU, p. 141, para. 4.7; first emphasis added; second emphasis in the original.

[35] CoMU, para. 4.34; CR 2018/20 (Reichler), p. 58.

where the term "*the* consequences" is used, then did not refer to "*the* obligations" referred in the resolutions mentioned, but rather merely to "obligations" reflected in them, not including *the* obligations, but only including obligations.

46. Mr. President, the Participants advocating a broad interpretation of the Request cannot have it both ways — and it is precisely for this reason that counsel for Mauritius yesterday, by mistake or on purpose, referred twice to "*the* obligations"[36].

47. If indeed the wording "the consequences" were to be understood as possibly indicating all possible consequences, including consequences for States, *quod non*, the term "obligations" *without* the definite article would then have to be understood *a contrario* as *not* referring to all the obligations referred to in those resolutions.

48. Besides, the limited wording "obligations" — rather than "the obligations" — in line with the overarching principle that the Court ought not to decide a bilateral dispute in the guise of an advisory opinion — confirms that it had not been the intention of the General Assembly to encompass references to State-to-State obligations in its Request.

49. Members of the Court, if indeed it had been the General Assembly's intention, as claimed[37] to have the Court also provide a reply as to the legal consequences for States deriving from the resolutions referred to in the Request, it would have been very easy for the General Assembly to indicate just this. The General Assembly could have simply added the words "for States" after the word "obligations" in the very text of the second question. Yet, the General Assembly decided not to do so.

50. Yesterday morning, it was further alleged that the reference to the United Kingdom in the second question argues in favour of a broad interpretation of the Request[38]. This phrase, however, merely describes the factual situation, rather than indicating that the General Assembly was seeking an opinion on legal consequences *for States*.

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[36] CR 2018/20 (Reichler), pp. 58, 60.

[37] CR 2018/20 (Reichler), p. 59.

[38] CR 2018/20 (Reichler), p. 59.

51. As the Court has confirmed, whenever the General Assembly expects an answer to a specific issue it has [slide on] "*framed the question in such a way that this aspect is expressly stated . . .*"[39] [slide off]

52. This brings me to my next point, namely the drafting history of the Request and, in particular, the position taken by the sponsors of the draft resolution prior to the adoption of the Request for an advisory opinion.

2. Drafting history of the Request

53. Mauritius, as one of the main sponsors of the Request, and also as one of the States most concerned, had made it clear, prior to the adoption of the Request, that the envisaged advisory opinion was meant to serve the General Assembly in its own work[40], given the General Assembly's own "direct *institutional* interest in the matter"[41].

54. The same holds true for Congo, when introducing the draft Request on behalf of the African regional group. Its representative took the position that the Court's opinion was meant, and meant only, to provide guidance to the General Assembly in exercising its own competences[42]. Put otherwise, it was not meant to decide on the consequences arising *for States* from the continued presence of the United Kingdom in the relevant area.

55. What is more, Mauritius had also made it clear that it was not looking to the Court to take a position on, far less decide, its bilateral dispute with the United Kingdom as to the legal status of the Chagos Archipelago[43]. Yet, laying out the legal consequences for both, Mauritius and the United Kingdom, of the continued presence of the United Kingdom in Chagos would *de facto* do just that.

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[39] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)* p. 423-424, para. 51; emphasis added and references omitted.

[40] Letter of H.E. Ambassador J. Koonjul, Permanent Representative of Mauritius to the United Nations, to H.E. Ambassador H. Braun, Permanent Representative of Germany to the United Nations, of 30 May 2017, para. 3.

[41] Aide-memoire: Item 87 of the Agenda of the 71st Session of the United Nations General Assembly, May 2017, para. 12.

[42] Statement by Congo on behalf of the African regional group, UN doc. A/71/PV.88, p. 6.

[43] See statement of Mauritius during the debate of the General Assembly leading to the adoption of the Request for an advisory opinion: "The subject of the request for an advisory opinion of the International Court of Justice does not relate to a bilateral dispute."; UN doc. A/71/PV.88, p. 9.

56. The limited scope of the Request had also previously been confirmed by Mauritius in the wake of submitting the Request. In that regard, it is worth considering the changes in the wording of the different statements provided by Mauritius as to the scope of the envisaged advisory opinion between 2016 on the one hand and 2017 on the other. [Slide on]

57. As you can see on the screen, Mauritius' *2016* letter to the Secretary-General, requesting the inclusion of an item on the agenda of the General Assembly[44], had still contained references to possible consequences for Member States of the Court's opinion.

58. But let us then consider the aide-memoire which Mauritius subsequently sent to Member States in May *2017* — just one month prior to the adoption of the Request. In the said aide-memoire Mauritius was asking Members to support the Request.

59. This aide-memoire, *2017*, did not contain any more, as you can see, such references to legal consequences for States as being the focus of the Request for the envisaged advisory opinion. Neither did the 2017 Mauritius aide-memoire, unlike the 2016 document, suggest any more to the General Assembly to engage with individual States once the opinion had been rendered, for which purpose it would obviously have been highly relevant to receive guidance from the Court on legal consequences for States.

60. Nor were Member States mentioned any more in 2017 as addressees of the future advisory opinion. If indeed legal consequences for States were meant to be addressed by the Court in its advisory opinion, those Member States would also have had to be among those very addressees — rather than solely the General Assembly in the exercise of its mandate under Chapters XI to XIII of the Charter.

61. However, Mauritius's Aide-Mémoire of May 2017 only made reference ***~~anymore~~*** to those Charter-based competences. And I submit to you that States relied on this explanation when voting on the resolution in the General Assembly. [Slide off]

62. This limited understanding of the request is further confirmed by the statements made prior to, and immediately after, the adoption of General Assembly resolution 71/292, providing for the Request.

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[44] UNGA, Request for the inclusion of an item in the provisional agenda of the seventy-first session, UN doc. A/71/142 (14 Jul. 2016), paras. 6-8.

63. Among those 15 States — and the representative of the African Union — taking the floor in the General Assembly, *no one* stated explicitly that the Request would cover legal consequences for States. Even Angola, which has been referred to[45] as being one of the two States having made such a statement, did not take the position that the advisory opinion would cover possible legal consequences for States. Rather, Angola merely specified, by way of a factual statement, that such opinion might contribute to the regaining of control of the territory by Mauritius[46].

64. That leaves us with the statement of Brazil. After underlining *the role of the General Assembly* in the process of the decolonization of the territory in question, Brazil merely stated that the opinion might guide parties to settle the question[47] — without specifically confirming that, at least in its view, the Request put before the Court was also meant to ask the Court to provide guidance as to legal consequences for States.

65. Furthermore, Germany respectfully submits that the Court shall not rely on any statement to the contrary made only *after* the adoption of the Request and for the purposes of these very proceedings[48].

66. For one thing, any such unilateral *ex post facto* statements made months after the request cannot alter the content of the request, once validly adopted. At most, this could only be the case if these *ex post facto* statements were evidence of a common understanding, by the States participating in the vote in the General Assembly, as to the content of the request.

67. As the Court is well aware however, Participants in these proceedings have taken very divergent positions as to the interpretation of the Request. Apart from a significant number of States that have taken the position that the Court should not accede to the Request at all, it was — as Mauritius itself put it — *inter alia*, China and the Russian Federation that "expressed similar concerns" to those of Germany[49].

68. Hence, no consensus — or, to use the terms of the Vienna Convention on the Law of Treaties, no subsequent agreement — on the matter exists.

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[45] CoMU, para. 4.50.

[46] A/71/PV.88, p. 10.

[47] *Ibid.*, p. 21.

[48] But see for such proposition CR 2018/20 (Reichler), p. 61, fn. 94.

[49] CoMU, para. 4.72.

69. On the whole, therefore, Germany respectfully submits that both the wording and the drafting history of the Request confirm that the Request was not meant to encompass legal consequences for States — and it is indeed in light of such understanding that Germany voted in the General Assembly.

70. That now brings me to the Court's 2004 Advisory Opinion in the *Wall* case.

3. The Court's 2004 *Wall* Opinion

71. Let me first recall the obvious, namely that the General Assembly, in 2003, had not *expressis verbis* asked about legal consequences for States of the construction, by Israel, of a wall in the Occupied Palestinian Territory. Still, and you are well aware of that, the Court addressed those questions.

72. Yet, it is worth recalling that the General Assembly had specifically asked the Court to consider, when dealing with the said request, the 4th Geneva Convention of 1949, and relevant General Assembly and Security Council resolutions.

73. However, given its common Article 1, obligations for third States are part and parcel of the system of the Geneva Conventions. Besides, both relevant Security Council and General Assembly resolutions — to which the 2003 request had made reference — had, time and again, specifically addressed legal obligations of Israel arising with regard to the Occupied Palestinian Territory.

74. Accordingly, on that occasion, while not *expressis verbis* requesting the Court to also provide advice on legal consequences for States generally, and for Israel in particular, it was obvious and self-evident that this was what the General Assembly had then in mind when submitting its request.

75. The very background to the adoption of the resolution containing the request in the *Wall* case further confirms this conclusion[50]. As is well known, the said request was adopted as part of the 10th Emergency Special Session of the General Assembly after the Security Council had failed to adopt a resolution which would have contained specific obligations *for Israel*.

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[50] Cf. in this regard *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 19 *et seq.*

76. Here, indeed, one can therefore hardly doubt that it had been the intention of the General Assembly, acting under the Uniting for Peace mechanism and thus replacing the inaction by the Council, to specifically request the Court to determine the legal consequences for States.

77. Besides, during the debate within the General Assembly in 2003, almost all of the speakers — and in contrast to the current case — all of the speakers that favoured the adoption of the request *specifically took the position* that the requested opinion was meant to primarily address the legal consequences for Israel flowing from the Court's findings as to the legality or illegality of the construction of the wall in the Occupied Palestinian Territory[51].

78. Even more, the representative of South Africa in 2003 then drew an uncontradicted parallel with the 1971 request concerning Namibia, which he referred to as a "clear precedent"[52]. He thereby confirmed that in 2003 it was assumed — contrary to the current proceedings — that the request was meant to also encompass legal consequences for States.

79. Mr. President, no such statement was made, however, when the current Request was debated in the General Assembly in 2017 — rather to the contrary.

V. Concluding remarks

80. Members of the Court, neither the Court, nor any other international court or tribunal, could decide a contentious case in which the legal consequences for both Mauritius and the United Kingdom of the continued administration of the Chagos Archipelago by the United Kingdom would be decided upon without their consent.

81. Given that the General Assembly was fully aware of this situation, can it then really be assumed that the General Assembly had wanted to request the Court to decide this very question while answering this request?

82. Or should it not rather be assumed that the General Assembly had instead wanted to focus on the exercise, by the General Assembly, of its own competences?

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[51] See UN doc. A/ES-10/PV.23, statements by Kuwait, *ibid*., p. 3; Palestine, *ibid*., p.3; Malaysia, *ibid*., p. 10; Senegal, *ibid*., p.13; Iran, *ibid*., p. 14.

[52] *Ibid*., p. 16.

83. Is that not what the Request had in mind when it made reference to the "active role in the process of decolonization" the United Nations is meant to play concerning the Chagos Archipelago?

84. Ought not the Court therefore focus exclusively on those issues that are necessary and relevant for the General Assembly in order for the Assembly to exercise its own competences when it comes to issues of decolonization generally, and concerning the Chagos Archipelago more specifically — rather than on possible legal consequences for States?

85. Let me therefore conclude by recalling what the PCIJ had to say when faced with a similar situation, namely that if the requesting organ — in the case at hand, the General Assembly — if it "*had wished* also to obtain the Court's opinion on this point . . . [it] would not have failed to say so *in terms*. In these circumstances the Court does not consider that it has cognizance of this question."[53]

Mr. President, Madam Vice-President, thank you for your kind attention. This concludes the presentation by Germany. Thank you.

The PRESIDENT: I thank the delegation of Germany for its presentation in the context of these advisory proceedings. Before I invite the next delegation, the Court will observe a coffee break for 10 minutes. The hearing is suspended.

The Court adjourned from 11.10 a.m. to 11.20. a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I call upon the delegation of Argentina. The first speaker is Ambassador Oyarzábal. You have the floor, Sir.

[53] Cf. *mutatis mutandis Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 2 at 17; emphasis added.

Mr. OYARZÁBAL:

THE EXERCISE OF THE ADVISORY JURISDICTION WILL CONTRIBUTE TO THE DISCHARGE OF UNITED NATIONS DUTIES ON DECOLONIZATION

A. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is an honour to appear before you on behalf of the Argentine Republic in order to set forth its views in these important advisory proceedings, dealing with decolonization.

2. My country reiterates its commitment to the work and responsibilities of the United Nations General Assembly, the organ that requested this advisory opinion. Argentina attaches great importance to the respect for international law in general, and United Nations law in particular, and praises the role of the International Court of Justice in its application.

3. There can be no doubt that some of the major achievements of the United Nations since 1945 have been in the field of decolonization. Thanks to ***its*** action and support, the membership of the Organization has expanded in an exponential way, through the accomplishment of independence of many peoples of Africa, Asia, the Caribbean and the Pacific[54]. From the very beginning and during the whole history of the United Nations, Argentina has been a strong supporter of the right of those peoples to create their own sovereign States.

4. Argentina reiterates its commitment to the process of decolonization and to the completion of this process in all its aspects and in all pending cases. The role of the General Assembly, and its subsidiary body the Decolonization Committee, is key in this process.

5. It is for these reasons that Argentina sponsored and voted in favour of resolution 71/292; so that the General Assembly can avail itself of your guidance as you have done in the past[55]. We participated in the two rounds of written pleadings and we respectfully refer the Court to our Statement and Comments, in which we developed our main arguments.

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[54] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 57; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 436, para. 79 and p. 438, para. 82.

[55] *International Status of South West Africa, Advisory Opinion: I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.* 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

6. Members of this Court, I will first refer to questions relating to the jurisdiction of the Court and its propriety. In so doing, I will elaborate briefly on the specific competencies of the General Assembly in the field of decolonization. Professor Kohen will follow by examining the international law of decolonization, with General Assembly resolution 1514 (XV) and the principles of respect for territorial integrity and the right to self-determination at its core.

7. Professor Kohen will demonstrate that the process of decolonization of Mauritius was not lawfully completed in 1968, following the separation of the Chagos Archipelago, since this separation breached the territorial integrity of Mauritius. Part of the territory of Mauritius was severed in order to be kept under the control of the administering Power. Due to this breach, the Mauritian people have not been able to exercise their right to self-determination over the totality of the territory of Mauritius.

B. There are compelling reasons for the Court to exercise its advisory jurisdiction

8. Members of the Court, yesterday we heard arguments inviting you not to render an advisory opinion. Other Participants have asked the same in their written pleadings. Let us be clear: all the conditions set out in Article 96, paragraph 1 of the Charter have been met: the General Assembly is one of the organs entitled to request advisory opinions, the questions raised have a legal character and they fall within the competencies of the General Assembly. I need not insist upon this[56].

9. Aware that the mere existence of a bilateral dispute has not been considered by the Court as a "compelling reason" not to render an advisory opinion[57], a minority of participants contend that the existence of a *sovereignty* dispute over the Chagos Archipelago should be considered a "compelling reason". This can be easily discarded for two simple reasons.

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[56] Cf. Written Statement of Argentina (StAR), pp. 4-5, paras. 6-9; Written Comments of Argentina (CoAR), pp. 6-10, paras. 14-22.

[57] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21, para. 23. Cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 72; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 86; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30.

10. *First*, by use of precedent, because you have already rendered opinions in cases where territorial disputes were also present[58]. *Second*, because the questions raised by the General Assembly relate to the exercise of its competencies in the field of decolonization and not to the settlement of a sovereignty dispute, like the one two neighbours may have with regard to their boundary.

11. Focusing on the bilateral territorial dispute is tantamount, with all due respect, to putting the cart before the horse. We are not dealing here with a bilateral dispute concealed as a decolonization issue. What we have before us is a decolonization issue in its own right that includes, because of the conduct and claims of the administering Power, a sovereignty dispute. This being the case, the task of the Court is not to settle the sovereignty dispute, but to analyse the process of decolonization of Mauritius and determine whether this process was lawfully completed. In exercising its advisory jurisdiction, the Court often makes legal determinations that may have an impact on bilateral or multilateral disputes. But this is not a reason not to respond to questions asked by a principal United Nations organ within its competencies. Neither did the Court in *Western Sahara* set as a condition that an advisory opinion have no effect on the rights of the administering Power[59].

12. Never in the past, has the existence of a bilateral dispute prevented the Court from rendering an advisory opinion on matters that are of direct concern and competence of the United Nations. If it were otherwise, the General Assembly, and the Court, could practically never resort to advisory proceedings, as in most cases there are deep opposing views among States and participating entities.

C. The General Assembly has specific competencies in the field of decolonization

13. Members of the Court, countries that oppose the General Assembly and the Court fulfilling their functions seek to create fear about the alleged consequences for existing bilateral disputes all over the world, if the principle of consent is circumvented by way of advisory opinions.

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[58] *Western Sahara, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.

[59] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 19, para. 42.

This is not the case here. This Request for an advisory opinion concerns a situation regarding which the General Assembly has specific functions to fulfil, which is supervising the legality of the decolonization process. And in performing this task, the General Assembly has always dealt not only with the process in general, but with each specific case in particular.

14. There is no doubt that the separation of Chagos Archipelago from Mauritius is a matter of decolonization. The separation occurred in 1965, at the time when Mauritius was a non-self-governing territory in the sense of Chapter XI of the Charter. It is not contested that before that separation, Chagos was part of Mauritius. It is not contested either that this separation was the result of an action by the administering Power. The Mauritian people achieved independence in 1968 but were prevented from completing their right to self-determination. The inhabitants of Chagos, as part of the Mauritian people, were expelled from their homes and deported, and have not been allowed to return since. This is also not contested. Mauritius was then deprived of its national unity and of its territorial integrity in breach of the obligation set out in paragraph 6 of General Assembly resolution 1514 (XV).

15. The rules and principles of the law of decolonization are at the core of the questions placed before this Court. Both main principles in this field are relevant here: the right of peoples to self-determination and the obligation to respect territorial integrity. Professor Kohen, who will speak next, will elaborate on this.

16. Members of the Court, there is no compelling reason for the Court not to exercise jurisdiction. On the contrary, it is absolutely essential that an authoritative voice such as this Court's provide the legal guidance that the General Assembly needs to fulfil its duties. Given the particular responsibility of the United Nations regarding decolonization, and your own jurisprudence pointing to the limited use of the Court's discretionary power in advisory proceedings, it would be *inconceivable* that the principal judicial organ of the United Nations decide not to answer the questions presented to it by the General Assembly.

17. The fact that the General Assembly has not taken action in a period of time with regard to the decolonization of Mauritius and the separation of Chagos in particular[60], is immaterial. It is

[60] Written Comments of the United States of America (CoUS), p. 8, para. 2.12, third point, and p. 12, para. 2.23; CoGB, p. 49, para. 3.18 b and pp. 51-52, para. 3.21 b.

not for the Court to examine if the organ requesting the advisory opinion acted sooner rather than later, frequently or infrequently or at different intervals. The crucial point is whether the General Assembly has the power to decide on the decolonization of a given territory and whether it has made a final decision or it has not. In United Nations practice such decisions take the form of General Assembly resolutions. Resolutions — adopted by consensus or by a vote, and not tacit assent or acquiescence — are the way the General Assembly pronounces itself. It is undisputed that the General Assembly has never endorsed the separation of Chagos from Mauritius and that it has dealt with the decolonization of Mauritius as a non-self-governing territory.

D. Conclusions

18. To conclude, allow me to quote what the Court said in *Western Sahara*, which also applies here, when asserting that a Member of the United Nations, having accepted the provisions of the Charter and the Statute, "could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers"[61]. Argentina is convinced that, in exercising your jurisdiction, you will contribute, as the principal judicial organ of the United Nations, to the goal "of bringing to a speedy and unconditional end colonialism in all its forms and manifestations"[62].

19. Mr. President, Madam Vice-President, Members of the Court, I thank you for your attention and I now invite Professor Kohen.

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[61] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 24, para. 30.

[62] *Ibid.*, p. 31, para. 55.

M. KOHEN :

LA SÉPARATION DE L'ARCHIPEL DES CHAGOS S'EST FAITE EN VIOLATION DU DROIT DE LA DÉCOLONISATION

Introduction

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, c'est un honneur de comparaître une nouvelle fois devant votre haute juridiction pour exposer les vues de mon pays. Je vais me référer à certains aspects de fond de la présente requête pour avis consultatif.

2. Qu'il me soit permis de rappeler les deux principales positions qui s'opposent ici. Pour la plupart des participants à cette procédure, la puissance administrante n'avait pas le droit de décider unilatéralement du détachement de l'archipel des Chagos pour le garder sous sa prétendue souveraineté au moment d'octroyer l'indépendance à Maurice, et ce, de manière contraire aux principes d'autodétermination et d'intégrité territoriale[63]. Le Royaume-Uni, par contre, considère qu'il pouvait opérer cette séparation, qu'il peut garder l'archipel sous sa prétendue souveraineté tout le temps qu'il jugera nécessaire pour ses besoins de défense, et qu'il le «cédera» à Maurice, uniquement lorsqu'il n'en aura plus besoin[64]. Voilà, en leurs grandes lignes, les deux thèses en présence, qui doivent être examinées à la lumière du droit applicable à la décolonisation.

3. Je vais diviser mon exposé en trois parties. J'aborderai tout d'abord la question de la décolonisation en général et du droit qui la régit. J'examinerai ensuite la valeur juridique des résolutions de l'Assemblée générale en matière de décolonisation et tout particulièrement celle de la résolution 1514 (XV), pour démontrer qu'elles vont au-delà de simples recommandations. Il sera question en troisième lieu de l'application de ce droit au cas concret de la séparation des Chagos et des conséquences qui en découlent.

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[63] Afrique du Sud, Argentine, Belize, Brésil, Chine, Chypre, Cuba, Djibouti, Guatemala, Iles Marshall, Inde, Madagascar, Maurice, Namibie, Nicaragua, Pays-Bas, Serbie, Seychelles, Viet Nam, Union africaine.

[64] Exposé du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (ci-après «EéGB»), par. 9.18.

A. Le processus de décolonisation est régi par le droit international

4. Je commence par le droit applicable. On a prétendu que la décolonisation est un processus «politique», pas juridique[65]. Alternativement, du point de vue juridique, on l'a limitée au droit à l'autodétermination, pour prétendre dans la foulée que ce droit n'existait pas au moment de la séparation des Chagos[66].

5. Il paraît saugrenu que l'on puisse prétendre que la décolonisation est simplement un processus politique, comme si le droit n'avait aucun rôle à jouer. Il est élémentaire de dire que dans ce processus, comme dans bien d'autres domaines des relations internationales, d'importantes règles juridiques entrent en ligne de compte, que la question n'est pas laissée à la discrétion des Etats, que la décolonisation est donc un domaine d'intérêt international et que les Nations Unies y jouent un rôle décisif depuis le début de leur existence.

6. Dans le cas de la décolonisation, il s'agit même de beaucoup plus que quelques règles qui seraient simplement appliquées à une situation donnée. Nous sommes ici devant un corpus composé à la fois de règles, de procédures et d'organes internationaux compétents. Grâce au chapitre XI de la Charte, ce corpus s'est sans cesse développé dans tous ses aspects. D'abord, l'Assemblée générale a établi les critères à appliquer pour déterminer quand un territoire devait être considéré comme étant «non autonome» ainsi que le type d'informations que les puissances administrantes devaient fournir à l'Organisation. Puis se sont développées des règles relatives au traitement à accorder à ces territoires, les critères pour l'application du droit à l'autodétermination et le respect de l'intégrité territoriale, la création d'organes subsidiaires de l'Assemblée générale chargés de surveiller le processus, l'envoi de missions, l'organisation ou la surveillance de référendums, l'audition de pétitionnaires et la décision de l'Assemblée quant au point de savoir comment un territoire devait être décolonisé et si sa décolonisation avait été menée à terme ou pas. Tout cela fait partie du processus de décolonisation, et le droit international n'y est bien évidemment pas étranger[67].

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[65] Observations écrites du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (ci-après «OéGB»), par. 4.4.

[66] Exposé écrit des Etats-Unis d'Amérique (ci-après «EéUS»), par. 4.46, 4.61 et 4.64, observations écrites des Etats-Unis d'Amérique (ci-après «OéUS»), par. 3.27 ; EéGB, par. 8.65, OéGB, par. 4.18-4.28.

[67] Exposé écrit de l'Argentine (ci-après «EéAR»), par. 14-22 ; observations écrites de l'Argentine (ci-après «OéAR»), par. 19.

7. Pour cette raison, la Déclaration des principes du droit international sur les relations amicales constate que :

> «[l]e territoire d'une colonie ou d'un autre territoire non autonome possède, *en vertu de la Charte*, un statut séparé et distinct de celui du territoire de l'Etat qui l'administre ; ce statut séparé et distinct *en vertu de la Charte* existe aussi longtemps que le peuple de la colonie ou du territoire non autonome n'exerce pas son droit à disposer de lui-même.»[68]

Ce statut «séparé et distinct en vertu de la Charte» constitue ainsi un élément clef pour l'analyse de la présente requête pour avis consultatif.

8. Compte tenu du rôle des Nations Unies en matière de décolonisation, les résolutions de l'Assemblée générale ont une portée qui va au-delà de simples recommandations. On peut distinguer deux types de résolutions dans ce domaine. Les premières ont un caractère général et possèdent une valeur normative[69], en ce sens qu'elles déclarent ou interprètent des règles préexistantes ou permettent la cristallisation d'un processus de formation de nouvelles règles de droit international général. Les résolutions 1514 (XV) et 2625 (XXV) constituent des exemples de déclarations interprétatives de principes fondamentaux déjà contenus dans la Charte des Nations Unies et applicables à la décolonisation.

9. Le deuxième type de résolutions concerne spécifiquement chacun des territoires non autonomes. Lorsque l'Assemblée générale décide qu'un territoire tombe sous le coup du chapitre XI de la Charte et de la résolution 1514, ou décide de la manière dont le territoire doit être décolonisé, ses résolutions ne sont pas de simples recommandations. Ce sont des résolutions qui font des déterminations sur des situations pour lesquelles l'Assemblée a des compétences spécifiques et qui sont directement opérationnelles[70]. C'est dans ce sens que votre Cour a parlé des «pouvoirs» de l'Assemblée générale en matière de décolonisation[71]. On est là dans une situation semblable aux résolutions de l'Assemblée admettant un nouveau membre à l'Organisation. On ne peut pas dire que ces résolutions sont des «recommandations». Elles ont comme résultat, dans un

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[68] Nations Unies, *Assemblée générale, vingt-cinquième* session, Déclaration relative aux principes de droit international touchant les relations amicales et la coopération entre Etats, conformément à la Charte des Nations Unies, doc. A/RES/2625 (XXV) du 24 octobre 1970 ; les italiques sont de nous.

[69] *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996*, p. 254-255, par. 70.

[70] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 50, par. 105.

[71] *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 24, par. 30.

cas, que la qualification de territoire non autonome est applicable, avec les conséquences qui en découlent, ou dans l'autre, qu'un Etat est devenu membre de l'Organisation.

10. Je vais donc examiner tout d'abord la résolution 1514 (XV), qui interprète les deux principes fondamentaux pertinents en matière de décolonisation déjà mentionnés dans la Charte, à savoir le droit des peuples à disposer d'eux-mêmes et le respect de l'intégrité territoriale. Je vais me référer ultérieurement aux trois autres résolutions mentionnées par la question *a)* et qui ont trait à la situation de Maurice en particulier.

B. La résolution 1514 (XV) interprète et applique des droits existants

11. Mesdames et Messieurs de la Cour, après votre examen de l'importance de la résolution 1514 dans les avis consultatifs de 1971 et 1975[72], il est étonnant de voir aujourd'hui des Etats prétendant que cette résolution et ses références à l'autodétermination et à l'intégrité territoriale ne reflétaient pas le droit en vigueur dans les années 1960.

12. Le droit de la décolonisation s'est forgé à partir de la Charte, en particulier du paragraphe 2 de l'article premier et du chapitre XI. C'est au cours des quinze années qui ont suivi l'année 1945 que le corpus a pris forme. Comme le disait Michel Virally en 1963 déjà, «[u]n chapitre XI *bis*, parallèle au chapitre XIII, a été appliqué en fait et même rédigé sous forme de résolutions de l'Assemblée générale»[73]. La résolution 1514 est le point d'aboutissement de ce processus. Sans aucun fondement, certains Etats ont avancé que cette résolution n'avait pas de portée juridique et qu'elle n'était que l'expression d'une simple aspiration politique[74].

13. Mesdames et Messieurs de la Cour, il suffit de lire le texte de la résolution pour l'interpréter dans toute sa clarté. On y condamne le colonialisme comme *contraire à la Charte*. On y parle du *droit* à l'autodétermination. On y affirme que la rupture de l'intégrité territoriale est *incompatible avec les buts et les principes de la Charte*. Cette terminologie ne permet pas d'interprétations divergentes. C'est une terminologie juridique claire qui évoque des droits et des

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[72] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 31, par. 52 ; *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 32, par. 56-57.

[73] Michel Virally, «Droit international et décolonisation devant les Nations Unies», *Annuaire français de droit international*, 1963, vol. IX, p. 526.

[74] OéGB, par. 4.20 ; OéUS, par. 3.28.

comportements qui seraient illicites car contraires, ni plus ni moins, à la Charte des Nations Unies[75].

14. Enfin, Monsieur le président, votre Cour a déjà par le passé appliqué la résolution 1514 et, pour autant que je sache, selon le paragraphe 1 de l'article 38 du Statut, vous appliquez le droit international tant dans votre compétence contentieuse que consultative[76].

15. Je renvoie également à notre examen des positions adoptées par la puissance administrante concernée lors du vote de la résolution et qui démontrent l'absence d'objection de sa part au contenu normatif de celle-ci[77].

a) **Le principe du respect de l'intégrité territoriale contenu dans le paragraphe 6**

16. Je passe maintenant à l'analyse du principe du respect de l'intégrité territoriale et au contenu du paragraphe 6 de la résolution 1514. Le Royaume-Uni reconnaît que l'intégrité territoriale est un principe fondamental du droit international, mais remet en question son application aux territoires non autonomes[78].

17. La puissance administrante considère que le paragraphe 6 de la résolution 1514 ne reflète pas l'état du droit coutumier. Pour justifier cette position, elle invoque des articles de doctrine qui analysent les travaux préparatoires et d'autres situations territoriales sans pertinence pour le cas d'espèce[79]. Pourtant, le texte du paragraphe 6 est dépourvu d'ambiguïté : «Toute tentative visant à détruire partiellement ou totalement l'unité nationale et l'intégrité territoriale d'un pays est *incompatible avec les buts et les principes de la Charte des Nations Unies.*»[80]

18. Monsieur le président, je pose la question suivante : peut-on douter qu'un comportement *incompatible* avec les buts et principes énumérés aux articles premier et 2 de la Charte soit *contraire au droit international* ?

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[75] Voir OéAR, par. 26.

[76] Voir *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 68, par. 162.

[77] OéAR, par. 29-30.

[78] OéGB, par. 4.29.

[79] OéGB, par. 4.35-4.58. Voir OéAR, par. 31-49.

[80] Nations Unies, *Assemblée générale, quinzième session*, Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, doc. A/RES/1514 (XV) du 14 décembre 1960 ; les italiques sont de nous.

19. La résolution 2625 (XXV) réitère l'existence d'une obligation internationale à cet égard : «Tout Etat doit s'abstenir de toute action visant à rompre partiellement ou totalement l'unité nationale et l'intégrité territoriale d'un autre Etat ou d'un autre pays.»

20. Il n'est pas contesté qu'une action coloniale qui porte atteinte à l'intégrité territoriale d'un Etat est contraire au droit international. La référence non seulement aux Etats, mais aussi aux *pays* dans les deux résolutions mentionnées dissipe tout doute quant à l'application du principe également aux territoires non étatiques soumis à décolonisation.

***b)* Le droit des peuples à disposer d'eux-mêmes existait dans les années 1960**

21. Monsieur le président, pour des raisons de temps, je ne m'appesantirai pas sur le caractère juridique de l'autodétermination dans les années 1960[81]. Je me contenterai de rappeler ici que le fait que l'Assemblée générale n'ait pas appliqué le principe d'autodétermination à toutes les populations des territoires non autonomes ne remet nullement en question la valeur juridique du principe. Votre Cour l'a déjà expliqué avec clarté :

> «La validité du principe d'autodétermination, défini comme répondant à la nécessité de respecter la volonté librement exprimée des peuples, n'est pas diminuée par le fait que dans certains cas l'Assemblée générale n'a pas cru devoir exiger la consultation des habitants de tel ou tel territoire. Ces exceptions s'expliquent soit par la considération qu'une certaine population ne constituait pas un «peuple» pouvant prétendre à disposer de lui-même, soit par la conviction qu'une consultation eût été sans nécessité aucune, en raison de circonstances spéciales.»[82]

22. Dans le cas qui nous concerne, l'existence d'un peuple mauricien comprenant l'ensemble des habitants du territoire non autonome, tel que reconnu par l'Assemblée générale en 1965, n'est pas en débat. Il n'y a non plus aucun différend sur la souveraineté des Chagos entre la puissance coloniale et un autre Etat.

23. Qui plus est, décolonisation et autodétermination sont deux termes qui ne sont pas identiques. Pour cette raison, la prétention de certains participants selon laquelle l'autodétermination n'était pas un droit dans les années 1960, en plus d'être infondée, est même sans pertinence dans le cas d'espèce. Il y a obligation de décoloniser, même si le principe d'autodétermination n'est pas applicable, comme l'extrait de votre avis consultatif de 1975 que je

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[81] Voir OéAR, par. 50-54.

[82] *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 33, par. 59.

viens de mentionner le démontre. L'on en veut pour preuve supplémentaire le fait que des territoires inhabités peuvent aussi faire partie de la liste des territoires non autonomes à décoloniser, ou faire partie d'un territoire non autonome. Il suffit de rappeler la résolution 1542 (XV) de l'Assemblée générale, qui considéra une colonie portugaise sans population, São João Batista de Ajudá, comme tombant sous le coup du chapitre XI et donc soumise à décolonisation[83]. Je ne compte pas comme population les deux fonctionnaires lusitaniens qui gardaient la place au moment de sa réintégration par le Dahomey, aujourd'hui le Bénin.

24. Le Gouvernement britannique prétend que, même si l'autodétermination était applicable, elle concernerait le statut politique ou le développement économique, social et culturel du peuple, et non l'intégrité de la «totalité du territoire où le peuple réside»[84] — ce sont ses mots. C'est une curieuse manière de mettre au rabais tant l'intégrité territoriale que l'autodétermination. Si l'on suit la puissance administrante, elle pourrait concentrer toute la population sur une partie du territoire colonial, lui permettant de déclarer l'indépendance uniquement sur cette portion, tout en gardant le reste du territoire pour elle.

25. Monsieur le président, ce n'est pas en privant les peuples de leurs territoires qu'on applique l'autodétermination. Le droit des peuples à disposer d'eux-mêmes a une dimension spatiale. Dans le cas qui nous occupe, nous sommes en présence d'une atteinte à l'intégrité territoriale du peuple mauricien et, par voie de conséquence, de son droit à disposer de lui-même.

26. Donc, même en supposant que l'autodétermination n'était pas un droit dans les années 1960, le résultat ne serait pas celui de donner à la puissance administrante le droit de garder sous sa domination une partie du territoire colonial. Au fond, Mesdames et Messieurs les juges, l'élément capital aux fins de cette procédure consultative est le suivant : ce n'est pas la puissance administrante qui décide unilatéralement du sort d'un territoire non autonome. Déjà dans sa résolution 742 de 1953, en dressant la liste des facteurs à prendre en considération pour savoir si un territoire est non autonome ou pas et si donc il existe l'obligation de fournir les renseignements prévus au chapitre XI de la Charte, l'Assemblée générale affirmait au paragraphe 3 que *c'est elle*

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[83] Nations Unies, *Assemblée générale, quinzième session*, Communication de renseignements au titre de l'alinéa *e)* de l'Article 73 de la Charte, par. 4.18, doc. A/RES/1542 (XV) du 15 décembre 1960.

[84] OéGB, par. 4.18.

qui décide de la question[85]. Cela a donc toujours était l'idée de base en la matière, et ce, *bien avant* la séparation de l'archipel des Chagos.

27. Que ce soit l'Assemblée générale qui décide est aussi une solution qui relève de la logique pure . S'il revenait aux Etats de décider unilatéralement de la question, cela aurait été chose aisée de se dérober de ses obligations envers l'Organisation. Il leur aurait suffi pour ce faire d'affirmer tout simplement que les territoires en cause ne sont pas «non autonomes». Le Portugal a essayé cette voie au début des années 1960 et l'Assemblée générale a réagi vigoureusement en dressant la liste des territoires coloniaux portugais[86]. Elle en fit de même avec la Rhodésie du Sud en 1962, la déclarant territoire non autonome, en dépit de la position de la puissance administrante[87].

28. Comme le disait le professeur Michel Virally en 1963 : «la force de l'Assemblée générale est venue de ce que le chapitre XI avait conféré aux territoires non autonomes un statut international, comportant une prestation positive à l'égard de l'Organisation, à partir de quoi cette dernière a pu instituer un système de contrôle»[88].

C. La séparation des Chagos s'est faite en violation du droit international

29. Mesdames et Messieurs de la Cour, une fois précisé le contenu du droit applicable à la décolonisation, il devient aisé de constater que le Royaume-Uni n'a pas agi conformément au droit international en détachant l'archipel des Chagos. Il s'agit donc d'une mesure unilatérale de la puissance administrante sans obtention du *quitus* de l'Assemblée générale, mesure qui porte atteinte à la fois à l'intégrité territoriale et au droit du peuple mauricien à disposer de lui-même.

30. Je vais brièvement commenter trois autres arguments avancés pour prétendre justifier la séparation des Chagos. Le Royaume-Uni invoque comme éléments importants la distance qui sépare l'archipel des Chagos de l'île principale et le fait que son rattachement aurait été fait pour

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[85] Nations Unies, *Assemblée générale, huitième session*, Facteurs dont il convient de tenir compte pour décider si un territoire est, ou n'est pas, un territoire dont les populations ne s'administrent pas encore complètement elles-mêmes, doc. A/RES/742 (VIII) du 27 novembre 1953.

[86] Nations Unies, *Assemblée générale, quinzième* session, Communication de renseignements au titre de l'alinéa *e)* de l'Article 73 de la Charte, doc. A/RES/1542 (XV) du18 décembre 1960.

[87] Nations Unies, *Assemblée générale, seizième session*, Question de la Rhodésie du Sud, doc. A/RES/1747 (XV) du 28 juin 1962.

[88] Michel Virally, *op. cit.*, p. 518.

des raisons de convenance[89]. Ces considérations géographiques ou administratives internes n'ont pas de conséquences en droit international, du moment que toutes les îles ou groupes d'îles sont considérés comme faisant partie d'une même unité territoriale bénéficiant d'un seul et même statut juridique. Ainsi fut le cas de l'archipel des Chagos, considéré comme faisant partie du territoire non autonome de Maurice aux fins de la décolonisation[90].

31. Certains participants ont avancé aussi le fait que l'Assemblée générale ne s'est pas prononcée sur la question de l'archipel des Chagos depuis des décennies[91]. Cela ne change pas la situation. L'Assemblée générale n'a pas entériné la séparation. Dans l'exercice de ses compétences, elle peut agir quand cela lui paraît opportun. Tel est le cas maintenant, préoccupée qu'elle est pour la fin du processus de décolonisation. Il suffit de lire le contenu de la résolution A/RES/71/292 demandant l'avis consultatif pour s'en apercevoir. Ce que l'Assemblée générale fera une fois l'avis consultatif rendu est une question relevant exclusivement de son ressort.

32. Enfin, la puissance administrante prétend justifier son comportement par l'existence d'un prétendu consentement des dirigeants mauriciens avant l'indépendance ou de la République de Maurice après celle-ci[92]. Dans l'affaire des *Phosphates à Nauru*, votre Cour a déjà mis en doute l'opposabilité à l'Etat d'une renonciation éventuellement opérée par des autorités locales avant l'indépendance[93]. La République de Maurice a par ailleurs expliqué les conditions dans lesquelles ces négociations ont été conduites et qui rendent inconcevable toute possibilité d'un consentement opposable valant renonciation[94].

33. Contrairement à ce que nous avons entendu hier, la sentence arbitrale sur l'*Aire marine protégée autour des Chagos* ne s'est pas prononcée sur la question de la décolonisation. Le Tribunal arbitral a uniquement traité des engagements britanniques à l'égard de Maurice formulés à

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[89] EéGB, par. 2.2 et 2.12-2.17, OéGB, par. 2.5-2.11.

[90] Nations Unies, doc. A/5800/Add.6, *in* doc. A/5800/Rev.1, Application de la Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, rapport du Comité spécial chargé d'étudier la situation en ce qui concerne l'application de la Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, annexe 8 (première partie), p. 353.

[91] OéUS, par. 2.12, troisième point et par. 2.23 ; OéGB, par. 3.18 *b)* et par. 3.21 *b)*.

[92] EéGB, par. 3.7-3.37, OéGB, par. 4.8-4.14.

[93] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 247, par. 13.

[94] Voir l'exposé écrit de Maurice (EéMU), par. 3.39-3.90 et 4.4-4.16 et ses observations écrites (OéMU), par. 3.78-3.106.

Lancaster House et relatifs aux espaces maritimes, comme la pêche, pas sur le prétendu consentement de Maurice à la séparation de l'archipel[95].

34. Quant au seul véritable accord international conclu entre Maurice et le Royaume-Uni touchant indirectement à la question, celui de 1982, il n'a aucune incidence sur la question de la licéité de la séparation de l'archipel. En effet, il concernait uniquement les modalités d'un paiement *ex gratia* à des particuliers afin d'éviter des réclamations individuelles[96].

35. Quoi qu'il en soit, Mesdames et Messieurs les juges, il n'est pas nécessaire d'examiner ces comportements aux fins de la présente procédure consultative. Ce qui est déterminant ici est le fait que, malgré ces négociations et leurs prétendus résultats, l'Assemblée générale adopta entre 1965 et 1967 les résolutions 2066 (XX), 2232 (XXI) et 2357 (XXII), dans lesquelles elle considéra que la séparation de certaines îles serait une violation de l'intégrité territoriale de Maurice, contraire au paragraphe 6 de la résolution 1514.

36. Monsieur le président, Mesdames et Messieurs les juges, les trois résolutions mentionnées qui se réfèrent explicitement à Maurice ont fait des déterminations claires quant au besoin de ne pas porter atteinte à l'intégrité territoriale de Maurice. Les exhortations de l'Assemblée générale n'ont pas été entendues par la puissance administrante, laquelle a procédé unilatéralement à la séparation des Chagos. Il s'ensuit que cette séparation ne s'est pas opérée conformément au droit international et, par conséquent, que la décolonisation de Maurice n'a pas été menée à bien.

37. Quant à la question *b)*, l'Argentine vous prie respectueusement de prendre en considération les éléments de réponse formulés dans son exposé écrit, tant par rapport aux conséquences juridiques pour la puissance administrante, que pour Maurice, pour les autres Etats et pour les Nations Unies[97]. Le fait qu'il s'agisse là d'un avis consultatif n'empêche pas la Cour

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[95] Voir *The Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, sentence arbitrale du 18 mars 2015, par. 448 ; OéMU, par. 2-71-73 et 3.81-3.85.

[96] Voir OéAR, par. 61-63.

[97] Voir OéAR, par. 67-68.

d'établir, dans le domaine qui fait l'objet de la demande d'avis, que la conduite d'un Etat est illicite. Les exemples de votre jurisprudence sont bien connus[98].

38. Au fond, Mesdames et Messieurs de la Cour, la question se résume à savoir si la puissance administrante a le droit de décider de maintenir un territoire soumis à décolonisation sous son contrôle, ou bien si l'organe, qui durant toute l'histoire des Nations Unies a surveillé le processus de décolonisation, doit décider si, quand et comment chacun des territoires non autonomes a cessé d'en être un.

39. Vos réponses permettront, pour reprendre vos mots, que «l'Assemblée générale exerce ses pouvoirs pour s'occuper de la décolonisation d'un territoire non autonome»[99]. Elles devraient également guider les parties les plus intéressées ainsi que d'autres quant au comportement à suivre pour mener à bien l'objectif de démantèlement de tous les vestiges du colonialisme, sous toutes ses formes et manifestations, et ce, le plus rapidement possible.

40. Cela conclut l'exposé oral de l'Argentine. Mesdames et Messieurs de la Cour, nous vous remercions de votre attention.

The PRESIDENT: I thank the delegation of Argentina for its statement. I now call upon the delegation of Australia. The first speaker is Mr. Campbell. You have the floor, Sir.

Mr. CAMPBELL:

Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is a privilege to appear before you again on behalf of the Government of Australia.

2. Mr. President, I will be addressing the Court on the matter of its jurisdiction or rather, as we would contend, its lack of the jurisdiction necessary to render an advisory opinion in this case. I will be followed by the ***Solicitor-General*** of Australia who will be addressing the discretion of

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[98] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 58, par. 133 (dispositif) ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004 (I)*, p. 201-202, par. 163 (dispositif).

[99] *Sahara occidental, avis consultatif, C.I.J. Recueil 1975*, p. 24, par. 30.

the Court to decline to render an advisory opinion in the event that it finds that it does have the jurisdiction to render such an opinion.

3. As noted in our Written Statement of 27 February 2018, Australia will not be addressing the substance of the questions referred to the Court by the United Nations General Assembly in its resolution 71/292 of 22 June 2017. And this flows from our position that the Court cannot, and in any event should not, render an advisory opinion in this case, particularly given the undesirable precedent that it would create if it were to do so.

Jurisdiction

4. Mr. President, Members of the Court, Australia would wish to place on record the value it places on its relationships with its fellow Commonwealth countries, Mauritius and the United Kingdom. However, as noted yesterday by both of those States, the existence of a dispute between them concerning sovereignty over the Chagos Archipelago, as well as over certain related matters, is not a matter of doubt.

5. But clearly that dispute is not subject to the contentious jurisdiction of this Court given the content of the optional clause declarations lodged by the United Kingdom and Mauritius. The matter I will be addressing is whether the questions drafted by Mauritius and referred by the United Nations General Assembly to this Court are within its jurisdiction to answer by way of an advisory opinion. This is a matter which precedes, and must be decided before, consideration of the Court's discretion to give or not to give an advisory opinion.

6. Mauritius and a small number of other States and the African Union have either noted or contested the submission of Australia that this Court lacks jurisdiction to respond to the questions set out in resolution 71/292. That submission of Australia, upon which we continue to rely, is set out in paragraphs 17 to 25 of our Written Statement. Before responding to the comments of Mauritius, such as they are, on Australia's submissions on jurisdiction, let me summarize the essence of those submissions.

7. Article 65, paragraph 1, of the ICJ Statute establishes the power of the Court to give an advisory opinion on any "legal question" at the request of certain bodies, including the

United Nations General Assembly[100]. Article 65, paragraph 2, of the Statute mandates that the Court be provided with "a written request containing an exact statement of the question upon which an opinion is required".

8. The "legal questions" that have been referred to the Court in this case do not raise — and, in fact, obscure — the real issue of international law with respect to the Chagos Archipelago on which the Court's opinion is sought. While the referred questions ostensibly concern decolonization, their true purpose and effect is to seek the Court's adjudication over a question of sovereignty. This true purpose and effect is confirmed in recent statements made by or on behalf of Mauritius, some of which I will mention later. A request for an advisory opinion that contains questions ostensibly relating to one matter, but in fact relating to a different matter, falls outside the jurisdiction of this Court because there is no "exact statement" within the meaning of Article 65, paragraph 2, of the real "legal question" upon which the opinion of the Court is sought.

9. As was further demonstrated yesterday, the response of Mauritius to Australia's submission on jurisdiction has consistently been dismissive rather than substantive in both its tone and content. It has failed entirely to address a key element of our argument, that being the requirement under Article 65, paragraph 2, for an exact statement of the question upon which an opinion is sought.

10. Mauritius reproaches Australia for allegedly reading "into the General Assembly's questions its own, subjective understanding as to the 'real issues' presented in the request, and [of accusing] the General Assembly of disingenuousness by submitting to the Court a 'proxy' for its 'true' questions"[101]. Mauritius also asserts that Australia's position "conveys doubt about the General Assembly's good faith"[102].

11. Mr. President, the first point to be made by way of response is that the lack of candour in the two questions is sourced in Mauritius itself, as it was Mauritius which drafted the questions that were subsequently adopted unchanged by the General Assembly in resolution 71/292. Mauritius now seeks to evade that fact by stating that Australia has cast a slight on the good faith of the

[100] Art. 96 of the United Nations Charter authorizes the General Assembly to request an advisory opinion from the Court "on any legal question".

[101] Written Comments of the Republic of Mauritius (CoMU), Vol. I, 15 May 2018, para. 2.22.

[102] CoMU, Vol. I, para. 2.2.

General Assembly. Australia has not. Moreover, even if the content of the questions is taken to express the position of those in the General Assembly voting for the resolution, it cannot be said that actions of the General Assembly are always beyond question. The existence of preconditions in Article 65 of the ICJ Statute means that this Court must, where necessary, inquire into whether those preconditions are met. It cannot abdicate that function to the General Assembly. Moreover, Members of this Court have questioned the actions of the General Assembly in the past. For example, Judge Higgins in the *Wall* case noted that:

> "The request [of the General Assembly] is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of our Opinion, to exercise powers over the dispute or controversy."[103]

12. In its Advisory Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*[104], this Court said that "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions *really in issue* in questions formulated in a request". In order to ascertain that the "real issue" at stake in this Request concerns sovereignty over the Chagos Archipelago, the Court need only turn to the submission of Mauritius that the answering of the questions by the Court will resolve that issue of sovereignty one way or the other. For example, at paragraph 2.47 of its Written Comments, Mauritius states:

> "sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonisation issue. There is no basis for a separate consideration or determination of any question of the territorial sovereignty."[105]

13. That sovereignty is the real issue at the heart of the questions is confirmed also by the statements made by and on behalf of Mauritius after moves were made to bring the Request for an advisory opinion before the General Assembly. For example, the Written Statement of the United Kingdom refers to the following exchange:

> "On 22 September 2016, in a conversation between Mauritian Prime Minister Jugnauth and the United Kingdom Foreign Secretary Johnson (once the item concerning an advisory opinion had been added to the UN General Assembly agenda),

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[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 210, para. 12; sep. op. of Judge Higgins.

[104] *I.C.J. Reports 1980*, p. 88, para. 35; emphasis added.

[105] See also CoMU, Vol. I, para. 2.17.

> Prime Minister Jugnauth stated that he would be frank: 'the question was sovereignty'."[106]

14. Similarly, a press release issued by the Government of Mauritius on 31 October 2017 refers to a meeting between the Prime Minister of Mauritius and the Chairman and Leader of the Chagos Refugees Group, Mr. Louis Olivier Bancoult, as being "focused on joint efforts being undertaken at the International Court of Justice for Mauritius to effectively exercise its sovereignty over the Chagos Archipelago"[107].

15. Mauritius also states that "records of discussions leading up to the decision to request an advisory opinion indicate that the purpose was to obtain the Court's opinion in order to assist the General Assembly in exercising its functions relating to decolonization under the United Nations Charter, and not for any other reason" and that "it is not for Australia to substitute its views for those of others"[108]. Mauritius supports this statement by referring to the statements made in the course of the United Nations General Assembly debate by the Republic of the Congo on behalf of the African Union, Mauritius itself, Venezuela on behalf of the Non-Aligned Movement, Angola, India, Kenya and Brazil[109].

16. What Mauritius fails to mention is the statements made by a significant number of other States in the course of that debate, which noted that the matter concerned a bilateral dispute, which should be resolved other than by the seeking an advisory opinion. Those statements by the United Kingdom, the United States of America, Croatia, France, Australia, Germany, New Zealand, Sweden, Canada, Israel and Myanmar were made either before the adoption of the resolution or by way of explanation after a vote had been taken[110]. Indeed, even one of the statements highlighted by Mauritius, being that of the Congo on behalf of the African Union, stated that the seeking of an advisory opinion had been initiated by the African States "to allow a State member of both the African Union and the United Nations to exercise its full sovereignty over the Chagos Archipelago"[111].

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[106] StGB, para. 5.16 *(a)*.

[107] StAUS, Ann. 3.

[108] CoMU, Vol. I, para. 2.23.

[109] *Ibid.* See also StMU, Vol. I, para. 1.20-1.26.

[110] UN doc. A/71/PV.88 (22 June 2017); UN dossier No.6.

[111] *Ibid.*, p. 5.

17. In summary, Mr. President and Members of the Court, there is no doubt whatsoever that the real issue sought to be resolved through the questions drafted by Mauritius, and adopted and forwarded to this Court by the General Assembly, concerns sovereignty over the Chagos Archipelago. That being so, it cannot be said that the questions posed by the General Assembly meet the requirement under Article 65, paragraph 2, that they contain an exact statement of the legal question upon which the opinion of the Court is sought. With all due respect, it follows that this Court lacks jurisdiction to render such an opinion.

18. Mr. President, Members of the Court, I thank you for your attention and give the floor to the ***Solicitor-General*** of Australia, Dr. Donaghue.

Mr. DONAGHUE:

Introduction

1. Mr. President, Madam Vice-President, distinguished Members of the Court, it is a great honour to appear before you today on behalf of the Government of Australia.

2. I will be addressing Australia's argument that the Court should decline to furnish an advisory opinion in this case on grounds of judicial propriety. This issue of course arises only if, contrary to the arguments Mr. Campbell has just advanced, the Court finds that it does have jurisdiction.

3. Australia recognizes that when the General Assembly requests the Court to give an advisory opinion, it is natural that the Court start from an assumption that the opinion should be provided**.** ***B***ut, like the submissions made by Germany this morning, we emphasize the fundamental underlying issue raised by this matter, which is of significance far beyond the specific issues involving the Chagos Archipelago concerning the way that the Court exercises its advisory role when asked to do so**.**

4. There are, we submit, a number of reasons why judicial propriety might require the Court to exercise its undoubted discretion to decline to provide an advisory opinion. The clearest, and the most important, such reason is where to provide an opinion would circumvent the fundamental requirement that the Court cannot decide the substance of a dispute involving a State without the

consent of that State[112]. That fundamental requirement applies whether the Court is exercising its contentious or its advisory jurisdiction. Australia submits that it applies in this case. Indeed, if the discretion to decline to provide an advisory opinion is not exercised in this case, it is hard to envisage any case where it *would* be exercised. In practice, the discretion — which all of the States appearing in this matter accept exists — will be stripped of any meaningful content.

5. We say that because this is a case where Mauritius has previously attempted to bring its claim over the Chagos Archipelago before the Court, but the United Kingdom has not consented to that occurring[113]. Mauritius has also sought to have that claim determined in other contentious proceedings, the findings of which it now seeks to side-step through the advisory processes of this Court. Those matters highlight that the request now before the Court involves a challenge to the requirement of consent of the starkest kind, because, despite its failure to secure the result it seeks in contentious proceedings, Mauritius now expressly says that the effect of answering the questions posed by the General Assembly will be to determine that *it*, rather than the United Kingdom, has sovereignty over the Chagos Archipelago.

6. In those circumstances, if this Court provides the advisory opinion sought, that will demonstrate that it is possible to circumvent the requirement of consent simply by securing majority support for a resolution in the General Assembly (which may, as this case demonstrates, be supported by less than half of the States represented in the General Assembly). That, we submit, would pose a serious threat to the authority of the Court, for it would allow the Court to be drawn into protracted or notorious disputes for which there is no agreed forum[114], and where its non-binding advisory opinions might be ignored by States on the grounds that they have never consented to the judicial resolution of those disputes.

7. Mr. President, Members of the Court, while an advisory opinion can be sought if there is majority support for that course in one of the political organs of the United Nations, Australia

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[112] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975, pp.* 22, 24-25, paras. 25, 32-33, referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, para. 71. See also Aust, *Handbook of International* Law (Cambridge University Press (CUP), 2nd ed., 2010), p. 396; Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press (OUP), 8th ed., 2012), p. 718; Shaw, *International Law* (CUP, 7th ed., 2014), p. 733.

[113] StGB, para. 7.13, particularly at *(d)* and *(e)*.

[114] See StGB, para. 7.9; StUS, para. 3.31.

emphasizes that once such an opinion has been sought, numbers cease to be relevant. We make that point because of the constant references yesterday, by many of the speakers on behalf of Mauritius, to the number of States that have advanced, or that support, particular submissions. Arguments were dismissed by Mauritius on the basis that only a few States had advanced them. Those submissions are, we think, ~~***are***~~ hard to understand, for this Court is a court of law. It has a long and proud history of deciding cases according to law. Its hearings are not a popularity contest. The merits of a legal argument do not depend on how many States advance that argument. They depend on the force of the legal analysis that is advanced. It is no substitute for that analysis to say, for example, that only six States contend that the Court should exercise its discretion to decline the opinion sought in this case, whilst many more contend that the question should be answered. Those numbers are simply irrelevant for a body that decides matters according to law, and Mauritius should not have implied otherwise. We, of course, are confident that this Court will resolve the matter, applying the applicable legal principles, and we submit that, here, those principles are very clear.

8. While, as I will show, the applicable principles pre-date the *Western Sahara* case, the proper approach was well captured in that case, where the Court said as follows:

> "the lack of consent of an interested State may render the giving of an advisory opinion *incompatible with the Court's judicial character*. An instance of this would be when the circumstances disclose that to give a reply would have the effect [which we say means the practical effect] of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[115]

9. That statement of principle fits this case precisely. Why do I say that? For the simple reason that it could not be clearer that there is a bilateral dispute between the United Kingdom and Mauritius on matters relating to sovereignty of the Chagos Archipelago and that the United Kingdom has not consented to the resolution of that dispute in this Court. The existence of the dispute was frankly acknowledged by Mauritius yesterday in its oral submissions, and it is also acknowledged in most of the written statements before the Court, including those of Mauritius[116]

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[115] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras. 32-33; emphasis added.

[116] See, for example, CoMU, para. 2.14 (arguing that the matter is not a bilateral dispute over territorial sovereignty), para. 2.30 (arguing that the matter is not a purely bilateral dispute), and para. 2.31 (acknowledging that there is a bilateral aspect).

and the African Union[117]. It was, we think, impossible to listen to the oral submissions yesterday without appreciating the depth and the breadth of that bilateral dispute, which has its core in the dispute between the United Kingdom and Mauritius concerning the validity of the consent to the separation of the Chagos Archipelago embodied in the 1965 Agreement. The validity of that agreement is the logical predicate to any consideration of whether the decolonization of Mauritius is complete, and is therefore integral to the advisory opinion that the Court has been asked give. To provide an opinion in those circumstances would provide the clearest imaginable example of the circumvention of the requirement of consent of which the Court spoke in *Western Sahara*.

10. Mr. President, Members of the Court, given that the existence of the bilateral dispute cannot be denied, Mauritius and others seek to marginalize the significance of that dispute by contending that it is not a "*purely* bilateral dispute"[118]. But that raises a false issue. The requirement of consent applies to the settlement of *any* dispute to which a State is a party, whether or not the dispute is "*purely* bilateral", and irrespective of the importance of the legal norms that are at issue in the bilateral dispute (including, in particular, whether those norms are owed *erga omnes* — a point to which I shall return). We submit that it is an error to equate the question of whether there is a "bilateral dispute" with the different question — which I will address shortly — of whether a request for an advisory opinion is made in a "broader frame of reference" than a bilateral dispute.

11. The fact is that Mauritius, and many of the States that support it, urge the Court to furnish its opinion *despite* their concession that there is a bilateral dispute. They rely on the *Western Sahara* and *Wall* cases in contending that the Court should take that course. But while relying on those cases in general terms, Mauritius avoids the detail, preferring to assert in a rather sweeping fashion that the arguments advanced are like a "broken record", repeatedly advanced and always rejected. That submission invites the Court to gloss over the serious discretionary issue that it now confronts, being an issue that arises directly from the Court's own jurisprudence, including the cases on which Mauritius relies. I will examine those cases shortly, for the purpose of demonstrating that they *actually* indicate that the Court should decline to furnish an opinion in this

[117] Written Comments of the African Union (CoAU), paras. 54, 72-74. Other States which recognize this fact in their written comments include Nicaragua (CoNI), para. 16 and Serbia (CoRS), para. 4.

[118] CoMU, para. 2.29 (summarizing the submissions of other States) and 2.30, 2.47, 2.50 (its own submission).

case. But before coming to those cases, it is useful to begin with the decision of the Permanent Court of International Justice in the *Status of Eastern Carelia*, both because that case establishes the foundational principles, and also because it has been misrepresented in a number of the written statements to the Court[119].

Status of Eastern Carelia

12. The Court will recall in *Eastern Carelia*, the Permanent Court took the course that Australia submits should be taken in this case, in that it declined to provide the advisory opinion sought of it because to do so would have required it to address a bilateral dispute in circumstances where one of the parties to the dispute did not consent.

13. The Court took that course notwithstanding that the question it was asked was framed in a way that attempted to sidestep the bilateral dispute. The question the Court was asked was whether two articles of a 1920 Treaty of Peace between Finland and Russia constituted binding engagements under international law. But that question did not capture the real issue because, as the Court pointed out, there was not, and never had been, any question between the two countries as to the obligatory force of that Treaty[120]. The real dispute concerned the binding status of a separate declaration made by Russia at the time of signing the Treaty. However, the Permanent Court did not allow the form of the question to obscure the fact that the advisory opinion sought concerned a bilateral dispute. It observed: "The submission . . . of a dispute between [Russia] and a Member of the League . . . could take place only by virtue of [Russia's] consent. Such consent . . . has never been given . . . The Court therefore finds it impossible to give its opinion on a dispute of this kind."[121]

14. In saying that, the Court expressly recognized that it had not been asked to decide the dispute between Finland and Russia, but instead to give an advisory opinion. But crucially, in the Court's analysis, that did not change the significance of the lack of consent, because the Court focused on the substance, rather than on matters of form. As it explained:

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[119] See StMU, pp. 173-174, para. 543, and CoAU, para. 106.

[120] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 22.

[121] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series. B, No. 5*, pp. 27-28.

> "The question put to the Court . . . concerns directly the main point of the controversy between [two States] . . . *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." [122]

15. Australia submits that the principle stated in *Eastern Carelia* is directly applicable in this case, because answering the question referred by the General Assembly "would be substantially equivalent to deciding the dispute" between the United Kingdom and Mauritius. Mauritius, in fact, makes no real effort to conceal that fact, stating in paragraph 2.47 of its Written Comments that "sovereignty over the Chagos Archipelago is *predicated on, and fully disposed of by*, the Court's determination of the decolonisation issue"[123]. In other words, Mauritius expressly submits that the advisory opinion that the Court has been asked to give will fully resolve the question of territorial sovereignty.

16. In those circumstances, the written submission by Mauritius that no "*other* question of title to territory arises" is not to the point[124]. Just as the Permanent Court declined to furnish the opinion sought of it in *Eastern Carelia*, judicial propriety requires the Court to decline to furnish an advisory opinion here, because otherwise it will decide a question of territorial sovereignty without the consent of a State party directly affected by that decision.

17. In the written submissions and comments, two submissions have been made in an effort to distinguish *Eastern Carelia.*

18. First, the African Union submits that it can be distinguished because the basis for decision was the "incompetence of the Council [of the League] to deal with the question"[125]. Australia respectfully submits that that argument cannot be accepted, because it is contrary to the reasoning in the Judgment. Indeed, in the concluding paragraph of the Judgment**,** the Court recognizes the competence of the Council to deal with the dispute, noting that the "Council has spared no pains in exploring every avenue which might possibly lead . . . to setting a dispute". The African Union also takes out of context the Court's statement that it was "unnecessary" to deal with the issue whether the consent of the parties was required where an advisory opinion was sought

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[122] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series. B, No. 5*, pp. 28-29; emphasis added.

[123] See also CoMU, Vol. I, para. 2.47.

[124] *Ibid*., para. 2.17; emphasis added.

[125] CoAU, para. 106.

with respect to the "subject of a *pending* dispute"[126]. That was unnecessary because, as the next paragraph of the Judgment makes clear, not because the Council was incompetent to deal with the dispute, but because the advisory opinion sought in that case related to an "*actual* dispute", not merely a "pending" one.

19. Second, Mauritius contends that *Eastern Carelia* can be distinguished on a different basis, being that Russia was not a member of the League of Nations[127]. While suggestions have previously been made to that effect, Australia submits that it is a misreading of the decision to confine it in that way[128].

20. Mr. President, Members of the Court, under the League of Nations system, a State's consent to the jurisdiction of the Permanent Court could take two forms. *First*, all of the Members of the League accepted the obligations imposed by the Covenant of the League for the pacific settlement of disputes[129]. *Second*, under Article 17 of the Covenant, non-Members could accept the jurisdiction of the Court on an *ad hoc* basis in respect of particular disputes.

21. Those two pathways are clearly identified on page 27 of the report. And the analysis on that page reveals that Russia's non-membership of the League was significant *only* because it meant that Russia had not accepted the jurisdiction of the Court by the first of the two routes just identified. But the Permanent Court expressly pointed out that the second route *was* available, as it was open to Russia to consent to the Court resolving the dispute despite the fact that it was not a Member of the League. Russia's position was therefore precisely analogous to that of ~~***the***~~ ***a*** Member of the United Nations that either has not accepted the compulsory jurisdiction of this Court, or that has done so but subject to an applicable reservation.

22. Accordingly, the result in *Eastern Carelia* plainly did not turn on Russia's non-membership of the League. The reasons for judgment make it clear that it turned on the fact that Russia had not consented to the Permanent Court's jurisdiction in either of the two ways that it could have done so. It was the absence of consent in circumstances where — as a matter of

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[126] CoAU, para. 106; emphasis added.

[127] StMU, Vol. I, p. 174, fn. 543. See also StBR, para. 10.

[128] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004 (I)*, sep. op. of Judge Owada, pp. 262-263, para. 6-7.

[129] See Arts. 12-16 of the Covenant of the League of Nations.

substance — the Court's opinion would determine the merits of the dispute between States that caused the Permanent Court to hold that it should not provide the advisory opinion that had been sought.

23. It follows**,** in our submission**,** that the legal principle that governs this case was recognized and applied to withhold an opinion some 95 years ago. While the Court has not needed to apply ***that*** principle since, the principle has been affirmed by this Court on multiple occasions, and it has never been doubted. It was, for example, affirmed in the *Interpretation of Peace Treaties* Advisory Opinion[130]. But, the two most pertinent examples are *Western Sahara* and the *Wall* cases.

Western Sahara

24. Turning first to *Western Sahara*, I have already noted the major statement of principle by the Court in its Judgment, to the effect that "the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character". The reason ***is*** because to give an advisory opinion in such a case "would . . . circumvent[] the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent"[131].

25. *Western Sahara* therefore *affirms*, rather than casts doubt on, the applicable legal principles. It forms part of an unbroken line of authority that recognizes the limits of the circumstances in which an advisory opinion can properly be given consistent with the Court's judicial character. To say, as Mauritius said yesterday, that the arguments advanced in this case are no more persuasive now than they were then, ignores the fact that the arguments of principle were accepted, and that the actual result turned on specific facts that have no equivalent in this matter. It was those facts that caused the Court to conclude that the questions put to it were "located in a broader frame of reference than the settlement of a particular dispute"[132].

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[130] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[131] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 32-33. See also p. 143, the separate opinion of Judge de Castro: "it seems evident that there is a compelling reason for refusal when the request for an advisory opinion implies that the advisory function of the Court is being used to get around the difficulty represented by the optional nature of the contentious jurisdiction".

[132] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 38.

26. In using the "broader frame of reference" language, the Court was referring to the fact that the questions upon which its opinion was sought in *Western Sahara* "differ[ed] materially"[133] from those that were the subject of the bilateral dispute. In that respect, we submit that two points are critical.

27. *First*, the request for an advisory opinion at issue in *Western Sahara* concerned a legal controversy that, as the Court put it, "arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations"[134]. That statement recognized the fact that the General Assembly had been actively considering the situation in Western Sahara for over a decade[135]. The same obviously is not true of the dispute between the United Kingdom and Mauritius, which *did* arise in bilateral relations, as is illustrated, for example, by the substantial focus yesterday on the 1965 Agreement and the associated meetings leading up to it. Further, as the United Kingdom explained yesterday afternoon, the legal controversy concerns a topic that was not debated by the General Assembly for a period of 50 years after Mauritius obtained independence, notwithstanding multiple attempts by Mauritius since the early 1980s to interest the General Assembly in that dispute.

28. *Second*, and critically to the Court's decision, Spain's lack of consent in *Western Sahara* was held not to be determinative because the advisory opinion sought was "not one as to the legal status of the territory *today*", but as to "the status of the [] territory *at the time of its colonization by Spain*"[136]. That had the crucial consequence that, as the Court put it, the "settlement of this [issue] will not affect the rights of Spain today as the administering Power"[137]. In other words, it was the fact that the question was historical, concerning the rights of Morocco "at the time of colonization", that provided the reason why the legal position of Spain was not (again to use the Court's words) "in any way compromised by the answers that the Court may give to the questions put to it"[138]. The historical nature of the questions meant that they did not "put Spain's present position as the

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[133] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 38.

[134] *Ibid.*, p. 25, para. 34.

[135] CoUS, para. 2.12, and materials there cited.

[136] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 14 and 27, paras. 14 and 42; emphasis added.

[137] *Ibid.*, p. 27, para. 42.

[138] *Ibid.*

administering Power of the territory in issue"[139]. And for that reason, those historical questions did not involve, in substance, the Court resolving a territorial dispute (which, we submit, the Court implicitly accepted it could not have done without Spain's consent).

29. Those points simply cannot be made here. The questions upon which the Court's opinion is sought in the present matter are not historical. Question *(b)*, in particular, is directed to the legal consequences of the continued administration of the Chagos Archipelago by the United Kingdom *today*. That question seeks to put the United Kingdom's sovereignty squarely in issue. If there be any doubt about that, it is put to rest by paragraph 3 *(a)* of the conclusion to the Written Comments filed by Mauritius. In that paragraph, which was shown to the Court yesterday, Mauritius asks the Court to find in this advisory proceeding that the international law requires the process of decolonization of Mauritius to be completed immediately "so that Mauritius is able to exercise *sovereignty* over the totality of *its* territory". Indeed, yesterday Mauritius went further, and asked the Court to set a timetable for it to take control of the Chagos Archipelago.

30. In light of both those oral and written submissions Mauritius has advanced, the Court can be in no doubt that it is being asked to decide *which* State exercises sovereignty over the Chagos Archipelago today. There is no "broader frame of reference". The legal issues concerning decolonization are not even reached unless the Court accepts Mauritius' attack on the 1965 Agreement, meaning that the whole proceeding is predicated on the resolution of the bilateral dispute about that Agreement, before the suggested "broader frame of reference" is even reached.

31. In those circumstances, applying both the general statement of principle and the specific reasoning in *Western Sahara*, Australia submits that the absence of the consent of the United Kingdom to the Court's consideration of the present day legal consequences for its territorial sovereignty over the Chagos Archipelago means that it would be contrary to settled principle and judicial propriety to render the opinion sought.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

32. Turning more briefly to the *Wall* case, the Court affirmed that the principle derived from *Eastern Carelia* and *Western Sahara* as to the circumstances in which it should decline a request

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[139] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 28, para. 43.

for an advisory opinion. It set out the relevant passage from *Western Sahara*, and strongly reaffirmed that 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"[140].

33. The fact that the Court answered the request in that case does not undermine the significance of those statements of principle. That follows because the Court found there to be two key considerations, which existed in the *Wall* case but that do not exist here, that justified answering the question notwithstanding its endorsement of the general principle.

34. *First*, the dispute concerning the construction of the wall was a single and limited facet of a wider and long-standing dispute between Israel and Palestine. The issue concerning the construction of the wall was by no means the central aspect of that dispute. And further, of course, in the *Wall* case, there was no question of Palestine having consented to the construction of the wall, and no issue as to the validity of bilateral agreements comparable to the 1965 and 1982 Agreements at issue in this matter[141].

35. *Second*, the Court pointed to the United Nation's long-standing concern with matters concerning Israel and Palestine, which had manifested itself through the "adoption of many Security Council and General Assembly resolutions"[142]. It was that direct and concentrated interest displayed by the Security Council and the General Assembly, which had its roots back in the League of Nations Mandate and the Partition resolution concerning Palestine[143], which caused the Court to observe that the request for an advisory opinion in the *Wall* case concerned "a question ***which is*** of *particularly acute concern* to the United Nations, and one which is located in a much *broader frame of reference* than a bilateral dispute".

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[140] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45. See StAUS, para. 30.

[141] StGB, para. 7.17 *(e)*.

[142] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 49. See StAUS, para. 52 *(d)*.

[143] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, p. 159, para. 49. The same kind of long-standing concern underpinned the Advisory Opinion provided in relation to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; see also StDE, paras. 101-106.

36. Mr. President, Members of the Court, the same simply cannot be said in this case, substantially for the reasons explained by the United Kingdom yesterday afternoon, with which Australia agrees.

37. The reliance that Mauritius places on the text of General Assembly resolution 71/292 in an attempt to answer that argument is entirely circular[144]. A resolution requesting the opinion of the Court cannot itself demonstrate that the provision of the opinion would assist the General Assembly in the discharge of any existing activity, as opposed to some speculative possible future activity. In any event, even if the argument was not circular, the wording of resolution 71/292 does *not* state that the opinion of the Court is required to guide the General Assembly in discharging its responsibilities either in relation to decolonization generally, or in relation to the Chagos Archipelago specifically[145]. Mauritius' reliance on the language of that resolution is therefore misplaced, not to mention somewhat self-serving in circumstances where Mauritius itself drafted the language on which it now relies to prove the asserted interest of the General Assembly[146].

38. The factors that underpinned the decision in the *Wall* case being absent here, the Court is left simply with its emphatic reaffirmation of the general principle stated in *Western Sahara* and in *Eastern Carelia*. Australia submits the Court should apply those principles.

Erga omnes

39. Before concluding, I should briefly address the argument advanced by Mauritius that this matter does not involve a "purely bilateral" dispute because of the *erga omnes* nature of the right to self-determination[147], which, it is said, "dominates any bilateral aspect"[148]. Taken to its logical conclusion, that argument would mean that the presence of an *erga omnes* obligation in a bilateral dispute would nullify the requirement of consent to the adjudication of that dispute.

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[144] CoMU, Vol. I, para. 2.54.

[145] StAUS, para. 53.

[146] See, for example, StGB, fn. 18.

[147] CoMU, Vol. I, para. 2.30.

[148] *Ibid.*, para. 2.31.

40. I can deal with that argument briefly because it is clearly not the law. In the *East Timor* case, this Court recognized that the differences over the interpretation and application of obligations *erga omnes* are just as capable of forming the subject-matter of a bilateral dispute as are any other obligations, and that where such a dispute arises the fundamental principle of consent remains relevant. As the Court said: "[t]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things"[149]. It continued, stating that where there is an absence of consent, "the Court cannot act even if the right in question is a right *erga omnes*"[150.] The Court reiterated this observation in its 2006 Judgment in the *Armed Activities* proceedings[151]. Accordingly, the *erga omnes* character of self-determination is not relevant to the propriety of the Court involving a bilateral dispute without the consent of the parties to that dispute.

Conclusion

41. Mr. President, Members of the Court, in conclusion, the precedent that would be set if the Court were to respond to the request for an advisory opinion in this case should, we submit, give the Court great pause. Mauritius itself has recognized that "advisory [opinions] should not be used as a pretext for bringing purely bilateral disputes before the Court, including bilateral disputes [in relation] to territorial sovereignty"[152]. Australia agrees. But regrettably, that is the very thing that is happening here.

42. The precedent this case will set if an advisory opinion is provided would undermine the distinction between the two spheres of the Court's jurisdiction which is, of course, carefully reflected in the Charter and the Statute of the Court. It raises the risk that the Court's advisory jurisdiction could, in practical terms, become blurred with its contentious jurisdiction, because States that can command the vote of a majority in the political organs could submit disputes to the Court, without the consent of the other party to the dispute. That would undermine the long-standing and fundamental principle concerning the consent of States to the judicial determination

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[149] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29

[150] *Ibid*.

[151] *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.

[152] CoMU Vol. I, para. 2.13.

of disputes being a principle that all States participating in this proceeding both recognize and accept.

43. In the *Wall* case, this Court accepted that it has a duty to satisfy itself as to the propriety of its exercise of its judicial functions on each occasion when an advisory opinion is sought. Australia submits that the Court *cannot* be satisfied that it is proper to provide such an opinion on this occasion. To the contrary, this is the very kind of case that the Permanent Court confronted in *Eastern Carelia*, and that this Court foresaw in its classic statements of the principle in *Western Sahara* and the *Wall* cases, when it recognized that the absence of consent *would* provide a compelling reason not to provide an advisory opinion, if the opinion sought would be "substantially equivalent" to deciding the dispute between two parties that have not consented.

44. In closing, Australia respectfully requests the Court to find that it is without jurisdiction to render the advisory opinion requested in General Assembly resolution 71/292.

45. In the event that the Court finds that it *does* have jurisdiction, Australia respectfully requests that the Court exercise its discretion to decline to render the opinion sought.

46. That concludes my submission. Thank you for your attention, Mr. President and Members of the Court.

The PRESIDENT: I thank the delegation of Australia for its statement. This statement brings to a close this morning's hearings. The Court will meet again this afternoon at 3 p.m. to hear Belize, Botswana, Brazil and Cyprus. The sitting is adjourned.

The Court rose at 12.40 a.m.

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