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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Wednesday 5 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 mercredi 5 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 Meredith A. Johnston, Attorney Adviser,

Ms Amy M. Stern, Attorney Adviser,

Mr. Paul B. Dean, Legal Counsellor, Embassy of the United States in the Kingdom of the Netherlands,

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The Republic of Guatemala is represented by:

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Ms Celeste Amparo Marinelli Block, Counsellor,

Ms Lucia Rodríguez Fetzer, First Secretary

Professor Jorge Antonio Ortega Gaytán, member of the Board of Guatemala's Academy of Geography and History.

The Republic of the Marshall Islands is represented by:

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Mr. Caleb W. Christopher, Legal Adviser, Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York.

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La République de l'Inde est représentée par :

S. Exc. M. Venu Rajamony, ambassadeur de l'Inde auprès du Royaume des Pays-Bas,

M. Luther Rangreji, conseiller juridique.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit ce matin pour entendre les Etats-Unis d'Amérique, le Guatemala, les Iles Marshall et l'Inde sur la demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies. Chaque délégation disposera de 40 minutes pour son exposé oral et ne devrait pas excéder le temps qui lui est alloué. Comme je l'ai déjà indiqué hier, lorsqu'il y a plusieurs orateurs dans une même délégation, je laisserai au premier intervenant le soin d'inviter les autres membres de la délégation de sorte que chaque délégation puisse faire toute sa présentation sans interruption. La Cour observera une brève pause après la présentation du Guatemala.

Je donne à présent la parole à Mme Jennifer Newstead, s'exprimant au nom des Etats-Unis d'Amérique. Vous avez la parole, Madame.

Ms NEWSTEAD:

I. INTRODUCTION

1. Thank you Mr. President, Madam Vice-President and Members of the Court, I am honoured to appear today on behalf of the United States of America in my capacity as Legal Adviser of the Department of State. My remarks will supplement our two written submissions earlier this year.

2. We have heard a great deal in these proceedings about the long and difficult process of decolonization, and about the struggle faced by many formerly colonized countries. We have heard about the suffering endured by the Chagossians, who now live dispersed among a number of States. And the United Kingdom has described its programmes, including its agreement with Mauritius, for compensating the Chagossians. We have also heard about extensive litigation, including proceedings by Mauritius against the United Kingdom under the Law of the Sea Convention, and contentious proceedings it sought to bring before this Court.

3. These facts provide an important backdrop for this case. The worldwide struggle for freedom and independence after World War II was hard fought and hard won. Nothing I will say today is intended to diminish this remarkable achievement, which the United States strongly supported.

4. The task before the Court, however, is to decide how to address the General Assembly's referral of two questions. Since these questions go to the heart of a bilateral sovereignty dispute over territory, answering them would pose a fundamental challenge to the integrity of the Court's advisory jurisdiction.

5. My submission today will focus on why the Court should exercise its discretion to decline to answer the questions referred. Advisory jurisdiction was not included in the Court's Statute as a way to circumvent the fundamental principle of consent to adjudication of bilateral disputes. None of the participants here has adequately addressed how the Court could provide a substantive response without transgressing this principle. Mauritius, which spearheaded the referral, has conceded that the purpose of the request was to enable it to exercise sovereignty over the Chagos Archipelago[1].

6. In the view of the United States, the observations provided by the participants in these proceedings make clear that the Court has been invited to give an advisory opinion that would be tantamount to adjudicating the territorial dispute between Mauritius and the United Kingdom. As such, this is demonstrably a situation in which the exercise of advisory jurisdiction would be inappropriate.

7. Mr. President, Members of the Court, after developing this point, I will turn to address Mauritius's claim that a specific rule of customary international law had emerged by 1965 that prohibited the United Kingdom from establishing the British Indian Ocean Territory. To be clear, in our view, this is not an issue that the Court should address in the absence of consent by both Parties to this dispute. But if the Court does decide to reach the merits, our submission will clarify the appropriate methodology for ascertaining the state of the law as it stood more than 50 years ago and will apply that methodology to the historical record. This is something that many of the submissions have failed to do, or have done incorrectly in our view. When judged under the rubric set out in this Court's jurisprudence, the historical record does not support Mauritius's contention that a prohibition existed under customary international law at the relevant time.

[1] See CoMU, paras. 2.16, 2.47; StMU, p. 285.

8. In addition, I note the fact that a key element of the bilateral dispute between Mauritius and the United Kingdom is their 1965 Agreement regarding the Chagos Archipelago. Mauritius has sought to challenge the validity and effect of that agreement here, as it tried to do in the Law of the Sea arbitration. But this is precisely the type of challenge that is unsuitable for resolution in advisory proceedings. The United States respectfully submits that the Court should exercise its discretion to decline to answer the questions referred, lest it be drawn into a bilateral dispute over sovereignty in the guise of an advisory proceeding.

II. THIS CASE PRESENTS COMPELLING REASONS FOR THE COURT TO DECLINE TO PROVIDE THE OPINION REQUESTED

9. Mr. President, Members of the Court, I will now turn to the Court's discretion to decline to provide the opinion, which resides in Article 65, paragraph 1, of its Statute.

10. I will focus on two areas where States have disagreed in these proceedings. First, they have disagreed about the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction. In this regard, I will explain that the questions referred relate so substantially and directly to that dispute that answering them would mean the Court has effectively dispensed with the principle of consent.

11. Second, States have disagreed about the applicability of the Court's jurisprudence to the present request. Some have emphasized that the Court has not found it necessary to exercise its discretion in prior advisory opinions where lack of consent was an issue. Those prior opinions are readily distinguishable, however, and this case raises exactly the issues that the Court has identified as factors that could lead it to decline to provide an opinion.

12. Following this discussion, I will touch briefly on the importance of the distinction between the Court's advisory and contentious jurisdictions, which the current Request seeks to erode.

A. The relevance of the relationship between the request and the bilateral sovereignty dispute

13. Mr. President, Members of the Court, I turn first to the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction.

1. The origin and scope of the dispute

14. In its Advisory Opinion in *Western Sahara*, the Court stated that where a request for an advisory opinion relates to a bilateral dispute, and one of the parties to that dispute has not given its consent, the origin and scope of the dispute are important for appreciating the "real significance" of a State's lack of consent[2]. In this regard, I recall a few points about the origin and scope of this dispute:

(a) First, Mauritius gained its independence in 1968 and in the same year became a Member of the United Nations. When its application for United Nations membership was presented to the Security Council and the General Assembly, no State mentioned the territorial scope of the newly independent State of Mauritius or suggested that its decolonization remained "incomplete"[3]. It was not until more than a decade after independence that Mauritius began to challenge the 1965 Agreement and to assert a sovereignty claim over the Archipelago.

(b) Second, prior to this case, Mauritius pursued its sovereignty claim against the United Kingdom through other legal avenues. Mauritius attempted to bring a contentious dispute before this Court, and the United Kingdom declined to consent[4]. Mauritius also initiated arbitral proceedings under the Law of the Sea Convention, claiming that Mauritius alone possessed sovereign rights arising from the Archipelago[5].

(c) Third, the submissions of Mauritius and the United Kingdom in these proceedings, when read in light of their very similar submissions in the arbitration, reveal a direct relationship between the request for an advisory opinion and the main points of the bilateral dispute[6].

2. The history of the request in the General Assembly

15. A review of the proceedings in the General Assembly that led to the present Request also attest to the understanding of many States and the General Assembly that the Request was aimed at resolving a bilateral dispute[7]. Four points are notable in this regard.

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[2] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 42.

[3] UN doc. S/PV.1414 (18 Apr. 1968); UN doc. A/PV.1643 (24 Apr. 1968).

[4] See StGB, para. 5.19.

[5] See StUS, para. 2.11, n. 9.

[6] See CoUS, para. 2.6, n. 17.

[7] See StUS, paras. 2.18–2.22, 3.27, n. 62.

16. *First*, the matter arose in the General Assembly only after Mauritius requested in 2016 that a new item be added to the agenda.

17. *Second*, the President of the General Assembly facilitated an understanding between Mauritius and the United Kingdom that the Assembly would not consider requesting an advisory opinion until the following year. It did so to allow the parties time to negotiate a resolution to their dispute.

18. *Third*, the Assembly took the matter back up in 2017 due to lack of progress between the parties to resolve the dispute[8].

19. *Fourth*, many States indicated that they understood the Request as seeking the Court's assistance in resolving the bilateral dispute — whether they voted for, against, or abstain on the resolution itself.

3. The wording of the two questions in the General Assembly's request

20. Finally, the wording of the two questions presented to the Court also confirms that they are designed to invite the Court to adjudicate the bilateral dispute.

21. The first question refers to "the separation of the Chagos Archipelago from Mauritius" in 1965. This "separation" is central to Mauritius's sovereignty claim, as it argued in the Law of the Sea arbitration and in its submissions to this Court.

22. The second question asks about the legal consequences of the United Kingdom's "continued administration" of the Archipelago, and references a programme by Mauritius to settle Mauritian nationals there. These matters bear directly on sovereignty over the Archipelago, and it is difficult to discern how such consequences could be addressed without adjudicating the underlying dispute.

23. Mr. President, Members of the Court, far from dispelling concerns that the Request improperly invites the Court to adjudicate a bilateral dispute, Mauritius has been clear that this is precisely what it wants the Court to do[9]. In Mauritius's own words, "sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by" the first question

[8] A/71/PV.88 (22 June 2017), p. 5.

[9] CoMu, paras. 2.16–2.17.

referred to the Court[10]. If that is the case, the Court could not, consistent with its own jurisprudence, provide a response.

24. In short, this Request places the Court in an untenable position. It asks the Court to opine on a sovereignty dispute in an advisory context, in circumvention of the principle of consent. However, this situation is one that the drafters of the Court's Statute had the foresight to address by giving the Court the discretion, under Article 65, to decline to provide an opinion. This discretion was provided to "protect the integrity of the Court's judicial function"[11].

B. The Court's jurisprudence

25. Mr. President, Members of the Court, several States have reminded you that this Court has never declined to give an advisory opinion. And that is true. But the Court has repeatedly recognized that it has "the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function"[12]. In addition, the Court in those prior advisory opinions has identified circumstances that readily distinguish those cases from the present case and that should lead the Court to decline to issue an opinion here.

26. Before turning to the advisory opinions most relevant to this case, I will briefly address the *Namibia* case. As counsel for Mauritius noted, the United States supported the Security Council's request for an advisory opinion in that case. However, there is no parallel to be drawn from the facts of that case to the request now pending before the Court. That request did not concern a bilateral dispute, it concerned a territory that had been under a League of Nations mandate, and it addressed the obligations of States arising from South Africa's continued presence in Namibia after the mandate had been terminated.

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[10] CoMu, para. 2.16.

[11] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* [hereinafter *Kosovo*], *Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 29.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [hereinafter *Construction of a Wall*], *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 157, para. 45; see also *Kosovo*, *supra* fn. 11, para. 31.

1. *Western Sahara* and the *Wall* cases

27. As many participants have recognized, the Court's advisory opinions in the *Western Sahara* and *Wall* cases are more instructive. There are, however, important points of distinction between those cases and the present Request. In this regard, I will make three observations:

28. *First*, in *Western Sahara*, the Court emphasized that it could respond to the General Assembly's request because the dispute between Morocco and Spain was *not* about the current legal status of the territory and an opinion would *not* affect the existing rights of Spain. The Court emphasized that the questions did *not* relate to a territorial dispute nor did they call for the adjudication of existing territorial rights or sovereignty[13]. As a result, the Court found that its response would *not* compromise the legal positions of the parties even though Spain had refused its consent. This case presents opposite circumstances. Mauritius *does* assert a claim to sovereignty today, it *does* seek to affect the existing rights of the United Kingdom, and this dispute *is* one over territory.

29. *Second*, in concluding in the *Wall* case that an advisory opinion would not have the effect of circumventing the principle of consent, the Court did not rely only on whether the request was situated in the context of a much broader set of issues. It also took care not to address permanent status issues, which were at the core of the underlying bilateral dispute between the Israelis and the Palestinians. In contrast, the submissions in this case demonstrate that sovereignty is at the core of the dispute between Mauritius and the United Kingdom, and cannot be separated from it.

30. *Third*, unlike in prior cases, the General Assembly has not addressed the decolonization of Mauritius since its independence in 1968, and has never engaged in the sovereignty dispute that arose over a decade later. In contrast, the Court will recall that in *Western Sahara*, the General Assembly had been actively considering the situation for more than a decade when the request was made, and the Court observed that the request in that case was "the latest of a long series of General Assembly resolutions dealing with Western Sahara"[14]. In the *Wall* case, the Court likewise emphasized the United Nations' "acute concern" with the question referred, given the General Assembly's historic involvement in the future of Mandate Palestine. Although it is true that

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[13] *Western Sahara*, *supra* fn. 2, para. 43.

[14] *Western Sahara*, *supra* fn. 2, p. 30, para. 53.

Mauritius has periodically reminded the General Assembly of its sovereignty claim to the Chagos Archipelago, the General Assembly itself has not been engaged in the matter, and certainly not to a degree that is comparable to its involvement in the matters at issue in the *Western Sahara* or *Wall* cases.

2. The relevance of the source of law at issue

31. Mr. President and Members of the Court, Mauritius has also suggested that the Court could respond to this Request consistent with its jurisprudence because the territorial dispute can be "fully resolved exclusively by reference to the rules of international law on decolonization and self-determination"[15]. Mauritius contends that this renders the dispute not "purely bilateral", particularly when coupled with the *erga omnes* character of the obligations purportedly at issue[16].

32. However, this argument fails to account for the Court's emphasis in its jurisprudence on the anticipated *effect* an advisory opinion may have on the principle of consent. If, as Mauritius concedes, the advisory opinion would have the effect of disposing of the bilateral dispute, then giving the opinion would, in the words of Judge Owada in the *Wall* case, be "tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute"[17]. In such circumstances, the Court has a duty to decline to provide the opinion regardless of whether the substantive principles at issue may be of broader interest or importance.

33. Nothing in the Court's jurisprudence suggests that the application of the consent principle hinges on the source of law a State may invoke to advance its claim. In fact, the Court has reached the opposite conclusion, upholding the consent principle even when the obligations purportedly in question had an *erga omnes* character. In *East Timor*, the Court found that it could not adjudicate the validity of a bilateral agreement — even one alleged to violate obligations *erga omnes* — absent the consent of the parties to that agreement. The Court explained that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things"[18]. The Court also noted that "[w]hatever the nature of the obligations invoked", the Court could not

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[15] CoMU, para. 2.17.

[16] *Ibid.*, para. 2.26.

[17] *Construction of a Wall*, *supra* fn. 12, *Advisory Opinion;* sep. op. of Judge Owada, para. 13.

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

rule in a manner that "would imply an evaluation of the lawfulness of the conduct of [a] State" that had not given its consent to adjudication[19].

34. To summarize, Mr. President and Members of the Court, the approach advanced by Mauritius on the question of the Court's discretion would seriously undermine the separation between the Court's two distinct functions: on the one hand, to resolve disputes with the consent of the parties, and on the other to render legal advice to the United Nations. If, as Mauritius suggests, the fundamental principle of consent could be avoided by simply recasting a bilateral dispute as one involving matters of general interest to the United Nations, those bodies empowered to seek an advisory opinion could effectively impose a form of dispute settlement on States, absent their consent, through a simple majority vote. But the Court's architects drew clear lines in the Statute between the Court's contentious and advisory jurisdictions. They rejected proposals that would have authorized the Court to provide advisory opinions on "disputes" or which would have had the effect of extending to States the authority to impose compulsory jurisdiction on other States without their consent.

III. NO RULE OF CUSTOMARY INTERNATIONAL LAW HAD EMERGED IN 1965 (OR 1968) THAT WOULD HAVE PROHIBITED THE UNITED KINGDOM FROM ESTABLISHING THE BRITISH INDIAN OCEAN TERRITORY

35. Mr. President, Members of the Court, I will now offer a few observations to assist the Court should it embark on the difficult task of attempting to address the first question referred: whether the decolonization of Mauritius was lawfully completed in 1968.

36. As our written submissions explain, there are a few key points on which States agree, and a number on which they do not. I will briefly summarize the areas of agreement before focusing on the disagreements, as these bear directly on this Court's jurisprudence on the development of international law.

37. Before beginning, I note that we are discussing the views of a limited subset of States. Some States felt it inappropriate for the Court to reach the questions referred. Other States provided only cursory views on these questions. What matters, of course, is not the total number of States advocating for one position or another, but the merits of their legal position.

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

38. Turning to the areas of agreement: States agree that, were the Court to reach this issue, it would need to ascertain the law as it existed at the relevant time. For these purposes, the relevant time is 1965, when Mauritius and the United Kingdom concluded their agreement regarding the Chagos Archipelago or, at the latest, 1968, when Mauritius became independent. In other words, the Court is being asked how it would view the matter if it were sitting in 1968, and not in 2018 on the basis of 50 years of progress in developing self-determination as a legal concept. In addition, most States that have addressed the issue acknowledge that multilateral treaties did not supply a relevant rule at the time, and the Court would thus need to focus on whether a relevant bilateral agreement existed between the parties or a relevant rule of customary international law had emerged. Finally, whatever the contours of international law at the time, the States that addressed the issue all agree that the boundaries of a non-self-governing territory could be altered prior to independence subject to the freely expressed wishes of the people.

39. In this respect, the Court has heard from the United Kingdom and Mauritius that much of their dispute centres on the relevance of their 1965 Agreement, which the Arbitral Tribunal found to be binding. If the Court were to address the merits, questions about the 1965 Agreement would play a central role. The United States' focus on customary international law is not meant to suggest otherwise. But it is, of course, Mauritius and the United Kingdom, and not third States, that are in the best position to explain their bilateral agreement.

40. Instead, the value we can add relates to the formation and content of customary international law, since the United States has been an active participant in promoting self-determination for the past century. During the 1950s and 1960s, the United States, along with many other States, expressed strong political support for decolonization and saw it as indispensable for securing freedom for peoples across the world[20]. At the same time, States maintained markedly different views about whether specific international legal rules governing self-determination had yet developed[21].

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[20] See StUS, paras. 4.18-4.20.

[21] *Ibid.*, paras. 4.32-4.41.

41. Turning to the points of disagreement in these proceedings: States disagree on whether a specific rule of customary international law existed at the relevant time and as to how the Court might make this determination. In particular, they disagree on four key points:

— *First*, how the Court might determine whether a specific rule of customary international law existed at the relevant time.

— *Second*, whether resolution 1514 reflected or created a rule of customary international law and, specifically, whether it created a "right to territorial integrity" for non-self-governing territories.

— *Third*, whether there was a requirement for non-self-governing territories to exercise self-determination through a plebiscite.

— *Fourth*, exactly when States reached consensus on the existence and content of a right of self-determination.

A. A rule of customary international law requires evidence of extensive and virtually uniform State practice and *opinio juris*

42. I turn to the first area of disagreement, over the proper test for determining a rule of customary international law. A number of States in these proceedings have simply asserted, without supporting evidence, that a relevant rule of customary international law existed at the relevant time. Others have misstated the methodology for determining the existence of such a rule.

43. As the Court explained in *North Sea Continental Shelf* and many times since, the emergence of a rule of customary international law requires two elements: "extensive and virtually uniform" State practice and *opinio juris*[22]. Only where these two elements are satisfied can the Court identify a rule of customary international law[23].

44. Mr. President, Members of the Court, this seems a self-evident proposition. And as shown by the evidence on State practice and *opinio juris*, which is cited extensively in our written submissions, there was no rule of customary international law that would have prohibited the establishment of the British Indian Ocean Territory.

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[22] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74; see also StUS, para. 4.27.

[23] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 122, para. 55.

B. The contemporaneous statements and practice of States do not indicate resolution 1514 reflected or created customary international law

45. The second area of disagreement concerns whether resolution 1514 reflected or created a relevant rule of customary international law. Several States have cited resolution 1514, and other decolonization resolutions, in arguing that a specific rule of customary international law existed at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory. But General Assembly resolutions do not themselves create customary international law. They could only be relevant to the extent that they reflected then existing *opinio juris*[24]. The fact that the General Assembly cited particular resolutions in the question referred to the Court does not alter their non-binding nature. As the Court explained in *Kosovo*, it is for the Court, and not the General Assembly, to determine the law applicable to answering the referral[25].

46. To determine whether a particular resolution provides evidence of *opinio juris*, this Court has stressed that "it is necessary to look at its content and the conditions of its adoption"[26] and that deducing *opinio juris* from "the attitude of States towards certain General Assembly resolutions" must be done "with all due caution"[27]. The best evidence of States' contemporaneous attitude toward a resolution are the statements they make during negotiation and adoption[28]. Expressions of moral and political support are not enough. Instead, the Court must be presented with evidence sufficient to establish that States at the relevant time believed that international law required the conduct in question.

47. None of the resolutions from the 1950s and 1960s cited by Mauritius and others as evidence of a rule of customary international law meets this standard, and here I will offer three observations.

48. *First*, during negotiation and adoption of these resolutions, several States emphasized that the resolutions did not create a new rule of international law or indicated that the resolutions

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[24] See StUS, para. 4.28; CoUS, para. 3.14.

[25] *Kosovo*, see fn. 11 *supra*, para. 52. See StUS, para. 4.14.

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

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

[28] See Report of the International Law Commission, 68th Sess., UN doc. A/71/10 (2016), Chap. V: "Identification of Customary International Law", p. 107, Commentary to Draft Conclusion 12, para. 6.

did not reflect their views[29]. In particular, States debated the reference to a "right" of self-determination in paragraph 2 of resolution 1514[30]. On Monday, counsel for Mauritius invited the Court to draw significance from the fact that only two States in these proceedings indicated that the right of self-determination had not yet crystallized in the 1960s. But counsel failed to address the relevant fact that, during the 1960s, other States expressed similar views, as noted in our written submissions[31].

49. *Second*, the fact that several States abstained on these resolutions means that the resolutions did not reflect a consensus among States, much less *opinio juris*. Some participants in these proceedings seek to dismiss the importance of abstentions, stressing instead that no State voted against resolution 1514 and other decolonization resolutions. However, the absence of votes against a resolution in no way establishes that it reflected *opinio juris*. States are often able to support a resolution, or at least to not vote against it, even where they may not agree with all of its terms, precisely because resolutions are not binding and States can explain their understanding of the resolution on the record.

50. *Third*, some States argue that paragraph 6 of resolution 1514 reflected or established an international legal right for non-self-governing territories. However, the negotiation records of this resolution do not demonstrate a consensus among States that paragraph 6 reflected a then existing international legal right with respect to non-self-governing territories.

51. Instead, some States saw paragraph 6 as a reaffirmation of Article 2, paragraph 4, of the United Nations Charter and nothing more[32]. Others emphasized that *newly independent States* were entitled to territorial integrity, but did not suggest that paragraph 6 applied to non-self-governing territories[33]. Two States understood paragraph 6 as *excluding* a right of self-determination for peoples of contested territories[34]. From this mixed record, it would be impossible to conclude that

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[29] See StUS, paras. 4.42-4.45.

[30] See *ibid.*, para. 4.46 and sources cited therein.

[31] See, e.g., *ibid.*

[32] See *ibid.*, para. 4.47 and sources cited therein.

[33] See *ibid.*

[34] See *ibid.*, para. 4.48 and sources cited therein.

States understood paragraph 6 to reflect or establish an international right of territorial integrity for non-self-governing territories.

52. State practice at the relevant time also illustrates that there was no right to territorial integrity that would have precluded the establishment of a British Indian Ocean Territory. Several territories changed their boundaries before or upon achieving independence and were endorsed by the United Nations[35].

53. For example, shortly before Jamaican independence, the United Kingdom made administrative changes to the colony of Jamaica by separating it from the Cayman Islands and the Turks and Caicos Islands. Jamaica opted for independence in 1962, and the two other territories freely decided to remain UK territories. The United Nations admitted Jamaica as a Member and treated the Cayman Islands and the Turks and Caicos Islands as separate non-self-governing territories. Neither the United Nations nor Member States complained that the separation of these territories from Jamaica and their maintenance as UK territories was inconsistent with resolution 1514[36].

54. On Monday, counsel for Mauritius suggested that international law required the people of Mauritius to be given the option of independence for a territory that included the Chagos Archipelago. But many territories in the 1960s were presented with options that did not include independence within prior territorial boundaries, and their independence was no less valid for that. For example, in British Cameroons, the United Nations held two separate plebiscites in the North and South and gave voters in each region only two options: independence by joining the Republic of Cameroon, or independence by joining Nigeria. These plebiscites did not include an option of independence with prior boundaries, contrary to counsel's claim that such an option was legally required.

55. These examples demonstrate that, even if resolution 1514 were interpreted to address the adjustment of territorial boundaries, States did not engage in any consistent practice on that issue before or after resolution 1514 was adopted.

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[35] See StUS, paras. 4.67–4.68 and sources cited therein.

[36] See *ibid.*, para. 4.68.

C. At the relevant time, there was no international legal requirement to hold a plebiscite prior to independence

56. I turn to the third area of disagreement. States generally agree that territorial boundaries could be changed prior to independence based on the freely expressed wishes of the people. However, a few States have asserted in these proceedings that the wishes of the people regarding such changes could only be determined through a plebiscite. And that is simply not consistent with history.

57. As this Court has previously advised, an essential feature of self-determination decisions is that they take into account the freely expressed wishes of the peoples concerned[37]. As a matter of State practice, general elections as well as negotiations or agreements between the administering State and representative bodies were used throughout the post-war wave of decolonization. For example, during this period the United Kingdom relied on both referenda and general elections, and the United Nations supported the United Kingdom's methods[38]. There is no dispute that, as a general matter, self-determination may be exercised through a variety of means.

58. Despite this history, Mauritius and a few other States have argued that there is an exception to this general principle when a territory's boundaries change prior to independence. They rely primarily on examples of the trust territories where the General Assembly called for plebiscites, such as those in the British Cameroons and Ruanda-Urundi. However, these States fail to adequately explain why a plebiscite was not required for Jamaica, Turks and Caicos, and the Cayman Islands. Nor do they explain why the General Assembly never called for a plebiscite for Mauritius in any of the resolutions mentioning Mauritius between 1965 and 1967.

59. In Mauritius, independence was achieved through decisions by its elected representatives following a general election in which the parties favouring independence achieved a clear majority[39]. After independence, Mauritius was admitted to the United Nations as a Member State without dissent. No State at the time contended that Mauritius's independence was incomplete or that its decision to become independent did not reflect the wishes of its people. There is no basis for the Court to advise now, 50 years later, that a different process should have been used.

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[37] *Western Sahara*, *supra* fn. 2, paras. 55–59.

[38] See StUS, para. 3.53.

[39] See StMU, para. 4.2; StGB, para. 3.8 *(f)*.

D. States continued to disagree about the existence and content of a right of self-determination until 1970, with the adoption of the Friendly Relations Declaration

60. Mr. President, Members of the Court, I turn to the fourth area of disagreement, whether States reached consensus about the existence and content of a right of self-determination prior to 1970. Although many States in these proceedings have focused on resolution 1514 of 1960, it is the Friendly Relations Declaration, adopted in 1970, that marks the turning point for the emergence of a right to self-determination under customary international law. The Declaration articulated, for the first time with the consensus support of all States, the specific elements of the "principle of equal rights and self-determination of peoples"[40].

61. The negotiating record of the Declaration, which is cited in detail in our Written Comments, undermines any argument that consensus about resolution 1514 or self-determination had been reached by 1965 or even 1968[41]. Through the late 1960s, key aspects of self-determination remained unsettled, such as the peoples to which the right extended, the status options available to such peoples, and whether force could be used to achieve self-determination[42].

The PRESIDENT: Ms Newstead, could you please speak a bit slower for the sake of the interpreter.

Ms NEWSTEAD: I will do so. Thank you.

States also continued to disagree about whether self-determination constituted a legal right and whether resolution 1514 could be regarded as reflecting international law. In fact, most aspects of the self-determination provision of the Declaration remained unresolved until 1970.

62. In addition, the formulation of self-determination in the Declaration departed in material ways from resolution 1514, as shown by the United Kingdom on Monday. In fact, the Declaration did not even mention resolution 1514[43].

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[40] UNGA res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN doc. A/RES/25/2625 (24 Oct. 1970), Ann., "The Principle of Equal Rights and Self-Determination of Peoples".

[41] See StUS, paras. 4.61–4.64; CoUS, paras. 3.19–3.27.

[42] See *ibid*., and sources cited therein.

[43] See StUS, paras. 4.62–4.64; CoUS, para. 3.26.

63. Mr. President and Members of the Court, Mauritius conspicuously made no mention of the Friendly Relations Declaration on Monday. Its written submissions likewise do not address the Declaration's negotiation history and gloss over the differences between it and resolution 1514[44]. That is likely because the historical record simply does not support the conclusion that *opinio juris* among States was reached prior to 1970, or that States had engaged by that time in extensive and virtually uniform State practice.

64. Contrary to some States' assertions, the Court has never held otherwise in its opinions addressing self-determination. Although the Court discussed the evolution of the principle as early as 1971 and 1975 in the *Namibia* and *Western Sahara* Opinions, it did not hold that a customary international law rule crystallized before the adoption of the Declaration in 1970, much less one specific enough to have prohibited the establishment of the British Indian Ocean Territory[45]. And nothing in the Court's treatment of self-determination in later cases — in *East Timor*[46], the *Wall*[47], and *Kosovo*[48] — indicates that a right of self-determination had crystallized prior to 1970.

65. Mr. President, Members of the Court, Mauritius has repeatedly drawn attention to the fact that our written submissions, alongside those of the United Kingdom, are in the minority in arguing that no relevant rule of customary international law existed[49]. However, the United States respectfully submits that our conclusions about the law are based on a rigorous assessment of the evidence of State practice and *opinio juris* in accordance with the jurisprudence of the Court.

66. Even if one could conclude that there was a growing consensus in 1965 or 1968 regarding the existence of a right of self-determination in international law, there was no consensus as to the specific rule that Mauritius asserts here: that the United Kingdom was required to hold a plebiscite prior to establishing the British Indian Ocean Territory. Further, there was no extensive and virtually uniform State practice.

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[44] CoMU, paras. 3.60–3.61.

[45] *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*, pp. 31-32, paras. 52–53; *Western Sahara*, *supra* fn. 2, *paras.* 54–59.

[46] *East Timor*, *supra* fn. 19, para. 29.

[47] *Construction of a Wall*, *supra* fn. 12, para. 88.

[48] *Kosovo*, *supra* fn. 11, para. 79.

[49] See e.g. CoMU, para. 1.7.

IV. CONCLUSION

67. Before concluding, I would like to briefly address the assurances offered by Mauritius that it is prepared to accept the continued operation of the military facility on Diego Garcia and recognizes the facility's role in supporting international and regional security. As stated in our Written Comments, the United States has operated this facility jointly with the United Kingdom for decades, and we agree that it continues to play a critical role in the maintenance of peace and security, both in the Indian Ocean region and beyond. Mauritius neglects, however, to note how the United States has responded to those assurances. And on this issue, I refer the Court to our written submissions. In addition, I note that offering those assurances underscores the fact that Mauritius is asking the Court to adjudicate its sovereignty claim through the guise of an advisory opinion.

68. Mr. President, Members of the Court, during these proceedings we have heard a great deal about a turbulent but inspiring period in history. However, the task before the Court is clear: to decide how to address the referral by the General Assembly of two questions that go to the heart of a bilateral sovereignty dispute over territory. There is no mistaking that these questions seek to engage the Court's advisory jurisdiction to resolve this dispute without the consent of both Parties. Answering the questions would accordingly run counter to the Court's mandate, its jurisprudence and the fundamental principle of consent to judicial settlement.

69. The United States thus urges the Court, in light of these compelling circumstances, to exercise its discretion to decline to issue the opinion requested.

70. Mr. President, Members of the Court, I thank you for your kind attention.

Le PRESIDENT : Je remercie la délégation des Etats-Unis pour son intervention. La délégation suivante qui prendra la parole est la République du Guatemala. J'invite M. Lester Ortega qui s'exprimera en premier au nom du Guatemala. Vous avez la parole.

Mr. ORTEGA LEMUS:

1. Mr. President, Members of the Court. It is an honour and a privilege to be able to speak before you and deliver the intervention of the Republic of Guatemala in these proceedings.

2. The Republic of Guatemala appears before you again, after being party to the landmark case of *Nottebohm* and filing written submissions in several advisory opinions.

3. Guatemala's motivation to be part of the proceedings may be apparent. Nevertheless, it is relevant to highlight the fact that, through its history as an independent State, Guatemala has had a persistent involvement in the consolidation of some of the basic legal concepts that underlie the Request for an advisory opinion in this case.

4. From that track record, it would have been improper for my country to remain silent on this occasion. The General Assembly has expressed the desirability to obtain legal advice from this honourable Court and Guatemala is ready to assist in that task by submitting relevant information on the perspective the Republic of Guatemala has on facts and law.

5. This presentation is divided in two. Firstly, I will address questions of jurisdiction, discretion and propriety, and thereafter H.E. Ambassador Ruiz Sánchez de Vielman will discuss all substantive matters including what the Republic of Guatemala understands by self-determination within the context of decolonization and its applicability to the situation under examination.

6. I shall be mindful of expediency as well as procedural economy, thus relying on Guatemala's written statement and observations, as well as many of the interventions that have preceded this one.

JURISDICTION: DISCRETION AND PROPRIETY

7. I must address you on matters of jurisdiction, particularly on the Court's discretion not to exercise it, and the propriety of rendering an opinion, as some of the interventions expressed in precedence to this have, particularly on the apparent existence of a bilateral dispute underlying the same circumstances object of the request for an advisory opinion and the importance to answer both questions.

Discretion and propriety

8. The Republic of Guatemala advances the opinion that the Court should dismiss any arguments inviting the Court to exercise its discretion not to render an opinion: the Court is the principal judicial organ of the United Nations and one of the six principal organs of the Organization. The discharge of its different roles is essential for the proper functioning of the Organization. The inaction of one in a role not feasible to be subsumed by another implies the failure of the whole. Whilst we have seen how inaction by the Security Council has been overcome

by action of the General Assembly, it is unlikely that the inaction of this Court could be overcome by the action of any other of the principal organs of the United Nations.

9. In several occasions, the Court has highlighted its awareness of this matter. Its answer to a request for an advisory opinion, it has said, "represents its participation in the activities of the Organization, and, in principle, should not be refused" once it can be satisfied that the "integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations" are protected. So far, the Court has never refused to reply to a General Assembly's request for an advisory opinion. The Republic of Guatemala believes the Court will find no grounds in this case at hand, to break such an uninterrupted discharge of its advisory function.

10. Counsel for the United Kingdom tried during their intervention on Monday, to cast a shadow over the General Assembly's resolution 71/292 which contains the Request in question. They have argued that it was solely drafted by Mauritius and that it was approved by "less than 50 per cent of its Members". With all due respect, such arguments are irrelevant.

11. Resolution 71/292 is valid and legal. The adoption followed the relevant procedures, it was approved with the requisite majority and thus it should not be questioned on those grounds.

12. In this same city, a few weeks ago, the United Kingdom sponsored a decision taken by a multilateral body, which was passed not without effort and adopted by just 42 per cent of the members of the said body. I am very sure the United Kingdom would not raise the same argument there, as it does about resolution 71/292.

13. One can review what the Court said about these matters, on the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* in 1996:

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution"[50].

[50] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 16.

14. Or what it was said in the *Kosovo* Opinion: "the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond"[51].

15. Counsel for the United Kingdom also argued that the matter of the decolonization of Mauritius has not been actively pursued by the General Assembly before: "This is not a case where the matter of decolonization is one on which the General Assembly or the United Nations has been actively engaged, and a request is then sought to assist the Assembly with the proper exercise of its functions." Guatemala wonders if by making such an assertion, Counsel for the United Kingdom is trying to change the very broad entitlement granted to the General Assembly by Article 96 (1) of the Charter of the United Nations, or to blur the difference between the former and paragraph (2) of the same Article, a much more limited entitlement indeed.

16. Being entitled to request an advisory opinion on *any legal question*, the General Assembly is not restricted by measures of topicality of an issue, or its permanent inclusion in its agenda, or any other similar demand. As stated in the well-known commentary of this Court's Statute, the Editor of which spoke here yesterday by the way: "Even if such a restriction existed, legal questions not covered by the activities of the General Assembly and the Security Council would scarcely be imaginable due to the wide range of competences"[52] of those two organs.

17. Mr. President, Members of the Court. Some of the speakers before me, and surely some that shall come after, have and will try to convince you of the false premise that this Request for an advisory opinion is simply a bilateral, territorial dispute and consequently, you should decline answering the request by the General Assembly in order to protect your judiciary function. To achieve that, they need you to turn a blind eye on the actual text as put before you by the General Assembly which clearly frames the subject-matter as one dealing with decolonization and concerning the work of the General Assembly.

18. The argument which was brought forward by some Parties that the underlying issue is a bilateral dispute and thus not appropriate subject-matter to be considered by the Court in its

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[51] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 417, para. 33.

[52] Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice. A Comment*, 2nd ed., Oxford Public International Law (2012), p. 212.

advisory role should be discarded. The Court has stated that "its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them", since the advisory opinion is not binding and that it is delivered to the requesting United Nations organs, not to the States.

19. Furthermore, the Court, when requested to give an advisory opinion, may entertain legal questions either abstract or related to a dispute between States. Enough testimony of such possibility may be taken from Article 102 (3) of the Rules of Court. If the United Kingdom was truly concerned about this matter, it could have triggered the appointment of a judge *ad hoc*, just as the separate opinion of Judge Owada in the *Wall* suggests[53], as a measure conducive to maintaining fairness in the administration of justice.

20. To reinforce the argument whether the Court would be circumventing the requirement of the States' consent by rendering advisory opinions in situations which could be construed as bilateral disputes by some, it is worthy to note that in the current proceeding, as in others in the past,

> "the legal questions of which the Court has been seised are located in a broader frame of reference [that is, decolonization] than the settlement of a particular dispute and embrace other elements. These elements, moreover, are not confined to the past but are also directed to the present and the future."[54]

21. Just as in your *Wall* Advisory Opinion, the General Assembly has come to the Court looking for clarity and guidance in order to discharge its own functions regarding broader issues than a mere bilateral dispute:

> "In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground [alone]."[55]

22. Were there be a need for further clarification, in a very fitting wording, the Court has also said that:

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[53] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 134, para. 19 of the separate opinion of Judge Owada.

[54] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 38.

[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 50.

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."[56]

23. At least one of the States participating in these proceedings advanced that Guatemala, among other States, has wrongfully relied on the above quoted *Western Sahara*'s Opinion when indicating that the existence of bilateral dispute should be no obstacle for the Court to render an opinion since in that case "the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relations to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations."

24. Guatemala firstly asserts, what it has said in its written submissions, that even in cases where there is an underlying bilateral dispute, the Court is not unencumbered to delivering an opinion for that reason alone.

25. Secondly, our answer using that said State's logic would be that, indeed the passage they quote from the *Western Sahara*'s Opinion is applicable, as the so-called underlying dispute did rise — just as in the *Western Sahara* — at the General Assembly proceedings first and foremost, as the General Assembly's resolution 2066 (XX) and subsequent show: in 1965 the General Assembly noted with concern the excision of the Chagos Archipelago, asked the United Kingdom not to mutilate Mauritius, and to respect its territorial integrity, I repeat, to respect its territorial integrity and to fully implement resolution 1514. At the same time, as per such State's assertions, and I must insist, as per such State's assertions alone, Mauritius would only raise the issue from the 1980s and onwards. A gap of no less than 15 years would exist between the two dates thus proving the dispute arose at the General Assembly's proceedings first and only thereafter became bilateral.

26. Nevertheless, Mr. President, Members of the Court, Guatemala is certain that, as it did in the *Wall* Opinion, the Court will not "consider that the subject-matter of the General Assembly's request can be regarded as only bilateral matter" between Mauritius and the United Kingdom, but "[g]iven the powers and responsibilities of the United Nations in questions relating to" decolonization and the right of self-determination, it will be the Court's view that the completion,

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[56] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39.

or pendency, of the process of decolonization of Mauritius — whether lawfully or not — "must be deemed to be directly of concern to the United Nations"[57], and particularly of the General Assembly.

27. Mr. President, Members of the Court, I apologize beforehand for adding to the many times you have heard so far the following quote: "The Court's opinion is given not to the States, but to the organ which is entitled to request it."[58]

28. The General Assembly has made a request to the Court for guidance. Some States warn of the effects the opinion may bring about. This has been pointed predominantly towards the second question. Gladly, the Court has stated that "the effect of the opinion is a matter of appreciation"[59].

29. It is the opinion of some of the Participants of these proceedings that the Court should not answer the second question, or if it does, it should only answer the part concerning consequences directed to the General Assembly and not to any other party. Guatemala respectfully submits that the Court should follow its own jurisprudence: "it [is] for the Court to determine for whom any of such consequences arise"[60].

30. Following the method the Court employed in the *Wall* Opinion, after identifying the applicable law, in order to be able to indicate whether there are any legal consequences, the Court must first determine whether or not the law has been breached. Breaches of the law are not *orphans*, nor they happen in the *vacuum*. For the Court to determine that the relevant law has been breached, it must assess the conduct of the subjects to the said law and isolate which of those subjects' actions or omissions resulted in a breach of the applicable law. This matter is important when the Court considers the second question, which Guatemala contends the Court should indeed consider.

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[57] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. I.C.J. Reports 2004 (I)*, pp. 158-159.

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

[59] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17.

[60] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. I.C.J. Reports 2004 (I)*, p. 155 para. 40.

31. In the view of the Republic of Guatemala, Mr. President, Members of the Court, it is of utmost importance that the Court does not shy away from its role as the principal judicial organ of the United Nations and participate in the Organization's activities.

32. The Court possesses enough *wisdom* to avoid overstepping its advisory function, but also enough *courage* to respond to the General Assembly's call for legal guidance despite the background at hand. Guatemala trusts that this Court will deliver the answers the General Assembly seeks, with *clarity* and *completeness*, much to the detriment of the many commentators and analysts that like to read volumes in between the lines of the Court's documents.

33. Mr. President, Madam Vice-President, Members of the Court, I thank you for your kind attention. With your permission, H.E. Ambassador Ruiz Sánchez de Vielman will continue with Guatemala's submission.

Ms RUIZ SÁNCHEZ DE VIELMAN:

Mr. President, Members of the Court, it is my privilege to speak to you on behalf of my country. I shall continue with the Republic of Guatemala and its direct involvement with the right of self-determination.

I. THE REPUBLIC OF GUATEMALA AND THE RIGHT TO SELF-DETERMINATION

1. Mr. President, Members of the Court, Guatemala has had a persistent and active stance when it comes to the right of self-determination. Since its emancipation from several centuries of colonial subjugation, Guatemala has exercised due diligence throughout the emergence and evolution of the said right now an *erga omnes* one as per this Court's findings. Such historical record places Guatemala — in its own opinion — in a privileged position when it comes to discussing the situation at hand.

2. Being a founding member of the United Nations and active participant of the negotiations of the United Nations Charter in the Conference in San Francisco, Guatemala contributed to the emergence of the right to self-determination within the system of the United Nations. Such right — as expressed in Articles 1 (2) and 55 — would become one of the pillars of the process of decolonization.

3. It has been admitted that before the adoption of the Charter of the United Nations self-determination was not considered a fully accepted rule of law, it was characterized as "a principle of justice and liberty, expressed by a vague and general formula"[61], not to be considered "as [a] positive rule of the Law of Nations"[62] and was even denied a full legal nature by early writings of an ex-president of the International Court of Justice, calling it "essentially a political principle"[63]. However, from the above-mentioned adoption of the United Nations Charter, it is undeniable that self-determination emerged and developed into a rule of international law despite its co-existing political nature.

4. Back in 1945, Guatemala was particularly active in the negotiations taking place in the Commission II, then dealing with the Trusteeship System. Since then, Guatemala has maintained a sharp attention with regards to the scope of the right to self-determination, as its interventions so evidence[64].

5. Several years forward, in 1960, Guatemala contributed once more and supported the adoption of resolution 1514 (XV). It voted in favour of the resolution together with 88 other States. During the discussions preceding such vote, Guatemala reaffirmed its 1945 position and put forward an amendment to paragraph 6 of the draft resolution[65].

6. Guatemala received full reassurances from the *sponsors* of the draft resolution, that the underlying concepts of Guatemala's proposal were already fully covered by the existing paragraph 6. With the said reassurances on record[66], Guatemala withdrew its proposed amendment and voted in favour of the resolution[67].

7. The said assurances withstood the test of time, to the extent that several of the States that influenced Guatemala to abandon the proposed amendment, later in history resorted to its

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[61] Council Resolution of 24 June 1921, 13th Session, League of Nations.

[62] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, CUP, p. 28.

[63] R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press (MUP), p. 96.

[64] Documents of the United Nations Conference on International Organization, San Francisco 1945, Vol. X, pp. 477-499.

[65] UNGA doc. A/L.325.

[66] UNGA doc. A/PV.945, p. 1271.

[67] *Ibid*., pp. 1273-1274.

interpretation when reclaiming territories under colonial domination, reincorporated those into their territory, and thus restored their territorial integrity.

8. As expressed in its written submissions, Guatemala made such position evident yet again during the International Court of Justice's *Western Sahara* Advisory Opinion by means of a submission that reiterated its original interpretation of paragraph 6 of the Colonial Declaration[68].

9. With its actions, Guatemala persistently tried to avoid the weaponization of the right of self-determination. Such abusive use has been discussed by publicists, in cases of external or internal destabilization of countries and governments, fragmentation of States, artificial secessions, and barring the recovery of territories unlawfully submitted to colonialism by imperialist countries under the excuse of self-determination outcomes. Guatemala asserted that territorial integrity of States could not be jeopardized under ill-intended exercises of self-determination: "The principle of national self-determination has been invoked to destroy the sovereign integrity of states and even now threatens many of them"[69].

10. The case of the Chagos Archipelago falls far from any of the above.

II. SELF-DETERMINATION AND THE CHAGOS ARCHIPELAGO

11. The record of Chagos Archipelago's history[70] leaves no room for doubt regarding Mauritius' entitlement to the full extent of the territory it comprised whilst remaining a colony: from uninhabited territory, to Dutch presence, passing to French colonization, thereafter to British colonization and finally to self-determination-driven independence . . . with a caveat: the amputation of the Chagos Archipelago.

12. Until its detachment, the Chagos Archipelago was never viewed as a separate unit, nor administered as such in practice. Therefore, allegations that by being called a "dependency" the Archipelago acquired a distinct existence or constituted a separate entity[71], should be discarded. It

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[68] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, Written Statement of the Government of Guatemala (StGT), 11 Mar. 1975.

[69] Jamie Trinidad, *Self-Determination in Disputed Colonial Territories*, CUP 2018, p. 11.

[70] StMU.

[71] StGB, pp. 2.12-2.29.

was so accepted during the Chagos Marine Protected Area Arbitration a few metres away from this Great Hall.

13. Much to the contrary! Since the capture of the island of Mauritius (back then *L'Ile de France*) from the French in 1810 and its cession by France to the British in the Paris Treaty of 1814, until the detachment of the Archipelago in 1965, that is to say, roughly 151 years, the Chagos Archipelago was considered *part* of Mauritius by the United Kingdom.

14. It was only when the said Archipelago represented a different value to the United Kingdom that it decided to view it as a separate entity, to the extent that it took the steps it deemed necessary to finally amputate Chagos from Mauritius in a series of events that leave plenty to wish for in terms of good faith from the United Kingdom. Especially given its position akin to a guardian to Mauritius, while its colonial master, until it finally exercised its right to self-determination.

15. It has been determined beyond any doubt that the United Kingdom considered the approval of Mauritius' leadership fundamental for the detachment of the Archipelago — so it proves the exhibited British correspondence. This fact begs the question: Why, if there was full confidence on British sovereignty, the lack of conflict with the decolonization process, or no link between Mauritius and the Chagos Archipelago, go to such extents to gain consent for the detachment of the latter?

16. Who asks the neighbour three doors away if one can divide one's own backyard in two, if not demanded of him?

17. Going back to the previous line of argument, why would the United Kingdom go into such lengths to try to please the Mauritian representatives in order for them to agree to the excision if, as the United Kingdom has pleaded, the Chagos Archipelago was always a distinct unit?

18. Why compensate Mauritius with £3 million – on top and above compensation to private landowners — for something that wasn't theirs?

19. Why even pledge fishing rights — and grant free fishing licenses to Mauritian vessels for decades — and to reserve any mineral or oil resources found in the marine areas surrounding the Chagos Archipelago, for the benefit of Mauritius? The mere vested interest of a future return of the Islands to Mauritians is not necessarily enough.

20. Why — the crux of the matter — pledge to return the Archipelago to Mauritius once it stopped being necessary for defence purposes? Return? Revert?

21. It was only late in the 1990s that the United Kingdom changed the language of the undertakings made in 1965, from *"return"* or *"revert"* to *"cede"* —, just as Sir Michael did two days ago, a very different term altogether. Nevertheless, the fact that it would be done without *any payment or financial obligation by Mauritius as a condition of return* does say something, particularly after the United Kingdom had paid £3 million on top and above the compensation given to private landowners and displaced persons.

22. Documents before the Court attest of such events and thus Guatemala finds no need to qualify these any further.

Status of the right to self-determination prior to Mauritius' independence

23. Regarding the status of the right to self-determination by the time these events took place, Guatemala understands that the United Nations Charter always included the said right in its texts. Articles 1 (2) and 55 include the actual wording *"self-determination"*. Article 73 spelled out some of the content of the right, elevating the interests and well-being of those peoples to higher grounds and pointing towards self-government.

24. Nevertheless, it was General Assembly resolution 1514 (XV) adopted in December 1960 that defined and completed the content of the right to self-determination within the process of decolonization. In the following years, a significant number of new States emerged as a consequence of self-determination-driven process of decolonization.

25. Six years later, in December of 1966, resolution 2200A (XXI) was passed with the affirmative vote of all 104 United Nations Members, including the United Kingdom. The relevance of that vote is of course the fact that the resolution approved the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which share common Article 1, the content of which cements the right to self-determination within the process of decolonization as we all know and understand it. Article 1, paragraph 3, is worth noting:

> 3. "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories,

> shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

26. The above — the affirmative vote of the United Kingdom together with the totality of the United Nations membership — allows us, Mr. President, Members of the Court, to consider the concrete value the right to self-determination had no later than 1966. Here, I am inclined to highlight what has already been stated: it was only in 1968 — when Mauritius gained independence when Chagos was effectively no longer part of its territory. Yes, in 1965 there was an Order-in-Council on that effect, but only in 1968 did the Archipelago effectively cease to be integrated to Mauritius. If that were the case, by 1966 the existence of the right to self-determination was more than crystallized into a rule of international law, and undeniably the United Kingdom was behind it.

27. Counsel for the United Kingdom expressed in the *Marine Protected Area Arbitration* that self-determination only emerged as a rule of customary international law until 1970, to which Counsel for Mauritius replied "[t]he implication is that it only became a legal right applicable in the colonial context once decolonization was more or less over and the international community had little need for it . . . The creation of dozens of newly independent States through decolonization in the 1960's apparently had nothing to do with the law of self-determination."

Mauritius territory as a self-determination unit

28. By the time the world witnessed the crystallization of the right of self-determination, that is to say when resolution 1514 (XV) was passed, there were no doubts whatsoever with respect of the extension of the territory of Mauritius — which, of course, included the Chagos Archipelago — nor were there any doubts of its treatment as a single unit. Key to this notion is that no other State disputed such facts or made claims opposed to such affirmation. There was no State demanding Mauritius as a whole or part of its territory to be returned to it, nor any claim its decolonization would affect the territorial integrity of its own State.

29. It is then, by the emergence and crystallization of the right of self-determination, and in that extension — the whole of Mauritius' colonial extension — that Mauritius should have comprised a self-determination unit, the Chagos Archipelago included, and any dismemberment from it, an act against the process of decolonization. And so it was.

United Nations General Assembly did not remain silent after Chagos' excision

30. Resolution 2066 (XX) makes it clear that the excision of the Chagos Archipelago was done against resolution 1514 (XV) and the mandated process of decolonization. I allow myself to quote loosely from the said resolution:

> "Regretting that the administering Power has not fully implemented resolution 1514 (XV) . . .
>
> Noting with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius . . . would be in contravention of the Declaration, and in particular of paragraph 6 thereof,
>
> . . . . . .
>
> 3. Invites the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV);
>
> 4. *Invites the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity*". *[Emphasis added]*

31. There were no valid justifications, entitlements, pending litigations or disputes that could explain the separation of the Chagos Archipelago other than the negation of the right of Mauritius to self-determination in its full expression.

32. British documents of the time — prior to the excision, during the excision, after the excision — portray candidly the understanding of the colonial ruler of its own actions and the sharp contrast between those and the standing rules regarding decolonization. Qualifications are superfluous when the documents speak so clearly and bluntly about the actions, motivations and goals.

33. The Chagos Archipelago constituted — and constitutes — part of the Mauritius territory. The forceful removal of the Chagossians from the Archipelago makes it more evident that their well-being — as required by Article 73 of the Charter of the United Nations — was not considered, nor was the free and genuine expression of the will of the peoples[72] (Chagossians in particular) ascertained or respected.

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[72] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, para. 55.

CONCLUSIONS

34. For the above reasons, Guatemala respectfully insists in submitting to the International Court of Justice that:

— The Court should find it has jurisdiction to entertain the Request for an advisory opinion contained in the United Nations General Assembly resolution 71/292.

— The Court should find no compelling reasons to exercise its discretion not to render the requested advisory opinion.

— The Court should find the decolonization of Mauritius has not been lawfully completed in 1968 due to the excision of the Chagos Archipelago and its continued administration by the United Kingdom.

— The Court should find that the continued administration of the Chagos Archipelago by the United Kingdom constitutes a continued wrongful act and that it ought to end by means of immediate restitution of the Chagos Archipelago to Mauritius, restoring its territorial integrity.

With this, I conclude the intervention of the Republic of Guatemala. Mr. President, Madam Vice-President, Members of the Court, and I thank you for your attention.

Le PRESIDENT: Je remercie la délégation du Guatemala pour son intervention. Avant d'inviter la prochaine délégation à prendre la parole, la Cour observera une pause de 10 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 20 à 11 h 35.

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend. Je donne maintenant la parole à M. Caleb Christopher, s'exprimant au nom de la République des Iles Marshall. Vous avez la parole, Monsieur.

Mr. CHRISTOPHER:

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is both a privilege and an honour to be able to address the Court on behalf of the Republic of the Marshall Islands and to

appear not only for the first time, but also in connection with so fundamental a subject as the one which is now before you.

2. In the opinion of the Republic of the Marshall Islands, the Court is competent to respond to the Request from the General Assembly. Article 65 of the Statute is clear and the question has been framed in legal terms.

3. Further, it is appropriate that the Court respond to the Request from the General Assembly. An advisory opinion is relevant both to the multilateral discourse of the General Assembly regarding decolonization and also relevant for general principles of international law of concern to many States.

4. Indeed, the differing views and interpretations by States of issues surrounding decolonization in the context of Mauritius and Chagos evidence the utility of such an advisory opinion to the wider international community, including the General Assembly. This advisory opinion is and must be specific as to the unique circumstances of Mauritius and the United Kingdom, and other States may also seek to learn from such an opinion in continuing efforts to engage with decolonization, what Guatemala called a broader frame of reference.

5. In considering the question of whether decolonization is complete in the situation of Chagos, international law may seek to carefully evaluate the base values and context of supposed agreements arrived upon in the context of decolonization. The Vienna Convention on the Law of Treaties is inapplicable because it applies only to agreements between States — not between an administering Authority and its territory. Rather, a wary eye should be cast upon situations between unequal Powers, when the administering Authority had the mantle of a wider multilateral responsibility, but was also inevitably acting in self-interest with those dependent upon it. Distinctions can be drawn between plebiscites which allowed for the free expression of the will of the peoples and those which did not.

II. Competence of the Court & appropriateness of exercising the Court's competence

6. The plain meaning of Article 65 of the Statute is beyond argument, as it states that the Court may give an advisory opinion on any legal question at the request of an authorized body, or in accordance with the United Nations Charter. The question has been framed in legal terms. The

fact that, as with many such questions, there are political aspects to the issues, this should not be used as a basis for arguing that the Court is not competent to answer the questions referred to it[73].

7. In the opinion of the Republic of the Marshall Islands, the Court is competent to respond to the Request. The constant jurisprudence of the Court would reveal that only compelling reasons could prompt it to refuse a to reply to a request from the General Assembly[74]. The Court has never refused a request from the Assembly[75].

8. The General Assembly has requested an advisory opinion on a matter within its mandate, and by adopting General Assembly resolution 71/292, the Assembly itself determined that it would benefit from an advisory opinion on the two questions posed. It is not for the Court to speculate upon or second-guess the needs of the Assembly in the exercise of its functions[76].

9. The Marshall Islands holds as incorrect the assertions that have been made that the Court cannot opine on the questions because there is an underlying sovereignty dispute. The Court is not opining upon a territorial or boundary claim. The objective of colonialism is the acquisition of sovereignty over a territory. Decolonization entails steps towards ending the exercise of sovereignty by the colonial Power. Therefore, the question of sovereignty and decolonization are interlinked.

10. If the questions over sovereignty were indeed conclusively resolved only through a mere majority vote of the General Assembly, or through advisory opinions referred therein, then there would be far fewer such disputes in the world than which exist today.

11. Having established the appropriateness and utility of such an advisory opinion, it is important to turn more closely to the questions asked, including whether decolonization remains incomplete in the case of Mauritius and Chagos.

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[73] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 415, para. 27.

[74] *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, para. 40.

[75] *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.

[76] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion ,I.C.J. Reports 1996 (I)*, p. 237, para. 16; see also *Western Sahara, Advisory Opinion*, p. 37, para. 72.

III. Decolonization is incomplete: vitiated consent in the Agreement of 1965

12. Considering the question, as well as the specific context of the Chagos question, decolonization is not complete when the administering Authority was acting in self-interest and in which it excised a portion of the territory without the free expression of its people.

13. The United Kingdom has previously stated that there are two occasions designated by the Vienna Convention in which consent would be vitiated, hence invalidating an international agreement, namely, Article 51 regarding coercion of a representative of a State through acts or threats directed against him, and Article 52 regarding coercion of a State by threat or use of force in violation of the United Nations Charter.

14. This argument should not be accepted by the Court because the Vienna Convention is wholly inapplicable to the agreement of 1965. According to Article 4 of the Vienna Convention, "the Convention applies only to treaties which are concluded *by States* after the entry into force of the present Convention with regard to such States."

15. Not only was Mauritius not a State at the time of the alleged agreement that resulted in Chagos' detachment, but also the Vienna Convention was adopted only in 1969, which prevents the application of such law to prior agreements.

16. Instead, the 1965 "agreement" must be viewed through the lens of the decolonization process. It must be evaluated in the context wherein an administering Authority offered its colony the option of independence without Chagos Archipelago or no independence, which was really not a choice at all. There is an obvious and inescapable context of disparity, and a lack of full sovereign equality, which demands closer scrutiny.

IV. Heightened scrutiny should be afforded to apparent consent obtained in the process of decolonization and its alleged "full and final" agreements

17. It is important to consider the historical context of discussions regarding Chagos, and specifically the imbalance at the negotiating table. The dissenting and concurring opinion of Judges Kateka and Wolfrum in the *Chagos Marine Protected Area* Arbitration noted that "there was a clear situation of inequality between the two sides" and that "Mauritius was economically

dependent upon the United Kingdom"[77], which calls into question alleged consent obtained under duress.

18. This context is not only evident from a contemporary view looking back into history, but was also a known element of interpretation of international law around the time of the 1965 Chagos discussions. A 1967 textbook on the interpretation of international agreements stated that "base values are pertinent to the task of interpretation since the relative equality or inequality of power, wealth, and other values is highly suggestive in evaluating the credibility of assertions about the expectations with which the parties concluded an agreement"[78]. Hence international law should seek to carefully understand and evaluate these base values and the context in which Mauritius had to obtain its independence, and in which alleged consent was obtained.

19. Some of the historical roots of resolution 1514 are found in the mandate system established by the League of Nations, and gave eventual rise to the expectation that the process of decolonization was for the interest and benefit of the colonized, not the colonizer, and what was considered to be the "sacred trust" by the international community[79]. However, despite the progressive evolution of a multilateral character and, with it, international law, such systems often served to prolong — rather than facilitate — the end of colonialism. Accordingly, the wider process of decolonization was fraught with actions by both multilateral institutions and administering Powers which contradicted or overstretched the sacred trust of or benefit for all of humankind. These multilateral principles were extended more widely in resolution 1514, to apply to decolonization generally. Situations in which ultimatums were given, or bargaining chips were dangled, in the peaceful pursuit of independence, in extreme examples of disparity such as between a territory and administering Authority, point to inherent suspicion that such accompanying outcomes could be founded upon desperation rather than a valid meeting of mutual expectations, and might not equate to full consent.

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[77] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)* Permanent Court of Arbitration 2015, pp. 19-20, paras. 77-78: dissenting and concurring opinion Judge James Kateka and Judge Rudiger Wolfrum.

[78] Myres Smith McDougal, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (1967), Yale University Press, p. 387.

[79] *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. 32, paras. 54-55.

20. As the Court recognized in the *Namibia* Advisory Opinion, even though South Africa's rights originated as a mandate Power under the League of Nations (and by extension the United Nations trusteeship system), the time was well over in which the allegedly benevolent civilized world stood as a paternal Power to advance native interests; internationalized colonialism was ultimately colonialism nonetheless. As the Court stated in *Namibia*, "[i]t is self evident that the 'trust' had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own"[80]. In this regard, heightened scrutiny should be given to apparent agreements in which this trust was — with obvious effect — not applied to fully benefit colonized peoples.

21. Here, the Marshall Islands can recall its own difficult experiences with apparent agreements arrived upon during the process of decolonization. Many years afterward, there remains considerable engagement and dispute or differing interpretation, which makes it clear that certain issues are still unresolved. It might strike an observer that if there was once truly a resolution, with a balanced negotiating table and common knowledge by all of essential facts, such discussions would have long since moved on. Rather, the process of decolonization has often produced difficult and complicated legacies, with ongoing activity, indicating that there may well be situations in which such final action during decolonization is indeed not always so complete after all.

22. If the 1982 Agreement for compensation of some Chagossians was also such a "full and final" outcome, then the continued dialogue, including a new initiative to provide further a £40 million to Chagossian individuals would indicate that the earlier 1982 Agreement is not exactly as "full and final" as advertised, and does not relieve the United Kingdom of its obligations under international law to Mauritius, including to lawfully complete decolonization.

23. In regard to 1965, the United Kingdom's own official records show that it decided to separate the Chagos Archipelago from Mauritius long before the Lancaster House meeting with Mauritian ministers and that this decision was irrevocable. In 1967, the Cabinet Secretary informed the British Cabinet that, in 1965, the Mauritian ministers had been told that "unless they accepted our proposals we should not proceed with the arrangements for the grant to them of independence". The only two international judges to have expressed a view on this point, in the *Chagos Marine*

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[80] *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. 28, para. 46.

Protected Area Arbitration, concluded that the United Kingdom's threat to withhold independence "amounts to duress", that the Colonial Secretary "resorted to the language of intimidation", that "the 1965 excision of the Chagos Archipelago from Mauritius shows a complete disregard for the territorial integrity of Mauritius by the United Kingdom". The other arbitrators expressed no view on this. None expressed a contrary view. The Tribunal did not find that there was an agreement and it did not find that Mauritius had ever consented to excision. It found only that the United Kingdom was bound by its unilateral undertakings to Mauritius and is estopped from denying them.

24. Since the early 1980s, Mauritius has consistently maintained that the grant of independence was made conditional on its representatives "agreeing" to the detachment. The United Kingdom does not challenge this.

V. The need for an adequate plebiscite prior to detachment

25. As Belize stated yesterday afternoon, if integration is to be a lawful exercise of a right of self-determination, the establishment of the free and genuine will of the people has required a vote of the people holding the right to self-determination and any agreement arrived at between executive governments, even if freely entered into, could not have qualified as an expression of the free and genuine will of the people. In relation to the Chagos excision, whether or not the United Kingdom obtained the alleged consent from Mauritius, the question of self-determination remains.

26. As provided in Mauritius' statements, the free and voluntary choice of the peoples of Chagos was a necessary step to validate the detachment of Chagos from Mauritius, on the basis of the right of self-determination. This could only be achieved by means of a referendum or a plebiscite, which did not occur in Chagos' detachment. Indeed, the general election of 1967 presented a false choice, which effectively omitted the issue of Chagos. Here, the Marshall Islands can compare the issue with its own historical experience of plebiscites, as a former United Nations trust territory.

27. In 1983, the Marshallese people exercised their vote in a plebiscite which contained two parts. First, voters were asked if they approved of sovereign independence as part of a proposed Compact of Free Association with the administering Authority, the United States. This included an

agreement to host a military installation at Kwajalein Atoll on the basis of a lease with annual payment, among other provisions. Second, voters were asked, if the Compact (and military installation) were not approved, to recommend that the Government negotiate either independence (presumably without the military base), or another form of relationship with the administering Authority. In 1983, 58 per cent of voters ultimately approved of the Compact.

28. Earlier formulations of the questions had been rejected by the Marshall Islands in 1982, as the rejected formulation would have omitted full independence. Instead, the earlier formulation, had it gone forward to vote, would have offered voters a false choice between either a continuation of United Nations trusteeship status, or a Compact including a military base, and either way the administering Authority would have maintained its occupation and existing military installation. At the time of rejecting the initial formulation in 1982, Marshall Islands Foreign Secretary Tony deBrum stated to the media that, without a plebiscite offering an option for full independence, "the only choice will be between two different forms of colonial administration"[81].

29. The Marshall Islands historical experience with its 1983 plebiscite, and earlier negotiations in 1982 surrounding that question, can be contrasted with Mauritius' historical experience whereby Mauritians were not offered the option of decolonization with the Chagos Archipelago or decolonization without it. Marshallese voters were offered the choice of expressing independence with, or without, hosting a military installation and its related Compact.

30. Even with such plebiscites, heightened scrutiny must be applied wherein the administering Authority has both self-benefit as well a higher international expectation of responsibility and sacred trust.

31. Obtaining the free and voluntary choice of the peoples involved in a merger or division of territory was vastly used by the United Kingdom in organizing plebiscites in several of its colonies. The absence of a plebiscite in Chagos and Mauritius only proves the point of an organized action, with the objective of attaining the intended results, which were the dismemberment of Mauritius' territory.

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[81] Robert Trumbull, "US and Marshall Islands Split on a Plebiscite", *The New York Times*, 25 July 1982, p. 8.

32. The Marshall Islands, on the basis of a plebiscite organized during the eventual process of United Nations trusteeship termination, and subsequent agreements including a renewal, has agreed to host an ongoing military installation of the United States at Kwajalein Atoll. Although not without challenges or controversy, the agreement was achieved as part of the democratic approval of a Compact with the United States, and includes a renewed long-term lease agreement, a joint management committee framework between the two nations to raise and resolve mutual differences, and jointly adopted environmental standards. Indeed, it is certainly possible that a small island and atoll nation has the free will and capacity to enter into a host country agreement, best expressed in deliberate sovereign State-to-State frameworks. While the Marshall Islands maintains that heightened scrutiny should be applied in the context wherein there is self-benefit of the administering Authority, it is nonetheless possible to evidence free will when expressed in joint or equal State-to-State frameworks.

VI. Consequences under international law

33. The General Assembly specifically framed the question to the Court regarding the consequences "under international law" and not restricted only to multilateral discourse within that organ, nor to be restricted only for consideration of States. To pretend that the General Assembly, under soft law, is somehow wholly untethered from the actions of its Member States would be to misunderstand the United Nations Charter, and the decades of practice thereunder. References to consequences under international law would apply to both the General Assembly and its Member States. It is important to underscore that the General Assembly resolution 71/292, which transmitted the Request for the opinion, itself referenced other General Assembly resolutions which contain calls for action by both the United Nations as well as, specifically, its Member States. States are, of course, primary actors under international law. If the General Assembly wanted this Request to be only limited to itself, it would have phrased the Request accordingly.

34. Germany has argued that the General Assembly did not intend to ask the Court to provide legal guidance as to possible legal consequences for States, because the 2017 Request makes no express reference to any legal consequences for States.

35. Nonetheless, Germany admits, relying on the *Wall* case, that the Court can address legal consequences for States even where a request for an advisory opinion does not expressly ask for them *expressis verbis*, at least in circumstances where the request refers to international instruments imposing obligations on States or to resolutions of a requesting organ, which address legal obligations of States.

36. Applying Germany's logic to the present case, the Court can address the legal consequences of States, because the Request for the advisory opinion on Chagos refers to both international instruments imposing obligations on States and resolutions addressing States' compliance with those obligations. In the present case such relevant instruments expressly referenced the questions:

— The first is resolution 1514, which provides in paragraph 7 that: "[a]ll States *shall* observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and *the present declaration*". This mandatory language is *expressly addressed to States*. And one of the obligations under this resolution, in paragraph 6, is that States must not make any attempt aimed at the partial or total disruption of the national unity and the territorial integrity.

— Another is resolution 2066 (XX). Pointing to the obligation set out in the 1514 resolution, it invited the United Kingdom to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV), and to take no action which would dismember the territory of Mauritius and violate its territorial integrity.

— Similarly, two other resolutions, 2232 (XXI) and 2357 (XXII), recalling the obligation set out in the 1514 resolution, called upon the administering Powers to implement without delay the relevant resolutions related to decolonization and reiterated that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial territories is incompatible with the purposes and principles of the Charter of the United Nations and the General Assembly resolution 1514 (XV).

37. It is surprising that Germany made no references to these instruments. In fact, they were completely excised from the slide of Question 2 *(b)*. The words "including obligations reflected in the above-mentioned resolutions" are replaced by ellipsis.

38. Germany's argument is not advanced by pointing out that the word "obligations" in the second question is not preceded by the definite article. The absence of the word "the", it was suggested, means the Court is not asked to provide its opinion in regard to *all* such obligations. But, even if Germany were correct that this means just *some* obligations, it cannot mean *no* obligations. And, since the obligations referenced in the second question are those found in resolutions 1514, 2066 (XX), 2232 (XXI), and 2357 (XXII), which are all obligations that pertain solely to States in relation to their colonial territories, even on Germany's own case, the General Assembly must have intended to request the Court's opinion in regard to legal consequences for States arising from such obligations.

VII. Conclusion

39. In conclusion, the Marshall Islands believes the Court has unarguable competence to respond to the Request of the General Assembly on a matter of decolonization, and that it is appropriate to do so regarding the consequences for international law. The Court should conclude that the process of decolonization was not lawfully completed.

40. The scope of the Request for an advisory opinion includes consequences under international law, for all States in addition to the General Assembly. This is clear from the text of the resolution and the preparatory works.

41. Mr. President, Madam Vice-President, Members of the Court, that concludes the presentation on behalf of the Republic of the Marshall Islands. I thank you for your patience.

Le PRESIDENT: Je remercie la délégation des Iles Marshall pour son intervention. J'invite maintenant S. Exc. M. Venu Rajamony à présenter son exposé au nom de l'Inde. Vous avez la parole.

Mr. RAJAMONY:

1. Mr. President, Madam Vice-President, esteemed Members of this Court, it is a great honour for me to appear before this Court as India's representative for presenting the position of India in the current advisory proceedings in the matter of the advisory opinion requested by the United Nations General Assembly in its resolution A/RES/71/292 of 22 June 2017.

2. In accordance with Article 96 of the Charter of the United Nations and pursuant to Article 65 of its Statute, this Court has been requested by the General Assembly to render an advisory opinion on the following two questions:

> *(a)* Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?; and
>
> *(b)* What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

3. Mr. President, Madam Vice-President, Members of the Court, the text of the questions referred to this Court for an advisory opinion suggests that the subject-matter of the question for advisory opinion essentially concerns the completeness of decolonization and independence of Mauritius from the United Kingdom, which commenced (or, in other words, took place) in the month of March of the year 1968, subject to the retention of the Chagos Archipelago with the United Kingdom. The retention was the result of separation, or detachment, of the Chagos Archipelago from Mauritius in November 1965. The basis of the separation has found content in an understanding/agreement between Mauritius and the United Kingdom, wherein in return to the use of the Chagos Archipelago for defence purposes, the United Kingdom made certain undertakings including for compensation to Mauritius; fishing rights; benefits of oil and minerals; and the return to Mauritius of the Chagos Archipelago when it is no longer needed for defence purposes. This agreement seems to have been constituted through a series of correspondence between the two sides.

4. Mauritius has repeatedly asserted that the Chagos Archipelago is part of its territory and that the United Kingdom should return the same to it. It is our understanding that, while the United Kingdom recognizes in principle the Mauritian sovereignty over the Chagos, it maintains that the Chagos will be returned to Mauritius once the Islands are no longer required for defence purposes. Given the absence of action on the part of the United Kingdom in returning the

Archipelago, Mauritius brought the matter, through the United Nations General Assembly, before this Court for an advisory opinion.

5. Mr. President, Madam Vice-President, Members of the Court, India has given its views in detail in its Written Submission, submitted on 28 February 2018, on the aspects relating to the issue in question for consideration of the Court in the process of framing its advisory opinion. These aspects include: historical facts concerning the colonial period of Mauritius; process of decolonization of Mauritius; the status of the Chagos Archipelago; resolutions of the United Nations and other measures relevant to the issue between Mauritius and the United Kingdom; and that how all these aspects contributed to the necessity of approaching this Court for the advisory opinion. Therefore, Mr. President, India will not go into or repeat all those details during the current oral proceedings and so would crave the leave of the Court to briefly draw attention to the substance only.

6. The Court, in our view, in the making of its advisory opinion on the questions referred to it, would need to analyse certain factors, *inter alia*, that with which country the sovereignty of the Chagos Archipelago rests; whether formal and final transfer of sovereignty to the United Kingdom has ever been agreed to by Mauritius; whether the decolonization of Mauritian territory has been and still continues to be an obligation of the United Kingdom; and if so, whether the process of decolonization of the whole territory of Mauritius has been completed.

7. The analysis of these factors would, in our view, necessitate consideration of the historical aspects and legal aspects associated with and surrounding the colonization of Mauritius, its decolonization, and the status of the Chagos Archipelago.

8. Mr. President, Madam Vice-President, Members of the Court, it is significant to note in this context that the historical survey of facts concerning colonization and the process of decolonization indicates that the Chagos Archipelago throughout the pre- and post-colonial era has been part of Mauritian territory. These Islands came under the colonial administration of the United Kingdom as part of the Mauritian territory.

9. Since May 1814, the United Kingdom is administering the Chagos Archipelago as part of Mauritian territory, in the capacity as a colonial Power. The understanding reached in November 1965 between Mauritius and the United Kingdom for the retention of Chagos by the

United Kingdom for defence purposes and return thereof to Mauritius when no longer needed for defence purposes, is also in itself evidence that Mauritius has been and continues to be the sovereign nation for the Chagos Archipelago.

10. Thus, the historical aspects of the matter in question do clearly establish the Chagos Archipelago being part of the Mauritian territory to the exclusion of the sovereignty of any other State.

11. In its efforts to reminding the United Kingdom to return the Chagos Archipelago back, in June 1980, Mauritius called on the United Kingdom to return the Archipelago, which was followed by a formal claim made in October 1980 in an address by the Mauritian Prime Minister to the United Nations General Assembly. Since then, Mauritius has repeatedly claimed sovereignty over the Chagos. Meanwhile, the United Kingdom has consistently maintained that it has no doubts about the Mauritian claim to sovereignty whilst at the same time acknowledging that it will cede the Archipelago to Mauritius when no longer required for defence purposes.

12. According to the Constitution of Mauritius, the outer Islands of Mauritius include the Chagos Archipelago. Mauritius did not recognize the British Indian Ocean Territory (BIOT) which the United Kingdom created by excising the Chagos Archipelago from the territory of Mauritius prior to its independence. Mauritius claims that the Chagos Archipelago forms an integral part of its territory under both Mauritian law and international law.

13. Turning to the legal aspects, Mr. President, Madam Vice-President, Members of the Court, it is our understanding that the legal aspects should root themselves in the historical facts, behaviour of the nations concerned and the consideration of the issue by relevant administrative and judicial institutions. Needless to mention that the United Nations is the highest and most relevant institution in matters affecting nations and the international courts and tribunals are the most relevant judicial institutions.

14. Mauritius became independent in March 1968. From the legal perspective, taking stock of the events before independence, around that time and thereafter, becomes crucial in determining whether or not the process of decolonization got completed.

15. Before the independence of Mauritius, the United Nations, in December 1960 — recognizing the ardent desire of the peoples of the world to end colonialism, believing in the need

of ending all practices of segregation and discrimination associated with the colonialism, convinced of the right of all peoples to full freedom and of the integrity of their national territory solemnly proclaimed the necessity of a speedy and unconditional end of colonialism in all its forms and manifestations in the General Assembly resolution 1514 (XV). This resolution declared any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country, as incompatible with the purposes and principles of the Charter of the United Nations.

16. However, in November 1965, detachment of the Chagos Archipelago still took place. The United Nations reacted to this detachment of the Chagos Archipelago by adopting resolution 2066 (XX) entitled "Question of Mauritius" in December 1965, calling on the United Kingdom to fully implement resolution 1514 (XV). The resolution obligated the United Kingdom to complete the decolonization of Mauritius and report the same to the General Assembly.

17. The plans for the detachment of Chagos Archipelago were however pressed ahead. The United Nations General Assembly again took cognizance of the matter and considered the issue in December 1966. Condemning the non-implementation of its resolutions and the continuation of colonial occupations, the General Assembly adopted resolution 2232 (XXI) on 20 December 1966. This resolution reaffirmed the right of colonial territories, including Mauritius, to full and complete independence, with the call to the administering Powers to complete the decolonization process without delay. There being no signs of positive action by the administering Powers, the General Assembly once again adopted similar resolution 2357 (XXII) a year after on 19 December 1967.

18. Mr. President, Madam Vice-President, Members of the Court, the international arbitration between Mauritius and the United Kingdom in the recent past (December 2010 to March 2015), which dealt with issues related to Chagos Archipelago, deserves mention from the point of view of determining the sovereignty status of Chagos Archipelago and also the nature and status of undertakings by the United Kingdom towards Mauritius.

19. The Arbitral Tribunal constituted by agreement between both these countries has, in its Award dated 18 March 2015, ruled that the undertakings of the United Kingdom with respect to the fishing rights of Mauritius in the waters of Chagos Archipelago, the eventual return of the

Archipelago to Mauritius, and the benefit of mineral and oil resources in and near the Archipelago, are legally binding undertakings. The Award has, by declaring as unlawful the marine protected area established by the United Kingdom in the waters of the Archipelago, denied the status of the United Kingdom as the coastal State for the Chagos Archipelago. Further, by declaring as legally binding the undertaking of the United Kingdom to return the Archipelago to Mauritius, the Award has determined the legal obligation of the United Kingdom to return the Archipelago to Mauritius.

20. Thus, the analysis of the historical facts concerning the Chagos Archipelago and consideration of the legal aspects associated therewith confirm that the sovereignty of the Chagos Archipelago has been, and continues to be, with Mauritius (which, in fact, the United Kingdom also admits). Regarding the process of decolonization of Mauritius, it remains incomplete both technically and in substance as long as the Chagos Archipelago continues to be under colonial control.

21. Mr. President, Madam Vice-President, Members of the Court, I conclude the submission of India with these words. I thank you for your kind attention.

Le PRESIDENT: Je remercie la délégation de l'Inde dont l'exposé oral clôt l'audience de ce matin. La Cour se réunira de nouveau cet après-midi à 15 heures pour entendre l'Etat d'Israël, le Kenya, le Nicaragua et le Nigéria. L'audience est levée.

L'audience est levée à 12 h 20.

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