Corrigé
Corrected

CR 2018/25

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Wednesday 5 September 2018, at 3 p.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 15 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
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
		Salam
		Iwasawa
	Registrar	Couvreur

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

M. Couvreur, greffier

The State of Israel is represented by:

Dr. Tal Becker, Legal Adviser, Ministry of Foreign Affairs,

H.E. Mr. Aviv Shir-On, Ambassador of the State of Israel to the Kingdom of the Netherlands,

Dr. Roy Schöndorf, Deputy Attorney General (International Law), Ministry of Justice,

Mr. Omri Sender, Legal Consultant to the Ministry of Foreign Affairs,

Ms Shira Giveon, International Law Department, Ministry of Foreign Affairs,

Ms Meital Nir-tal, Legal Adviser, Embassy of the State of Israel in the Kingdom of the Netherlands,

Ms Hanni Maoz, Embassy of the State of Israel in the Kingdom of the Netherlands.

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Ms Pauline Mcharo, Deputy Chief State Counsel, Office of the Attorney General of Kenya,

Ms Rose Sumbeiywo, Counsellor, Embassy of Kenya in the Kingdom of the Netherlands,

Mr. Edwin Rioba, Counsellor, Embassy of Kenya in the Kingdom of the Netherlands,

Ms Edith Kaki, Legal Officer, Embassy of Kenya in the Kingdom of the Netherlands.

The Republic of Nicaragua is represented by:

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Ms Claudia Loza Obregón, Legal Adviser, Ministry of Foreign Affairs of Nicaragua,

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

The Federal Republic of Nigeria is represented by:

Mr. Dayo Apata, Solicitor General of the Federal Republic of Nigeria, Permanent Secretary, Federal Ministry of Justice,

H.E. Mr. Oji N. Ngofa, Ambassador,

Mr. Alex Ebimiebo,

Mr. Otaigbe M. Irusota,

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comme chef de délégation ;

Mme Claudia Loza Obregón, conseillère juridique, ministère des affaires étrangères du Nicaragua,

Mme Sherly Noguera de Argüello, consule générale de la République du Nicaragua,

La République fédérale du Nigéria est représentée par :

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S. Exc. M. Oji N. Ngofa, ambassadeur,

M. Alex Ebimiebo,

M. Otaigbe M. Irusota,

Mr. A.T. Abdullahi,

Ms Kehinde Ibrahim,

Mr. F. O. Oni,

Ms E. N. Ozoagu.

M. A.T. Abdullahi,

Mme Kehinde Ibrahim,

M. F. O. Oni,

Mme E. N. Ozoagu.

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

Pour des raisons qu'il m'a dûment fait connaître, M. le juge Abraham n'est pas en mesure de siéger avec nous cet après-midi et demain.

La Cour se réunit cet après-midi pour entendre l'Etat d'Israël, le Kenya, le Nicaragua et le Nigéria sur la demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies. Chaque délégation dispose de 40 minutes pour présenter son exposé et ne devrait pas excéder le temps qu'il lui est alloué. Avant d'inviter la délégation de l'Etat d'Israël à la barre, j'aimerais inviter tous les orateurs à la présente procédure à ne pas parler trop vite, afin de permettre aux interprètes de pouvoir suivre leur intervention et d'en assurer une traduction intelligible dans l'autre langue de travail de la Cour.

La Cour observera une brève pause après l'exposé du Kenya.

J'invite à présent M. Tal Becker, qui s'exprimera au nom de l'Etat d'Israël. Vous avez la parole, Monsieur.

Mr. BECKER:

1. Mr. President, Madam Vice-President, Members of the Court, it is a great honour for me to appear before this Court and to do so in my capacity as Legal Adviser of the Ministry of Foreign Affairs of the State of Israel.

2. If I am not mistaken, the last time the State of Israel took part in oral proceedings before this Court was almost six decades ago when the late, and great, Shabtai Rosenne, then Legal Adviser to the Israeli Ministry of Foreign Affairs, represented his Government in the case concerning the *Aerial Incident of 27 July 1955*. The Israeli delegation is honoured to follow in Professor Rosenne's footsteps, even if I would not presume to fill his shoes.

3. Mr. President, Israel attaches importance to the present advisory proceedings, as they touch upon matters that transcend the particular circumstances of this case and bear upon the pacific settlement of international disputes in more general terms. My presence here today is also a testimony to the importance that Israel attaches to international law more broadly.

4. As Israel has made clear in its Written Statement of February this year[1], our comments are without prejudice to the question of the Court's jurisdiction in the present case. Israel also has no intention of engaging with the merits of the dispute underlying the case, which it considers to be a bilateral matter that we encourage the Parties — both of whom have our sincere respect — to address and resolve between them.

5. Rather, my arguments today will relate solely to the issue of judicial propriety. Israel, like other States, is not insensitive to the situation of the Chagossian people or to the unfortunate events that have transpired. Our comments today relate only to the principled and important question of whether the advisory function is the appropriate mechanism to address these issues. I shall try and explain why Israel is firmly of the view that the circumstances of this case are of such a character that responding to the Request for an advisory opinion risks jeopardizing the Court's judicial integrity and could lead to the abuse of its advisory function. Surely, it is in the interests of all that this kind of outcome be avoided. And it is in precisely these kinds of circumstances, we respectfully submit, that the Court's own jurisprudence indicates that it should forestall such an outcome by exercising its discretion and declining to give the advisory opinion requested of it.

6. I would add, Mr. President, that Israel has carefully considered the written statements submitted to the Court in connection with the present case. We have also listened with much interest to the statements delivered thus far in these oral proceedings. A significant number of the statements are clearly supportive of the proposition that the Court should *not* give an advisory opinion on the questions put to it. Of the other statements, which sought to refute this position by suggesting that there are no compelling reasons for the Court to refuse to give the opinion, some — as I will soon point out — have actually given significant cause for concern.

Ensuring the judicial integrity of the Court

7. Mr. President, I now turn to the compelling reasons for which this Court should decline to give the advisory opinion requested. I would recall, first, that the Court itself, in its most recent

[1] Written Statement of the State of Israel (StIL), para. 1.5.

advisory opinion, has emphasized that the discretion afforded to it as to whether to reply to a request for an advisory opinion exists, *"for good reasons"*[2].

8. The Court explained, more specifically, that even if its position as a principal organ of the United Nations implies a strong inclination to reply, the Court must also have regard to its integrity as a judicial body[3]. As the Court has elsewhere said, "it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions"[4]. Therefore, as the Court's *jurisprudence constante* has indicated, compelling reasons may well justify a refusal.

9. There is an important observation to be made here before addressing the particulars of this case. These, and similar statements by this Court, give expression to a core idea that the judicial integrity of any court — and its *judicial* character more broadly — are shaped not only by those moments when it asserts jurisdiction or addresses a legal issue before it. They are equally shaped by those moments when it *declines* jurisdiction, or refuses to answer a question put to it, so as, for example, to demonstrate a consistent and impartial commitment to established legal principles, or to remain true to its mandate and mission and prevent abuse — even if this may be regarded by some as politically unpopular.

10. Mr. President, such a moment is upon us in the present case. This is a case in which declining to respond to the Request for an advisory opinion would represent the faithful application of the plain and persuasive force of the Court's own settled jurisprudence. Responding to the Request, on the other hand, as the submissions of some States illustrate, would require the manipulation of that jurisprudence by what may appear to be forced and convoluted reasoning. This appearance of reaching — one might say over-reaching — for arguments in order to justify involvement in the merits of this case, when the jurisprudence of the Court clearly points in the opposite direction, is precisely when judicial character and integrity risk being undermined.

11. Indeed, a court's wider judicial appeal and general legitimacy over time — as a distinctly *legal* institution — is drawn from positioning itself in the middle of the legal river, so to speak,

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[2] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012 (I)*, p. 25, para. 33 (emphasis added); also citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 71-72).

[3] *Ibid.*, para. 34.

[4] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21, para. 23.

where the current is strong, not in side tributaries that are slow and narrow. In the case currently before this Court, as we will endeavour to show, the application of the Court's own jurisprudence regarding the non-circumvention of the principle of consent is both uncomplicated and legally compelling, while the attempt to find ways around that jurisprudence seems strained and legally dubious.

12. Of course, the Court is a principal organ of the United Nations and the appeal of responding to any request for advisory opinion brought before it is not just understandable, it is powerful. As is well known, this Court has not declined a single request for an advisory opinion on grounds of judicial propriety since its founding. But on the facts of *this* case, an opportunity has been presented to the Court to demonstrate that, as distinct from the other principal United Nations organs, it is a *judicial* body and its judicial character would best be protected by upholding the limits it has itself set on recourse to its advisory jurisdiction.

Ensuring respect for the principle of consent to jurisdiction

13. Mr. President, the Court's case law is very clear about the need to ensure respect for the fundamental principle of consent to jurisdiction. The Court has indeed recognized repeatedly, and here I quote from the *Western Sahara* Opinion, as others have done before me, that

> "when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent . . . [then] the powers of the Court under the discretion given to it . . . would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction".[5]

14. Even if the Court has thus far construed quite narrowly — perhaps *too* narrowly — the circumstances in which this fundamental principle of consent to jurisdiction may be considered to be jeopardized in advisory proceedings, such circumstances are manifest in the present case.

15. Mr. President, philosophers will likely never agree on the exact standard by which the important distinction between "abstract" and "concrete" may be drawn. Lawyers, however, would likely *all* agree that essentially any legal question could lend itself to broader construction and presentation.

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[5] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33.

16. As Israel has observed in its Written Statement, even if the questions currently put to the Court are ostensibly located within a broader frame of reference, that of decolonization and self-determination, the Court must — as it has itself acknowledged — "ascertain what are the legal questions really in issue in questions formulated in a request"[6]. This process of determining the real issue put before the Court is a quintessentially legal one familiar to all legal traditions, including my own. Ancient Jewish texts and most especially the Talmud — the foundational canon of analysis and commentary on Jewish law — can often be seen as an exercise in making explicit that which is implicit and in peeling away the layers of a situation, as it is presented, until the real issue to be determined is laid bare. The Court's own approach in this regard is similarly an expression of the essence of the judicial process, and it is indeed both necessary and appropriate for the Court to identify what actually lies behind the question that has been put to it.

17. This is precisely what the Arbitral Tribunal constituted under the Law of the Sea Convention (UNCLOS) in the matter of the *Chagos Marine Protected Area* has done when, following in your footsteps, by citing authority from this Court, it held that it has "to isolate the real issue in the case and to identify the object of the claim"[7]. The Arbitral Tribunal then concluded that despite the way the dispute was depicted when placed before it, it was "properly characterized as relating to land sovereignty over the Chagos Archipelago"[8].

18. In other words, the Arbitral Tribunal rejected jurisdiction because it identified that an issue of land sovereignty was being brought before it under the guise of a question about the identity of the relevant "coastal State". In the same way, we submit, this Court should follow its jurisprudence and decline to respond to a request to adjudicate a bilateral dispute that is being brought to it under the guise of a broader question about decolonization.

19. Ascertaining what legal questions are really in issue is all the more important given the fact — and here I borrow from some of Judge Lauterpacht's words — that the General Assembly

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[6] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 88, para. 35.

[7] Award dated 18 March 2015, para. 208 (referring to *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30).

[8] *Ibid.*, para. 212 (referring to Mauritius's First Submission).

could cast any request in an apparently general form unrelated to a particular situation, even when it is actually desirous of an answer bearing upon a specific situation[9].

20. In such a way, all too many essentially *bilateral* disputes may quite easily be depicted as a matter of broad and general interest to the international community as a whole, also bearing in mind the broad mandate assigned to the General Assembly. The African Union's Written Comments are unfortunately as telling as they are disquieting in this context. They suggest that "any dispute . . . begins in a confined context and then evolves into a larger one in a wider context"[10]. Cast in this way, the advisory opinion procedure risks turning into an alternative (even if non-binding) dispute settlement mechanism for any claimant that enjoys majority support in the General Assembly, but is unable to acquire the consent required by the Court's Statute to establish contentious jurisdiction. That "red line" between contentious and advisory proceedings that counsel for Mauritius referred to on Monday[11] would indeed be crossed.

21. Disregarding the potential for this kind of abuse could serve a harsh blow to the fundamental principle of consent to jurisdiction — and to the Court's advisory mechanism more broadly, to say nothing of the harm to the rule of international law in general.

22. Attention has been drawn in these proceeding to the Court's previous observation that "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"[12]. But it is inconceivable, Mr. President, that this would serve to allow for an abuse of process. No legal rule should lend itself to such an objectionable result.

23. Perhaps, more specifically and importantly, what is at issue here are not any hidden motives of the sponsors of the Request for an advisory opinion. The underlying objective of the Request, and the near inevitable legal effect of responding to it, are hardly a matter of conjecture or speculation.

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[9] See *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956*, p. 37; sep. op. of Judge Lauterpacht.

[10] CoAU, 15 May 2018, para. 68.

[11] CR 2018/20, p. 35, para. 6 (Klein).

[12] *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.

24. After all, as Israel and others have noted in statements submitted to the Court, it is difficult to deny that it is, indeed, the territorial dispute between the United Kingdom and Mauritius that is being placed before the Court in the present advisory proceedings. Mauritius' own statements in initiating the Request for an advisory opinion, and its previous attempts to have this very issue adjudicated in contentious proceedings are transparent in this regard.

25. What is more, to use the language this Court has itself adopted in previous advisory opinion cases, the bilateral dispute between the two States is not merely "in the background"[13]. The subject of the present case is not just *connected to* the pending bilateral dispute. On the contrary. The questions put to the Court bear directly upon the dispute which is at the very heart of the current proceedings. The submissions of other States, arguing against responding to the Request for an opinion, have made this point abundantly clear, and I need not labour it. Simply put, in addressing the question as to whether the process of decolonization was lawfully completed, it seems utterly unavoidable, for example, to address first the ongoing and specific bilateral dispute that underlies that issue — namely, the legal validity of the 1965 bilateral Agreement between the United Kingdom and Mauritius**,** — and the subsequent behaviour post-independence of the parties in reaffirming it, when what is at issue there is the conduct and agreement of two sovereign States as to the status of the Archipelago, not an agreement between the United Kingdom and a dependent territory.

26. What is especially instructive in this regard is to engage in a careful reading of the statements submitted by those States that support the Request for an advisory opinion. Several of these States express the belief that giving the opinion will *not*, so they claim, engage the bilateral dispute. Importantly, they have *all* accepted, like Mauritius, that "advisory proceedings *should not* be used as a pretext for bringing purely bilateral disputes before the Court, including bilateral disputes relating to territorial sovereignty"[14]. They assert, instead, that addressing the questions will somehow not involve addressing the underlying bilateral dispute — though it is hardly clear from these statements how in fact the Court might do so.

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[13] See also *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 171, para. 14.

[14] CoMU, para. 2.13; emphasis added; see also para. 2.11 (where Mauritius accepts that such disputes "have no place in advisory proceedings").

27. Argentina, for example, observed that "[i]f there is a dispute between two States or entities in the framework of an advisory opinion . . . the advisory opinion will not settle the dispute"[15].

28. Nicaragua, too, sought to clarify that "[t]he question is whether the process of decolonization was lawfully completed[,] and not the legal effects of any arrangements between the United Kingdom and its subject people"[16].

29. Serbia explained that even if an advisory opinion is given, "this long-standing bilateral dispute will not be resolved. Rather, the advisory opinion will only provide an appropriate legal guidance to the General Assembly."[17]

30. And the African Union, for its part, asserted that the questions put to the Court "do not call for adjudication upon existing territorial rights or sovereignty over territory"[18].

31. Mr. President, these statements essentially claim that the issue of decolonization with respect to the Chagos Archipelago can somehow be divorced from the ongoing bilateral dispute over sovereignty regarding the self-same Archipelago. That seems a particularly onerous challenge when these two issues are so obviously intertwined, if not synonymous. Indeed, and strikingly, Mauritius itself has expressly conceded in its Written Comments that "the territorial dimension here is completely and fully resolved exclusively by reference to the rules of international law on decolonization and self-determination"[19]. It further asserted, and I am again quoting from its Written Comments, that "in these proceedings . . . the question of whether decolonization has been lawfully completed comes first and, once determined, leaves no territorial issue to be resolved"[20].

32. In other words, Mr. President, in Mauritius' own view, and not just on the facts of the case, it could hardly be said that the present Request for an opinion "in no way touches the merits" of the dispute between the relevant States, to use the standard referred to by this Court in the past[21].

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[15] CoAR, para. 14.

[16] Written Comments of the Republic of Nicaragua (CoNI), para. 16.

[17] CoRS, para. 4.

[18] CoAU, para. 43; see also para. 41.

[19] CoMU, para. 2.17.

[20] *Ibid.*, para. 2.47.

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

The Request does not simply "relate to a legal question actually pending between States"[22], rather it "concerns directly the main point of controversy" between them[23]. In other terms that the Court has previously employed, the settlement of the issue placed before the Court in the present case will doubtless "affect the rights . . . today [of the State not giving its consent]", and its legal position may, again using the language of the Court, be "compromised by the answers that the Court may give to the question put to it"[24]. Indeed, answering the questions put to the Court may well be, again in the language of the Court, "substantially equivalent to deciding the dispute between the parties"[25].

33. This, as the Court has made clear, should not be permitted, and it is as if its previous pronouncements were crafted with exactly a situation like the one now before it in mind. Even if it has in the past shown willingness to give advisory opinions concerning questions that were connected to a bilateral dispute, the position that remains consistent throughout the Court's jurisprudence is that questions that touch directly upon such disputes must not be the subject of advisory proceedings, when an interested State has expressed a lack of consent for such adjudication.

34. Mr. President, much has been made in the present proceedings of the Court's advisory opinion in the *Wall* case, which attracted a number of interpretations (and perhaps some misinterpretations). But what ultimately mattered in that case, too, as the Court indicated, was that the subject-matter of the case was "part of a greater whole" and that the question put by the General Assembly was confined and limited[26]. Judge Higgins clarified, in her separate opinion, that

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

[23] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, pp. 28-29 (referring to the question put to the Court by the request).

[24] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 42 (also citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72).

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

[26] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 160, para. 54.

the Court "wisely and correctly, avoid[ed] what we may term 'permanent status' issues"[27]. And Judge Owada noted, in his separate opinion, that

> "the critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists"[28].

35. While Israel took issue with the Opinion and reasoning of the Court in that case, it notes, nonetheless, that the Court was constrained to point out that addressing the question before it was not, in its view, the equivalent of pronouncing on matters central to that bilateral dispute, and thus affirmed the principle that it has long held that were it to have that effect, the Court should have declined the request for an advisory opinion.

36. In this sense, Mr. President, it does not matter that the question is cast in broader terms of decolonization and self-determination. This is not a formalistic test by which the mere framing of an issue in different terms overcomes the fundamental problem of consent to jurisdiction. Nor does it matter in the final analysis when, how often, or with what intensity the General Assembly has been preoccupied with this issue, as some States supporting giving a reply to the Request for an advisory opinion have conceded. This is not a quantitative test by which the mere involvement of the General Assembly obviates the need for consent when the issue put before the Court touches squarely on a bilateral dispute. After all, in a hypothetical scenario where the General Assembly was specifically addressing a bilateral dispute and directly referred issues central to that dispute to the Court for an advisory opinion, the Court's jurisprudence would not allow for the circumvention of the principle of consent merely because the matter was of "acute concern" to the Assembly.

37. What ultimately matters, therefore, in the Court's consistent jurisprudence in support of the need to uphold the principle of consent to jurisdiction, is whether giving an advisory opinion would essentially involve adjudicating matters that underlie a concrete existing bilateral dispute — not the way the question is ostensibly formulated or the degree to which the General Assembly is preoccupied with that dispute. And, as the Court has made clear, the real issue it must determine is

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[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 211, para. 17 of Judge Higgins' separate opinion..

[28] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 265, para. 13 of Judge Owada's separate opinion.

whether the questions put to it by the General Assembly can be separated out from, and genuinely treated distinctly from, the issues that form the very subject-matter of that bilateral dispute. The Court consistently applied these tests to justify responding to the requests for an advisory opinion in previous cases. It should apply the same tests so as to decline the Request for an advisory opinion in the present case.

38. Mr. President, Madam Vice-President, Members of the Court, I thank you for your attention. I wish to invite my colleague, Dr. Roy Schondorf, Deputy Attorney General of the State of Israel for International Law, to present the remainder of Israel's arguments today, with your permission.

Mr. SCHONDORF:

Ensuring respect for the principle of consent in cases involving territorial sovereignty

1. Mr. President, Madam Vice-President, Members of the Court, I join my colleague Dr. Becker in expressing what a sincere honour it is for me, and for the Israeli delegation as a whole, to appear before you today.

2. As Israel and others have stressed in their written statements, the need to ensure that the principle of consent to jurisdiction is not circumvented, is ever more important when the relevant dispute relates to territorial sovereignty.

3. The territorial domain of States is a matter of critical importance. It inherently bears upon the highest considerations of national interests, including national security. I recall, in this context, that the Arbitral Tribunal constituted under the Law of the Sea Convention in the matter of the *Chagos Marine Protected Area* has recognized — and I quote — the "manifest sensitivity of States to the compulsory settlement of disputes relating to sovereign rights and maritime territory"[29]. The Tribunal saw it fit to add that "[s]uch sensitivities arise to an even greater degree in relation to land territory"[30].

[29] Award dated 18 March 2015, para. 219; see also para. 216 (the Tribunal recognizing the "inherent sensitivity of States to questions of territorial sovereignty").

[30] *Ibid.*, para. 219.

4. That the principle of consent to jurisdiction commands particular respect when the question placed before the Court bears upon disputes concerning conflicting *territorial* claims appears to have been accepted by the Court as well in the *Western Sahara* case. There, the Court did not reject Spain's argument that "the consent of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary": it found, rather, that "[t]he questions in the request do not [] relate to a territorial dispute, in the proper sense of the term, between the interested States"[31]. The case now before the Court is fundamentally different, given that a territorial dispute, in the proper sense of the term, indeed lies at the heart of the present proceedings.

5. Israel is thus in full agreement with those States that have cautioned that when it is a *territorial* dispute that the requested opinion may touch the merits of, the principle of consent to jurisdiction commands particular respect. No factors could justify compromising this fundamental principle of international law in such circumstances.

6. I respectfully refer you to Israel's Written Statement for our additional and more detailed arguments on this matter. Significantly, these arguments demonstrate the full compatibility of the position I have presented before you today with the Court's own jurisprudence to date.

The existence of significant differences regarding the facts underlying the case is another compelling reason for the Court to exercise its discretion to decline to give the advisory opinion requested

7. Mr. President, I now turn to an additional compelling reason for which the Court should decline to give the advisory opinion requested. In short, Israel is of the view that in the present case the Court cannot be satisfied that it has sufficient information and evidence to enable it to arrive at a judicial conclusion upon the disputed questions of fact. This is because the advisory opinion mechanism is simply not suitable for the elucidation and resolution of complex factual disputes.

8. It will be recalled, Mr. President, that the Court itself has previously explained that "the question whether the evidence available to it is sufficient to give an advisory opinion must be decided *in each particular instance*"[32]. Indeed, raising this issue and others should not be

[31] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 27-28, para. 43.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 161, para. 56; emphasis added; citing previous case law as well.

dismissively characterized as playing a broken record. Like the other considerations that the Court has referred to as relevant to the exercise of its discretion in deciding whether or not to give an advisory opinion, this consideration must not come to be seen as a dead letter.

9. Advisory proceedings, being essentially designated to respond to *legal* questions, are inherently ill-suited to the determination of complex disputed facts. Their procedural framework does not adequately afford the Court the conditions required for such a purpose in the way that contentious proceedings do.

10. As Professor Shabtai Rosenne observed,

> "unless there is agreement on the facts as the point of departure for the determination of the law applicable to those facts, non-contentious and non-adversarial judicial procedures are not likely to be appropriate machineries for the establishment of facts"[33].

11. This is not a mere theoretical concern, nor is it one that may easily be resolved or set aside, as some of the statements submitted to the Court seem to suggest. The Permanent Court of International Justice has therefore recognized in the *Eastern Carelia* case that "under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are"[34].

12. Judge Greenwood, too, has observed, in a book chapter on the Court's advisory jurisdiction published in 2014, that "[w]hile the Court will . . . usually have a substantial dossier of information available to it, resolving disputed points of fact may still prove problematic"[35].

13. In the present case, it is noteworthy that soon after contending in its Written Comments that the facts are "straightforward and not contentious", Mauritius did concede that several "principal areas of disagreement as to the facts" do exist[36]. These include critical questions such as whether its representative of Mauritius freely consented to the detachment of the Chagos Archipelago, and whether this detachment and the independence of Mauritius were separate issues.

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[33] M. N. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, fifth ed., Vol. II (Brill / Nijhoff, 2016) 980.

[34] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28.

[35] C. Greenwood, "Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice", in: G. Gaja and J. G. Stoutenburg (eds.), *Enhancing the Rule of Law Through the International Court of Justice* (Brill, 2014) pp. 63-68.

[36] CoMU, paras. 1.9, 1.11 (respectively).

14. In such circumstances, we respectfully submit, the Court is not well-positioned to resolve outstanding disputes as to facts that are central to providing a full, or even partial, answer to the questions put to it without compromising its judicial character.

Conclusion

15. Mr. President, it is for these compelling reasons that Israel respectfully submits that the Court, in keeping with a long line of its past decisions, should remain faithful to the requirements of its judicial character and decline to give the requested advisory opinion. The Court has previously made it clear that "[t]here are certain limits . . . to the Court's duty to reply to a Request for an Opinion"[37]**.** ***The*** circumstances of the present case very much run up against such limits.

16. A self-evident and central feature distinguishing a Court from a non-legal institution is its commitment to the consistent and fair application of legal principles. In the case presently before the Court, the same legal principles that the Court applied to justify a response to requests for advisory opinions in the past, require it to decline the request in this instance. This is the essence of upholding the Court's commitment to its judicial character and its judicial integrity. It is respectfully submitted that the Court should not miss the opportunity presented to it to do just that.

17. Mr. President, Madam Vice-President, Members of the Court, that concludes Israel's oral statement. I thank you very much for your careful attention.

Le PRESIDENT : Je remercie la délégation de l'Etat d'Israël pour son intervention. J'invite à présent S. Exc. Lawrence Lenayapa qui s'exprimera le premier au nom du Kenya. Vous avez la parole, M. Lenayapa.

Mr. LENAYAPA:

Mr. President, Madam Vice-President, honourable Members of the Court, it is an honour to submit the oral statement of the Republic of Kenya.

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

I. INTRODUCTION

1. It is with great honour that the Republic of Kenya expresses its view in respect of this Request for an advisory opinion. In this statement, the Republic of Kenya reiterates its position on the completion of the process of decolonization and the right of self-determination pursuant to resolution A/RES/71/292 of the General Assembly of the United Nations.

2. It is recalled that on 22 June 2017, the United Nations General Assembly adopted resolution 71/292, requesting the ICJ to give an advisory opinion on two questions which are on the screen now:

> *(a)* Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?
>
> *(b)* What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?[38]

3. The purpose of the Request by the United Nations General Assembly made pursuant to Article 96 (1) of the United Nations Charter is to obtain authoritative legal guidance from the Court to guide the United Nations General Assembly in its mandate in fulfilling decolonization globally. Kenya supported and sponsored the resolution at the United Nations General Assembly. It was an African Group resolution, not a Mauritian resolution.

4. This submission is divided in six parts. The Republic of Kenya shall first address the issue of the competence of the Court (II); secondly, whether the decolonization of Mauritius was lawfully completed under international law (III); thirdly, the right of self-determination as an obligation in the United Nations General Assembly resolutions (IV); fourthly, the position of other international organizations on the issue of self-determination (V); fifthly, jurisprudence of the International Court of Justice on self-determination (VI); and finally conclude.

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[38] UNGA res. 71/292, Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, doc. A/RES/71/292, 22 June 2017.

5. Mr. President, it is now my pleasure to introduce Ms Pauline Mcharo, who will take you through the submissions of the Republic of Kenya. Thank you, Mr. President.

Ms MCHARO: Thank you, Mr. President, Madam Vice-President, Members of the Court. I am honoured to appear before the Court on behalf of the Republic of Kenya in my capacity as Deputy Chief State Counsel. I shall first address the issue of the competence of the Court.

II. COMPETENCE OF THE COURT

1. Mr. President, on the competence of the Court, Kenya submits, as most States participating have, that the Court has jurisdiction to address this Request and that there is no reason for it not to give the opinion requested. Article 92 of the United Nations Charter designates the Court as the "principal judicial organ of the United Nations"; Article 96, paragraph 1, stipulates that the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. The Statute of the Court, Article 65, further stipulates that the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. There are no limitations, provisos or restrictions in those Articles, once the organs are requesting opinions on a question of law.

2. The questions before the Court are undoubtedly legal questions. The questions seek to clarify whether the decolonization of Mauritius was completed, having regard to international law, and the legal consequences under international law arising out of the continued administration by the United Kingdom of the Chagos Archipelago.

3. Matters concerning decolonization are directly of concern to the functions of the United Nations, including the United Nations General Assembly. The history of the United Nations General Assembly's engagement with the questions of decolonization and the related issues of self-determination and territorial integrity is long and well established. This long history is revisited in the resolution 71/292 — the resolution by which this Court is seised with the present Request for an advisory opinion. This resolution was tabled by the African Group of States. It was supported by 94 States from across the world. Only 15 States voted against it, significantly less than one tenth of

the membership. Putting it another way, 159 of the 174 States who voted for the resolution supported it or did not oppose it.

4. A moment of culmination of the United Nations General Assembly's engagement with the question of decolonization was on 14 December 1960, when the United Nations General Assembly adopted the resolution 1514 (XV).

5. In more recent times, the United Nations General Assembly adopted resolution 65/118 on 10 December 2010, in which it noted that it was incumbent on the United Nations to continue to play an active role in the process of decolonization and that the process of decolonization was not complete; and resolution 65/119 on the same date of 10 December 2010, in which it called for the immediate and full implementation of the resolution 1514 (XV).

6. The subject-matter of the present Request for an advisory opinion is, therefore, one over which the United Nations General Assembly has had a continuous and sustained engagement, subsisting over several decades. The United Nations General Assembly and its organs have addressed the issue of the decolonization of Mauritius for decades. There are no grounds for declining to exercise jurisdiction. This Request therefore inscribes itself in a long line of advisory opinions given by the Court to the United Nations General Assembly.

7. We respectfully submit that the Court should therefore render an advisory opinion to guide the United Nations General Assembly in the exercise of its mandate of enabling the full implementation of resolution 1514 (XV)[39], and in so doing identify the meaning, effect and consequences of obligations of States set out in the four United Nations General Assembly resolutions referred to in resolution 71/292.

8. We move on to address the question of whether decolonization of Mauritius was lawfully completed under international law and having regard to obligations in the United Nations General Assembly resolutions.

[39] UNGA res. 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples" (A/RES/1514 (XV) of Dec. 1960.

III. DECOLONIZATION OF MAURITIUS WAS NOT LAWFULLY COMPLETED UNDER INTERNATIONAL LAW

9. Mr. President, the Republic of Kenya will confine and address itself before this Court to the first question, in which the Court is required to determine whether the process of decolonization was lawfully completed, having regard to international law, including obligations reflected in the United Nations General Assembly's resolutions 1514 (XV), 2066 (XX), 2232 (XXI) and 2357 (XXII).

10. The Republic of Kenya submits that the process of decolonization of Mauritius was incomplete. From the facts presented by the Republic of Mauritius to the African Union and the United Nations General Assembly it is readily apparent that the decolonization of Mauritius was not completed. The dismembering of the territory of Mauritius prior to independence, without the freely expressed consent of the people, prevented Mauritius from the effective exercise of its right of self-determination and also violated its associated right of territorial integrity.

11. The right of peoples to self-determination is a principle of international law, regarded as *jus cogens*. It has *erga omnes* character[40]; the implication is that the right of self-determination entailed a corresponding duty on the part of all States to the international community as a whole to enforce this right. This characterization means that we are not here concerned with a bilateral dispute. The failure to respect the right of self-determination is the failure to respect an obligation to the whole world.

12. The right to self-determination is a right vested in peoples. It entails the right of peoples to determine their internal political status. It is intrinsically linked to the notion of territorial integrity. A territorial unit should not be dismembered prior to the exercise of the right of self-determination by people of that territory. The right to self-determination could only have been exercised with the freely expressed will of the entire people of the territory. It meant that the people of Mauritius, including the inhabitants of the Chagos Archipelago, were entitled as a matter of international law to be given a free opportunity to express their views on the future of their territory, including any possible dismembering of the territory. In this case that did not happen. The process of decolonization relating to the Chagos Archipelago was and is to be treated as part of the

[40] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 16 para. 29.

decolonization of Mauritius. The will of the population of the Chagossian origin — a population that has been very badly mistreated — must be taken into account as part of the will of the population of the territory of Mauritius in its entirety, including the Chagos Archipelago. Since the will of the population of the territory of Mauritius, including the population of Chagossian origin, was not taken into account prior to the detachment of Chagos in 1965, that detachment is contrary to the law of self-determination.

13. On 3 September 2018, the United Kingdom acknowledged before the Court that it fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and that it deeply regrets that fact. This is a situation that ought to be remedied and made good. Expressions of shame, and acknowledgment of wrongdoing, and payment of compensation to them, are obviously not enough.

14. The International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR), both of which were adopted by the United Nations General Assembly on 16 December 1966, confirmed the status of self-determination in international law, and set out some of the principle's essential elements. Both the ICCPR and the ICESCR make clear that *all peoples have the right of self-determination*, in Article 1. The right to self-determination is, par excellence, a human right.

15. These provisions of the ICCPR and the ICESCR reflect the principles that had already received affirmation in both the Charter of the United Nations, and in resolution 1514 (XV) of the United Nations General Assembly.

16. By dismembering the territory prior to self-determination and independence of Mauritius, this action not only violated the territorial integrity of Mauritius but it also limited and affected the rights of the people to self-determination. Further, the human rights of the Chagossians were violated during and after their forcible eviction from their homeland. The independence and sovereignty of Mauritius was thus granted on an incomplete territorial basis.

IV. THE RIGHT TO SELF-DETERMINATION IS AN OBLIGATION IN THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

17. Mr. President, the process of attaining full decolonization is core to the proper implementation of the right to self-determination. The United Nations Charter, Article 1 (2)

provides that one of the purposes of the Organization is the development of friendly relations amongst the nations *"based on the respect of equal rights and self-determination of peoples"*[41].

18. Article 55 of the Charter specifies that the United Nations should work *"with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"*[42], and in Article 56, Member States pledged themselves *"to take joint and separate action in co-operation with the Organization for the achievement"* of those purposes.

19. The United Nations General Assembly played an essential role in carrying out the process of decolonization. This is evinced by analysis of relevant General Assembly resolutions such as resolution 421 D (V)[43], resolution 545 (VI)[44], resolution 637 (VII)[45], resolution 648 (VII)[46], resolution 738 (VIII)[47] and resolution 837 (IX)[48] that demonstrate that the right to self-determination existed in customary international law by the time UNGA resolution 1514 (XV) was adopted.

20. As mentioned before, the UNGA resolution 1514 (XV) was adopted on 14 December 1960. In paragraphs 2 and 5, the resolution recognized a *right* to self-determination of all peoples to freely determine their political status and freely pursue their economic, social and cultural development, without *any* conditions or reservations, in accordance with their freely expressed will and desire.

21. The principle of territorial integrity of colonial territories was enshrined in paragraph 6 of the resolution 1514 (XV), which prohibits partial or total disruption of territorial integrity of colonies.

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[41] UN Charter, Art. 1 (2).

[42] UN Charter, Arts. 55 and 56.

[43] UNGA res. 421D (V), 4 Dec. 1950.

[44] UNGA res. 545 (VI), 5 Feb. 1952.

[45] UNGA res. 637 (VII), 16 Dec. 1952.

[46] UNGA res. 648 (VII), 10 Dec. 1952.

[47] UNGA res. 738 (VIII), 28 Dec. 1953.

[48] UNGA res. 837 (IX), 14 Dec. 1954.

22. The language used in resolution 1514 (XV) is of a mandatory nature. It has reflected a rule of general international law since it was adopted in 1960. It evinces a clear intention that its provisions were meant to have normative significance[49].

23. Eighty-nine countries (89) voted in favour of the Colonial Declaration, none (0) voted against, and nine (9) abstained: Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom and the United States abstained. We heard from counsel for the United Kingdom that those abstentions might be relevant in support of its argument. Yet you heard yesterday from counsel for Botswana, who easily refuted that argument.

24. The vote for UNGA resolution 1514 (XV) was a clear proof of *opinio juris* by the supporting countries and a sign of acquiescence to the right of self-determination in the abstaining States, and accordingly, a clear sign of emergence of a customary rule. Therefore, the resolution 1514 (XV) can be said to have formed a vital base for all subsequent resolutions and for an international recognition of a customary rule as well as for the decolonization policy of the United Nations[50].

25. Similarly, resolution 1514 (XV) is said to possess a "quasi-constitutional status in international law, which is comparable to the Universal Declaration of Human Rights and the UN Charter"[51].

26. Member States to the United Nations agreed that an enforcement mechanism be put in place to give effect to resolution 1514 (XV); *this* further demonstrates that they considered the right to self-determination to be an enforceable right under international law.

27. The UNGA resolution 2066 (XX) of 16 December 1965, recalled resolution 1514 (XV). The United Nations General Assembly noted that the administering Power had not fully implemented resolution 1514 (XV) with regard to Mauritius and further requested the United Kingdom not to take any action that would dismember Mauritius and violate its territorial integrity.

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[49] Stephen Allen, *The Chagos Islanders and International Law* (OUP, 2014), p. 177.

[50] Christian Walter, Antje von Ungern-Sternberg, Kavus Abushov, and 'Introduction' in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), *Self-Determination and Secession in International Law* (OUP 2014), p. 2.

[51] James Crawford, *The Creation of States in International Law* (2nd ed. OUP, 2006), p. 604.

28. The United Nations Security Council, in its resolution 183 of 1963, also reaffirmed the interpretation of UNGA resolution 1514 (XV) as follows: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

29. The UNGA resolution 2232 (XXI) reaffirmed the inalienable right of the people of Mauritius and other specified territories to self-determination and independence. The United Nations General Assembly reiterated its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial territories and the establishment of military bases and installations in these territories is incompatible with the purposes and principles of the Charter of the United Nations and of UNGA resolution 1514 (XV).

30. The UNGA resolution 2357 (XXII) again reaffirmed the inalienable right of the people of Mauritius and other specified territories to self-determination and independence. The United Nations General Assembly again reiterated its declaration that any attempt, and either partial or total disruption of the national unity and the territorial integrity of colonial territories and the establishment of military bases and installations in these territories is incompatible with the purposes and principles of the Charter of the United Nations and of the United Nations General Assembly.

31. The UNGA resolutions 1514 (XV), 2066 (XX), 2232 (XXI), 2357 (XXII) are evidence of international practice that the people of Mauritius had an inalienable right to self-determination and independence. The resolutions are also evidence of international practice that any partial or total disruption of territorial integrity of territories was incompatible with the purposes of the United Nations Charter and resolution 1514 (XV). The UNGA resolutions are therefore a declaratory evidence of international practice, concerning the existence of a right to self-determination in customary international law.

32. From the analysis of the UNGA resolutions 1514 (XV), 2066 (XX), 2232 (XXI), 2357 (XXII) it is submitted that the dismemberment of the Chagos from Mauritius three years prior to independence meant that decolonization of Mauritius was not lawfully completed under customary international law.

33. We note, finally, that a distinguished judge of this Court, Dame Rosalyn Higgins concluded as early as 1963 "there now exists a legal right of self-determination"[52]. The United Kingdom now seems to be saying she was wrong. With respect, on this matter it is plain that she is right and that the United Kingdom is wrong.

V. RESOLUTIONS ON THE RIGHT TO SELF-DETERMINATION BY OTHER INTERNATIONAL ORGANIZATIONS

34. Mr. President, I now move on to the resolutions on the right to self-determination by other international organizations. The Organization of African Unity recognized the normative value under general international law of UNGA resolution 1514 (XV) through a succession of its own resolutions. In a summit conference held as early as 1963, it declared that the imposition by colonial Powers to control governments and administrations to be a flagrant violation of the inalienable rights of the legitimate inhabitants of territories concerned. It further urged the colonial Powers to take necessary steps to grant independence to colonial countries and peoples. It maintained that the colonial Powers continued determination to maintain colonies or semi-colonies in Africa constituted a menace to the peace of the continent[53].

35. Most recently, on 28 January 2018, the Assembly of the African Union adopted decision Assembly/AU/Dec.684 (XXX), in which the African Union renewed "its commitment to UN Resolution 2066 (XX) . . . which reaffirms the inalienable right of the people of Mauritius to freedom" and invited the United Kingdom to "implement UN Resolution 1514 (XV) fully". Decision 684 (XXX) also recalled that the situation of the Chagos Archipelago would also have to be assessed in light of UNGA resolution 2232 (XXI) and resolution 2357 (XXII). Those two resolutions — supported by the Head of State or government of every member of the African Union — reiterated "that any disruption of the territorial integrity of colonial territories in the decolonization process would be contrary to the UN Charter".

36. The Non-Aligned Movement (NAM) has also emphasized the immense importance of the decolonization process and the resultant legitimate right to self-determination of peoples under

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[52] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p. 104.

[53] Organization of African Unity, Resolutions Adopted by the First Conference of Independent African Heads of States and Government Held in Addis Ababa, Ethiopia from 22-25 May 1963, p. 2, CIAS/Plen 2/Rev 2, para. 3.

colonization and alien dominance in many resolutions[54]. In its resolutions the Non-Aligned Movement has consistently reiterated the Mauritius sovereignty over the Chagos.

37. The Asian-African Legal Consultative Organization (AALCO) member States have also reaffirmed the right of people to self-determination by virtue of which they freely determine their political status, and freely engage their economic social and cultural development.

38. The collective main aim of all the decolonization resolutions was to achieve the right to self-determination and ensure that all peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development and it has attained considerable content over time through State practice.

VI. JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE ON SELF-DETERMINATION

39. Mr. President, I now move on to the jurisprudence of the International Court of Justice on self-determination. The International Court of Justice has played a fundamental role in providing jurisprudence on this very important right. The Opinion of the Court in the *Western Sahara* case[55] is especially relevant with regards to the elements of self-determination. It recognized self-determination as a right of peoples and stated that:

> "The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV)."

40. The Court also declared that self-determination requires the free and genuine consent of the population concerned to determine the future of the territory[56].

41. In the Opinion of the Court in the *South West Africa Advisory Opinion* case[57], the Court found that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately. In particular, the Court considered

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[54] See resolutions A/38/132 S/15675, para. 81, A/40/854 S/17610, para. 131, A/41/341 S/18065, para. 122, A/44/409 S/20743, para. 107 and many other resolutions have reaffirmed the sovereignty of Mauritius over the Chagos.

[55] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 31, para. 55.

[56] *Ibid.*, para. 57

[57] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, I.C.J. Reports 1970*, p. 31, para. 53

that the mandate of South Africa had to be interpreted in light of the right to self-determination. According to the Court:

> "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. *These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned*." (Emphasis added.)

42. In the *East Timor* case, the Court stated that:

> "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omne*s character, is irreproachable. The principle of self-determination has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . it is one of the essential principles of contemporary international law."[58]

VII. CONCLUSION

43. Kenya was among the 49 countries that attained independence in the period of the 1950s to 1965. The fact that so many colonies became independent at that time is a strong indication that the right of people to self-determination existed even before 1965 and was without doubt part of customary international law, when the Chagos was excised from Mauritius in 1965. As an African country having experienced colonization, Kenya knows that it takes many years for a country that has been colonized to be able to question the actions of its former colonial Power.

44. On 3 September we listened with great interest and respect to a counsel of a colonial Power as they addressed what they say the Government of Mauritius should have done after 1968, if they had an issue with the detachment of Chagos Archipelago. With equal respect, we are bound to say that counsel appears to have little understanding of the realities of what it means to emerge from a period of lengthy colonial domination of over 150 years. In the case of Mauritius, as for many countries emerging from colonization, there could have been a period of implementation of systems and structures of government as well as economic dependence. For the former colonial Power to treat its actions during that period as reflecting consent for actions taken during the colonial period — in particular the dismemberment of territory — is wrong.

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

45. The Republic of Kenya has always fully supported the full decolonization of States in the United Nations General Assembly. The Republic of Kenya therefore submits this statement to reaffirm the importance it places on the completion of decolonization globally, which gives States the right of self-determination and to safeguard the territorial integrity of States. Kenya fully associates itself with resolution 1514 (XV) and subsequent resolutions made by the various intergovernmental organizations such as the United Nations, the Organization of African Unity, the African Union, the Asian-African Legal Consultative Organization, the Non-Aligned Movement — in support of the right to self-determination.

46. It is clear that the right to self-determination under customary international law is reflected in the Charter of the United Nations, in resolutions of the United Nations General Assembly, in State practice, and in the jurisprudence of the Court. It is an *erga omnes* right and a peremptory norm of international law from which no derogation is permitted.

47. The Court should therefore take into account the strong body of practice and *opinio juris*, which has been developed by the United Nations, African States as members of the Organization of African Unity and later of the African Union, as well as by the Non-Aligned Movement. Kenya submits that this right to self-determination is thus legitimate and inalienable.

48. The Republic of Kenya resubmits that the decolonization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968 and it is recommended that the process of decolonization should therefore be pursued to its logical completion.

49. The Republic of Kenya further submits that, under international law and by virtue of being a Member of the United Nations, the United Kingdom of Great Britain and Northern Ireland is obliged to, *inter alia*, consider and implement such steps as are necessary to give effect to the Charter of the United Nations which is "based on the respect of equal rights and self-determination of peoples"[59] and accordingly, facilitate the immediate return of the Chagos Archipelago to Mauritius to enable Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin.

[59] United Nations Charter, Art. 1 (2)

The Republic of Kenya would like to thank the Court for the courtesy of hearing its submissions. Thank you.

Le PRESIDENT: Je remercie la délégation du Kenya pour son exposé. Avant d'inviter la prochaine délégation à prendre la parole, la Cour observera une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 16h15 à 16h30.

Le PRESIDENT: Veuillez vous asseoir. L'audience reprend. J'invite à présent S. Exc. M. Argüello Gómez afin qu'il fasse sa présentation au nom de la République du Nicaragua. Vous avez la parole.

Mr. ARGÜELLO GÓMEZ:

1. Thank you, Mr. President. Mr. President, Madam Vice-President, Members of the Court, it is an honour for me to appear before you today as representative of Nicaragua in these proceedings dealing with fundamental rights of paramount interest to the international community.

2. The reason for Nicaragua's presence before the Court does not stem from any position it might have on any bilateral dispute between Mauritius and the United Kingdom, whatever sympathies that situation might generate. The reason for Nicaragua's presence is that the interpretation of the norms and international rights and obligations that are under consideration in this advisory opinion requested by the General Assembly affects not only two or three States, but the international community as a whole; that is, all States including Nicaragua. This is also the reason why Nicaragua was one of the sponsors of the draft resolution that was submitted to the General Assembly requesting the opinion of the principal judicial organ of the United Nations.

3. Mr. President, the United Kingdom at the outset of its oral presentation "reiterated what had been stated in its (the UK) Written Statement and its Written Comments, that it fully accepts that the manner in which the Chagossians were removed from Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets the fact"[60].

[60] CR 2018/21, para. 5 (Buckland).

4. After listening to this statement, we had hopes that it would be followed by a statement that the United Kingdom was ready to revert the Archipelago to Mauritius, but the rest of the statement was basically a narrative of monies paid to Mauritius and the monetary compensation given to some Chagossians for the loss of their property.

5. Mr. President, all this is well and good, and we commend it, but we are not here to discuss the amount of reparation owed for material loss of the homes of the Chagossians, but to discuss the loss of their homeland and the loss of the territorial integrity of Mauritius.

THE QUESTION OF JURISDICTION

6. Passing to the question of jurisdiction, in the *Wall* case the Court recalled that when seised of a request for an advisory opinion, it must "first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction"[61].

7. We will not reiterate all the arguments on jurisdiction, since there are certain aspects that have not been seriously questioned, but a brief comment might be in order. The opinion was requested by the General Assembly that, as the Court pointed out repeatedly, has "a competence relating to 'any questions or any matters' within the scope of the Charter"[62]. Although the General Assembly has no limits to the type of "legal questions" it may formulate to the Court, and therefore it is not necessary to determine whether a legal question falls within its competence, it is important to emphasize that in the present case, the General Assembly is posing a question on decolonization which, by virtue of the Charter and, more so, by the special interest and assumption of powers the Assembly has taken on this issue since the creation of the United Nations, is a question of great concern to the Assembly.

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[61] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13.

[62] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, para. 17.

DISCRETION OF THE COURT

8. In the present case, as in several others in which the advisory opinion was requested upon a legal question actually pending between two or more States, claims to the effect that the Court should not exercise its jurisdiction have been raised.

9. It has been alleged by certain States, including two of the especially interested States, that "giving of an advisory opinion in this case would not be consistent with judicial propriety"[63] and that for this reason "the Court should exercise its discretion to decline to issue an opinion in this case"[64].

10. These sorts of claims have frequently been made in situations involving a legal question actually pending between two or more States, in spite of the fact that paragraph 3 of Article 102 of the Rules clearly provides for it and that the Court has recognized in the *Western Sahara* case: "It has undoubtedly been the usual situation for an advisory opinion of the Court to pronounce on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs"[65].

11. There is then no possible discussion that the legal question presently before the Court, in spite of the fact that it will involve pronouncements on existing rights and obligations, clearly falls within its competence and deserves a response. The Court has also made clear that only "compelling reasons" should lead it to refuse to render its opinion[66].

12. The reason for this appeal to propriety is allegedly because, according to the United Kingdom, it does not appear possible for the Court to give an advisory opinion without making determinations on or directly concerning the long-standing bilateral dispute over sovereignty, and for this reason "the Court should exercise its discretion so as to decline to answer the Request"[67].

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[63] CoGB, para. 3.26; see also CR/ 2018/21, paras. 30-31 (Wordsworth).

[64] CoUS, para. 5.1.

[65] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 20, para. 19.

[66] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155.

[67] CoGB, para. 1.4.

13. Another State agrees that for reasons of propriety the Court should refuse to give an opinion because it would be "utilizing the Court's advisory jurisdiction in a case that is, at its core, about an ongoing bilateral sovereignty dispute"[68].

14. According to the United Kingdom, "the Court has exercised its discretion to answer a Request that asks the Court to state its position on an ongoing dispute over sovereignty over territory"[69].

15. In the *Wall* case, it is correct that the Court was not being asked to give a direct answer to the question of sovereignty over the area where the wall was being built. But the question was implicit since if the wall had been erected in undisputed Israeli territory, the question would never have been put to the Court. The Court in that case clearly stated that the issues under consideration involved, among others, questions of self-determination[70].

16. In the *Western Sahara* case, the Court was not being asked whether Spain had sovereignty over the territory but the question of sovereignty permeated the whole situation.

17. There was clearly a legal dispute over the status of Western Sahara and the territorial claims that Morocco and Mauritania had over that territory, claims that were opposed by Spain. It is correct that Spain was not itself claiming sovereignty over the territory since it was the colonial Power and the territory was under its jurisdiction and effective sovereignty.

18. In the present case, the United Kingdom cannot be considered as claiming full sovereignty over Chagos since it can only claim to be the administering Power to this part of the territory of Mauritius. If the United Kingdom were to claim sovereignty over Chagos other than that devolving on it as administering Power, then the United Kingdom should clarify to the international community and the General Assembly that it has changed its policy on the question of decolonization.

19. The claim that the advisory opinion is being sought to circumvent the consent of the United Kingdom to settle a dispute concerning the attribution of territorial sovereignty over the Chagos Archipelago, can be addressed in the same way the Court addressed the observations of

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[68] CoUS, para. 1.6.

[69] CoGB, para. 3.22.

[70] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155.

Spain with respect to sovereignty over the Western Sahara: "There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations."[71]

20. Similarly, the controversy over the separation of the Chagos Archipelago did not arise outside the proceedings of the General Assembly. Resolutions 2066, 2233 and 2357 make it clear that the General Assembly was keeping track of what the United Kingdom was doing in the decolonization process of Mauritius. When these resolutions were passed, putting the United Kingdom on notice that any separation of the Chagos Archipelago would be a violation of the rights of self-determination of Mauritius, the General Assembly was not making any reference to a bilateral dispute between the States of Mauritius and the United Kingdom. This was an impossibility. Mauritius did not yet exist as a State. It came into being in 1968. These resolutions on the detachment of Chagos and its effects on the future decolonization of Mauritius was a question that arose in the General Assembly with the United Kingdom in 1965. A question that after so many years has not been resolved and that has now been placed before the Court.

21. It must be reiterated that the question put to the Court is not whether the United Kingdom is the lawful sovereign of the Chagos Archipelago. The question is whether the process of decolonization of Mauritius was lawfully completed.

22. As the Court pointed out in the *Western Sahara* case: "The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory."[72]

23. The present case is similar. The Court is being asked a question for which the General Assembly needs an answer since it is the authority invested with all faculties derived from Article 73 of the Charter.

24. At this point, Mr. President, it might be convenient to go over the obvious. It is indisputable that questions of decolonization are properly dealt with by the General Assembly and the organs it has set up to keep track of these issues. It is also indisputable that questions of

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[71] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 34.

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

decolonization of necessity imply questions of sovereignty over territory. There cannot be any process of decolonization without sovereignty reverting to the new decolonized State and being withdrawn from the colonizer. If the United Kingdom considers that its purported sovereignty is in question here, then it is as much in question as all the issues of decolonization have implied questions of sovereignty over colonized territory. If this question was only of bilateral interest, then the decolonization process promoted, monitored and certified by the United Nations in the past 70 years has been pure surplusage and neither the General Assembly or the principal judicial organ of the United Nations have any right to interfere in these bilateral matters. But of course this is not the case and that is why it would not be proper for the Court to deny a response.

25. Mr. President, the United Kingdom understood very clearly when it was separating the Archipelago of Chagos from the rest of Mauritius that it was going against the authority of the General Assembly. The brief account that follows is an embarrassing example that further evinces that the dispute presently between the United Kingdom and Mauritius had its origins in the United Nations system.

26. The reason for the dismemberment of Chagos from the rest of Mauritius, as is now well known and documented, was the installation of a military base in the main island of Diego Garcia. A quick review of the extensive dossier filed with the Court on this issue brings to light very dubious manoeuvres by the interested States to keep the United Nations from knowing what was being done with Chagos and the reasons for those proceedings. Once they became public, the interested States misrepresented the facts about it and assured the United Nations that "to the best of his delegation's [the United Kingdom's delegation's] knowledge [there were] no plans for any such bases"[73].

[73] UN dossier No. 253. The UK also stated at some point that "no firm plans ha[d] yet been made by either government". Telegram from the UK Foreign Office to the UK Mission to the UN, No. 4327 (8 Nov. 1965), StMU, Vol. III, Ann. 75.

27. The United Kingdom was well aware of the impact its activities would have with the international community and, in particular, with the United Nations[74], which was entrusted with supervising the decolonization process.

28. Had the United Kingdom considered that this matter was *strictly a bilateral* question then it would had not gone to great lengths to conceal it from the United Nations[75].

29. The Request for an advisory opinion that comes from the General Assembly resolution 71/292 leaves no doubt of its interest in the question of the proper and complete decolonization of Mauritius. It recalls the resolutions of the General Assembly on questions of decolonization and self-determination in 1960 (1514 and 1541) and its 1965 resolution on the question of the decolonization of Mauritius recalling that no action should be taken to dismember its territory. The Request also recalls the more recent General Assembly resolution of 10 December 2010 that shows its special renewed interest on the question of decolonization during the period 2011-2020 which it declared as the Third International Decade for the Eradication of Colonialism, as well as its resolution of 6 December 2016, in which it called for the immediate and full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

30. As the Court pointed out, "the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized"[76].

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[74] In February 1966, while the UK was still deceiving the United Nations, its Mission to the UN reported to the Foreign Office that

> "the point of attack, or rather warning, has so far been restricted, apart from the general 'bases' issue, to the point concerning the territorial integrity of Mauritius and the Seychelles in the context of resolution 1514 and is not yet on the more serious charge of violating Chapter XI of the Charter itself, although this would come and be much more serious if it became apparent that we were doing so".

See also UK Foreign Office, Minute from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529 (5 Nov. 1965), StMU, Vol. III, Ann. 70.

[75] See Telegram from the UK Foreign Office to the UK Mission to the UN, No. 4310, FO 371/184529 (6 Nov. 1965) in which concerns of publicity are self-explanatory:

> "If this operation is complete before Mauritius comes up in the Fourth Committee it seems to us that you will then be better placed to deal with the inevitable criticism. We hope therefore that you will do your best to ensure that discussion of Mauritius and other territories in the Indian Ocean is put off for as long as possible, and at least until 11 November. . . . You should concert tactics with the United States Delegation, on whose support we rely in this matter" (StMU, Vol. III, Ann. 72).

[76] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 36, para. 71.

31. In sum, Mr. President, following the words the Court used in the *Wall* case, which are here applicable:

> "The object of the request before the Court is to obtain an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, for the Court to give an opinion would not 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."[77]

Mr. President, this is exactly the same request presently before the Court.

THE LEGAL ISSUES ARISING FROM THE QUESTIONS PUT TO THE COURT

32. In response to Question *(a)* posed by the General Assembly on whether the process of decolonization of Mauritius was successfully completed in 1968, the main arguments of the United Kingdom to attempt to demonstrate that the process was completed are as follows.

A. That Mauritius validly consented through its elected representatives to the detachment of Chagos in the 1965 Agreement[78]

33. This question has been amply addressed by the representatives of Mauritius in their written[79] and oral statements[80] before the Court. The position of Nicaragua, as explained below, is that no legal and valid consent could have been given for the violation of the fundamental rules of international law involved in the treatment received by the Chagossian people of Mauritius.

34. The United Kingdom has spent a considerable amount of time discussing the *Chagos Arbitration* and its interpretation of the agreement between the United Kingdom and Mauritius. The United Kingdom went so far as to state that any response by the Court to the questions under consideration would have to be based on this Award. It categorically asserted: "Whatever views this Court might express in an advisory opinion, the Award will remain the binding law between the Parties."[81]

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[77] *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.

[78] CoGB, p. 59.

[79] See generally StMU, Vol. I, Chap. 3, p. 55.

[80] See for example CR 2018/20, para. 11 (Jugnauth); paras. 23-44 (MacDonald).

[81] CR 2018/21, para. 11 (Wood).

35. Mr. President, this assertion is correct but only as far as the competence of the Arbitral Tribunal reaches. How can an award by an arbitration tribunal, that may only deal with questions of the law of the sea, be of paramount importance for an advisory opinion requested of the International Court on questions of decolonization?

36. My distinguished colleague, Mr. Wordsworth, for his part, meticulously pointed out what were claimed as similarities between the Memorial filed by Mauritius in the *Chagos Arbitration* and the arguments that it has put before the Court[82]. But, with respect, if there could possibly be any question dealt with in that Arbitration that could be of present relevance, this would have to be sought in the *dispositif* of the Award itself and not in Mauritius' Memorial.

37. Whatever the enthusiasm and possible despair with its situation that led Mauritius to place before the Arbitration Tribunal many of its problems, the only possibly relevant question for the present procedure is that the Award is limited, as it should be, to questions of the law of the sea. It could not have been otherwise. It was the only subject within its competence.

B. The second claim by the United Kingdom is that there was no right of self-determination under international law in 1965/68[83] when the process of decolonization of Mauritius began, and that resolution 1514 "was drafted as an aspirational instrument setting out desired principles, not precise obligations"[84].

38. Curiously, and erroneously, counsel for the United Kingdom has asserted that Mauritius has the burden of proof that this was a norm of customary international law in the pertinent period[85].

39. Mr. President, I will not reiterate the quotes from the several authoritative publicists[86] that have been cited that consider that the right of self-determination is a fundamental right enshrined in the Charter and, as such, a fundamental right since that period. The United Kingdom has cited other authorities with different opinions[87]. We will not even go beyond the mere mention

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[82] CR 2018/21, para. 5 *(a)* (Wordsworth).

[83] CoGB, p. 59.

[84] CoGB, para. 4.20.

[85] CR 2018/21, para. 13 (Webb).

[86] See for example Cassese, *Self-determination of peoples* (1995); Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

[87] See for example Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, (1971) *American Journal of International Law*, vol. 65, p. 713.

that the International Law Commission in 1966 expressed the view not only that the right of self-determination was a norm of customary international law, but that it was a norm of peremptory international law[88]. *Yes*, Mr. President, in 1966. But in order to avoid a back and forth of authorities, we will consider only the authority that the United Kingdom respects and cites, that of this Court as expressed in its judgments and advisory opinions.

40. In the *Namibia* case, the Court went over the development of international law in regard to non-self-governing territories. The vision of the Court on this development reaches back in time to the period of the creation of the Mandates and the League of Nations. The Court concluded that the objective of these Mandates "was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore."[89]

41. If this development of a right to self-determination began with the mandates system, then it is indisputable that by the time that a resolution of the General Assembly, 1514, was approved in 1960, the right of self-determination of colonial peoples and countries was a customary rule of international law.

42. In the *Western Sahara* case the Court left no room for doubt that it was a rule of international law. It recalled that, "The Charter of the United Nations, in Article 1, paragraph 2, indicates, as one of the purposes of the United Nations: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .'."[90]

43. When referring to resolution 1514, the Court in *Western Sahara* states that,

> "The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were *enunciated* in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). In this resolution the General Assembly *proclaims* 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'."[91]

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[88] *ILC Yearbook 1966*, Vol. II, pp. 2, 47.

[89] *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, para.53.

[90] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 31, para. 54.

[91] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 31, para. 55; emphasis added.

And then the Court goes on to quote the resolution verbatim. The words used by the Court "enunciated" and "proclaims" are not mere suggestions by the General Assembly, as alleged by the United Kingdom; they are proclamations of the law.

44. And the Court has gone further in explaining the extent of the right of self-determination. It has made it clear that it is a right that creates obligations *erga omnes*.

45. In the *East Timor* case, often quoted, the Court expressed the view that, "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[92]

46. In the *Wall* case the Court observed that "[t]he obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination"[93].

47. This obligation *erga omnes* to respect the right of self-determination is an obligation from which no derogation is permitted. The right is absolute and cannot be curtailed by agreement even of equal parties. Much less can it be put aside by a colonial Power dealing with its subject peoples.

48. The agreement the United Kingdom has claimed to have validly reached in 1965 with the people of Mauritius for the detachment of the Chagos Archipelago could not have been perfected at the international level at the moment of independence in 1968. There was no expression of the will of the people of Mauritius, much less the Mauritians from Chagos, that this archipelago be detached and its population forcefully expelled.

49. Mr. President, there is a further more important issue at stake. This type of agreement, even if it had been freely and knowingly accepted by the Mauritian people, would have been born invalid and void since it violated a peremptory norm of international law enshrined in the Charter of the United Nations. It cannot be acceptable at this stage of development of international law that any agreement involving the forcible expulsion of people from their homeland could have been validly entered into. The procedure was not merely shameful, as expressed by the Solicitor General[94], it was a violation of the fundamental rights of the people as expressed in a

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

[93] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155.

[94] CR 2018/21, para.5 (Buckland).

decision of the highest court in the United Kingdom, the House of Lords. The High Court expressed:

> "If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed."[95]

50. Mr. President, this is a clear recognition by the highest court of the United Kingdom that the actions that led to the separation and forceful occupation of the Chagos Archipelago violated fundamental human rights.

51. Mr. President, the United Kingdom and the United States, and Israel earlier this afternoon, have claimed that the Court for reasons of judicial propriety should deny the Request for an advisory opinion since the response to the question involves a bilateral territorial dispute.

52. Nicaragua knows very well what a territorial dispute is — it has had several before this Court. Nicaragua also knows what a dispute on violations of fundamental rights is — we have also pleaded this situation before this Court.

53. We are not here faced with a territorial dispute. We are faced with a dispute in which the fundamental rights of the people of Mauritius, particularly those from the Chagos Archipelago, have been violated.

C. Territorial integrity

54. Mr. President, the third point alleged by the United Kingdom is that even if self-determination was a norm of customary law in 1965, the question of the territorial integrity of the "totality" of the previous non-self-governing territory prior to independence is not part of the right of self-determination and is not customary international law.

55. The United Kingdom argues that it was common practice for colonial Powers to attach or detach or otherwise dispose of territory and that there were no rules prohibiting this. This is correct up to the first half of the twentieth century. What is pertinent to the present question is that after the Second World War, when it became clear to the colonial Powers that they would have to give

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[95] StGB, *R (Bancoult)* v. *Secretary of State for Foreign & Commonwealth Affairs (No. 2)* [2009] 1 AC 453, paras. 52-63 (Judgments, Vol., tab 5).

independence to those occupied territories, this foreknowledge became a problem so long as States were allowed to freely rearrange the territories under colonial dominion.

56. That is why resolution 1514 (XV), the Declaration on Granting of Independence to Colonial Countries and Peoples, includes the right to the integrity of their territory. This right to territorial integrity is not only mentioned in paragraph 6 of resolution 1514 that states that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country" is not permitted.

57. This substantive element of the right to self-determination of territorial integrity is introduced in the preamble of the resolution, in which the General Assembly states that: "Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory." This is reiterated in paragraph 4 that refers to peoples "right to complete independence, and the integrity of their national territory shall be respected". And the last paragraph, paragraph 7, ends with the statement "All States shall . . . respect the sovereign rights of all peoples and their territorial integrity". The question of territorial integrity permeates the whole subject of self-determination and decolonization enshrined in resolution 1514.

58. The United Kingdom has claimed that when this resolution was approved, it abstained and that this signified opposition[96]. This is incorrect. Rule 86 of the General Assembly states: "For the purposes of these rules, the phrase 'members present and voting' means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting."

59. The question of the effects of an abstention is important for evaluating the allegations made by the United Kingdom and the United States that the right of self-determination was not applicable to the United Kingdom because it had been a persistent objector. The legal effect of a claim of being a persistent objector is not universally accepted, but the generality of those who invoke it agree that it must be clearly and unequivocally made. Abstaining from voting a General Assembly resolution of such importance for the question of self-determination can hardly be claimed to constitute a clear objection.

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[96] CR 2018/21, para. 24 *(f)* (Webb).

60. The United Kingdom further claims that the territories of several other colonies like the Cayman Islands and Turks and Caicos were separated from Jamaica[97]. This is true. The difference with Mauritius is that there was no equivalent resolution 2066 of the General Assembly that applied to those other non-self-governing territories.

RESPONSE TO THE QUESTIONS

61. Mr. President, to end without the response to the questions, Nicaragua's reply to the first question put to the Court would be that there is no possible answer to the question other than that the process of decolonization was not lawfully completed.

62. One of the particularities of this case is that the United Kingdom itself admits that the process of decolonization was not completed. What other meaning could be given to the fact amply and repeatedly recognized by the United Kingdom that it will revert the Chagos Archipelago to Mauritius when the interests of the United Kingdom have been satisfied.

63. A reversion of territory is only conceivable to a former sovereign or colonial entity. The commitment of reversal is a plain and clear recognition that the Archipelago of Chagos was part of Mauritius when it was detached and that it will eventually be returned. It is a clear recognition that in 1968 the decolonization of Mauritius was incomplete since the United Kingdom retained part of its territory.

64. The second Question put to the Court referred to the effects of this incomplete decolonization.

65. From Nicaragua's point of view the consequences for the United Kingdom is that it has the obligation to complete the process of decolonization of Mauritius by reverting to it the Archipelago of Chagos and making reparation for any injury caused by the prolonged occupation. Since "reparation [as the Court has explained] must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[98] in the *Factory at Chorzów* case. Then this reparation should include the means "to implement a programme for the resettlement on the

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[97] CR 2018/21, para. 29 (Webb).

[98] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

Chagos Archipelago of its nationals, in particular those of Chagossian origin". Furthermore, that after more than 50 years of this occupation of Chagos, the United Kingdom should as soon as possible proceed to end this prolonged colonial occupation.

66. The consequences for third States are similar to those pointed out by the Court in the *Wall* case. The present case also involves the right of peoples to self-determination and since this right has an *erga omnes* character, the Court should also, as in the *Wall* case

> "recall that under the terms of General Assembly resolution 2625 (XXV) . . . 'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .'"[99].

67. With respect to third States the Court should further recall that the right of self-determination is a peremptory norm of international law and that any agreement or treaty entered into with the United Kingdom involving the Chagos Archipelago is void. If the Court were to consider that the right of self-determination became accepted as a peremptory norm at a later stage than 1968, then it should indicate the period as from when this norm became peremptory and recall that any agreements in force after this date have become void and terminated.

68. Finally, the Court should advise the United Nations, especially the General Assembly, to take the steps necessary to bring to a speedy end the process of complete decolonization of Mauritius.

69. The United Kingdom has claimed that the Court has no authority to advise that the process of decolonization and reversion of Chagos to Mauritius should be expeditious nor that the General Assembly has any authority to implement this advice[100]. The United Kingdom further claims that this is a complex procedure since the island of Diego Garcia is indispensable for reasons of security and the fight against international terrorism[101].

70. This claim is quite unusual and entirely ignores the question of decolonization and self-determination of people. In the past, the colonial Powers attempted to delay the process of

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[99] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 156.

[100] CR 2018/21, para. 19 (Wood).

[101] CR 2018/21, para. 23 (Wood).

decolonization by alleging that the peoples of the colony were not yet ready for self-government, but a claim based on security needs in time of peace must sound shocking to the people of Mauritius. After all they are not unaware of the questionable uses that their homeland has been put to. It is public knowledge.

71. In sum, there is no basis in international law to delay the completion of decolonization because of any alleged needed defence purposes.

72. The United Kingdom is asking the Court to use its discretionary power and not give the advisory opinion requested because as a matter of judicial propriety, the Court should not answer a request for an advisory opinion where it would circumvent the principle of consent[102].

73. Mr. President, there are different aspects of propriety in the administration of justice. The most important is to set wrongs right and see that justice is done. In the present case we are faced with violations of the most fundamental principles of international law: self-determination and the basic human rights of the Chagossian population. These violations are not being invoked per se as a jurisdictional base for a decision of the Court — the Court has made it clear in the *East Timor* case that they cannot serve that purpose — but these violations when the balance of justice hangs at best on a dubious and debatable claim of consent that the Court has never entertained in the past, then the giving a decision must certainly fall on the side of trying to right the grievous wrongs done to the Chagossian people of Mauritius.

74. Mr. President, the highest law court in the United Kingdom considered that the United Kingdom had violated the fundamental rights of the Chagossian people. This highest World Court should do no less.

75. Mr. President, Madam Vice-President, and Members of the Court this concludes Nicaragua's oral pleadings and I wish to take this opportunity to extend to you our gratitude for your attention. Our thanks to the Registrar and the members of his staff and the interpreters.

Le PRESIDENT : Je remercie la délégation du Nicaragua pour son exposé. Je donne maintenant la parole à M. Dayo Apata pour effectuer son exposé au nom de la République fédérale du Nigéria. Vous avez la parole, monsieur.

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[102] CR 2018/21, para. 30 (Wordsworth).

Mr. APATA:

1. Introduction

1. Nigeria presents compliments to the distinguished President, Madam Vice-President and Members of the International Court of Justice (ICJ) and with honour presents legal views in support of the Republic of Mauritius on the Request for advisory opinion posed to it by the United Nations General Assembly on the continued presence of the United Kingdom of Great Britain in Chagos Archipelago. Let me begin by expressing Nigeria's concern that *today*, in the twenty-first century the world is yet gathered together to discuss the issues on decolonization, forceful relocation of Chagossians from their ancestral homes, in whatever pretext that was done, to us in Nigeria that cannot be justified by any legal or logical reasoning.

2. Comments on Germany's presentation

2. Mr. President, Madam Vice-President and Members of the Court, let me also comment briefly on the presentation of the Republic of Germany. Yesterday, Germany insinuated that the resolution requesting this Court's advisory opinion was, for all practical purposes, Mauritius' alone. With respect, this is mistaken. Resolution 71/292 is a resolution of all 54 Members of the United Nations' African Group. The questions it poses are the result of extensive consultations among the nations of Africa and the Non-Aligned Movement. We decided — consistent with our decades-long call for the immediate termination of the colonial administration of the Chagos Archipelago — to seek an advisory opinion on all consequences under international law that arise from the continuing colonial administration of the Chagos Archipelago. These include the consequences of the administering Powers and other States.

3. Mr. President, since Nigeria participated in this process, I can say that when the questions were being drafted, careful regard was had for the Court's advisory opinion jurisprudence, including the *Wall* case, where the Court interpreted a request for "the legal consequences" as requiring that it set out the consequences for all relevant entities, including States. Were the Court to now forebear from expressing its opinion on the consequences for States on the basis that resolution 71/292 does not include the specific words "for States", as Germany has suggested, it would — in effect — be announcing a new rule for advisory opinions. But those words have never

been required, and it would be manifestly unfair to impose such a rule now. Nigeria, for one, would be deeply disappointed if the Court were to follow that path.

4. Nigeria's disappointment would be especially acute since the imposition of such a new rule would have the pernicious effect of depriving the General Assembly of the Court's opinion on a matter where the intention to obtain it is clear.

5. Professor Zimmerman referred to the 14 July 2016 document which asked that the Request for an advisory opinion be included on the provisional agenda of the General Assembly's 71st session. He conceded that this Request — which was circulated as an official document of the General Assembly — contains in its Explanatory Memorandum what he referred to as "references to possible consequences for Member States of the Court's opinion"[103]. The fact that he did not dispute this shows an intention to obtain an advisory opinion on the legal consequences for the States.

6. Indeed, the Explanatory Memorandum makes that intention unmistakable:

— It refers to resolution 1514, which expressly refers to the obligations of "all States".

— It refers to resolution 2066, which the Explanatory Memorandum describes as a resolution where "the General Assembly drew attention to the duty of the administering Power to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and invited 'the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity'".

— It refers to resolution 2357, adopted in 1967, which calls upon the "*administering Powers* to implement without delay the relevant resolutions of the General Assembly . . .".

— And it states that Member States of the United Nations would "benefit from the guidance of the principal judicial organ of the United Nations".

7. The Request was accepted onto the General Assembly's agenda without objection.

(1) Since the intention is incontestable, Professor Zimmerman attempted to suggest that it had changed by the time the African Group introduced resolution 71/292. It did not.

[103] CR 2018/22, p. 19, para. 57 (Zimmerman).

(2) The only document the Professor cited to try to show such a change is an aide-memoire that Mauritius circulated in May 2017. He relied exclusively on the fact that the aide-memoire does not include precisely the same language as the Explanatory Memorandum. But he ignored the fact that the aide-memoire invokes both resolution 1514 and resolution 2066. In other words, it explained the need for the Court's advisory opinion, by reference to resolutions that impose obligations on States.

8. This hardly supports Professor Zimmerman's thesis. Plainly, the intention to seek an advisory opinion that addresses the legal consequences for States had not changed. For its part, Nigeria underwent no such change of heart; nor, as far as Nigeria is aware, did any State. Of course, the legal consequences for which the Court is asked to opine in resolution 71/292 are defined by reference to, among other things, these very same resolutions. Nigeria observes that Professor Zimmerman studiously avoided mentioning them.

9. Mr. President, in sum, an opinion that fails to address the legal consequences for States, including the administering Power, would, in Nigeria's view, depart from the plain text of resolution 71/292 and would not be faithful to the intention of the General Assembly, including the Members of the African Group that sponsored it.

3. Comments on the April 1965 Agreement

10. I would like to comment on the April 1965 Agreement. Mr. President, Members of the Court, Nigeria has only one simple sentence or comment on the April 1965 Agreement, which purportedly ceded the Chagos Island to the United Kingdom of Great Britain for a paltry sum of £3 million. Nigeria is of the opinion that the Agreement was concocted by one and the same party (the Colonial Government of Great Britain in Mauritius at the time and the then British Foreign Secretary, Mr. Anthony Greenwood). In this case the Court can decipher the weakness of Mauritius from the strength of Great Britain in the purported negotiation. Nigeria urges this Court not to place any reliance in the so-called agreement in rendering its advisory opinion being requested.

4. The issue of self-determination

11. I would like to also make oral presentation on the issue of self-determination. This issue has been thoroughly belaboured by other speakers. Nigeria joins other speakers that have argued that the concept of self-determination has assumed the status of *erga omnes*. We can only add that in this case the exercise of the right of self-determination by the Chagossians should be done in the context of exercising the right in the form of internal self-determination within the sovereignty of Mauritius and clearly not in the form of exercise of external self-determination that would result in disintegration of the territorial integrity and sovereignty of Mauritius.

5. The issue of jurisdiction of ICJ to give the advisory opinion

12. Permit me, also, to make an oral submission on the issue of the jurisdiction of the ICJ to give the advisory opinion. Mr. President, Madam Vice-President and Members of the Court, Nigeria respectfully submits that the issue of exercise of contentious jurisdiction by this honourable Court is aptly dealt with by the provisions of Article 34 (1) of the Statute of the International Court of Justice which provides that, "only States may be parties in cases before the Court". Article 35 on the other hand refines the provisions of Article 34 (1) by setting out the conditions under which States that are not parties to the ICJ Statute may access the Court. This Article clearly distinguishes between States that are parties to the Statute of the Court, on the one hand, a community of States which by virtue of Article 93 of the Charter of the United Nations includes, "all Member States of the United Nations".

13. Nigeria further submits that Article 65 (1) and (2) of the Statute of the Court vests in the Court the jurisdiction to give advisory opinions, especially where such opinion has been requested by a major organ of the United Nations as in this case and Nigeria urges that this Court should so hold.

14. Mr. President, it is true that the United Kingdom of Great Britain was one of the nine States that abstained from either voting in favour or against the adoption of the United Nations General Assembly resolution 1514 of 14 December 1960 — that is the Declaration on the Granting of Independence to Colonial Countries and Peoples — and as such has urged the Court not to render the opinion being sought. Nigeria urges the Court to consider that, notwithstanding the fact

that the United Kingdom of Great Britain abstained from voting in favour of resolution 1514, it indeed complied with and applied the provisions thereof by granting independence to most of its colonial territories (Mauritius and Nigeria inclusive), except a few that wanted to remain under it. By so doing, the United Kingdom of Great Britain must be held to have brought itself under the provisions of resolution 1514.

15. In deciding whether or not the Court has jurisdiction to give this advisory opinion, the Court is urged to take cognizance of Articles 65 (1) of its Statute and also consider that the matter in dispute has to do with sovereignty, territorial integrity and political independence — the very essence or existence of a State. Thus, if the Court denies jurisdiction by failing to render legal opinion as being requested, the question then is where will the United Nations General Assembly go to seek for legal advice that could guide it in the determination of the questions?

16. Nigeria also urges the Court to consider that 89 States voted in favour of the adoption of resolution 1514, apart from the nine abstentions earlier mentioned; no single State voted against it. If jurisdiction is thus denied because a State abstained from voting for adoption of a document that ends colonialism in its entirety, there will be no other means of complying with the provisions of Article 2 (3) of the Charter of the United Nations on pacific settlement of international disputes.

6. The principle of *uti possidetis*

17. Let me quickly also go into the principle of *uti possidetis*. Mr. President, Nigeria urges the Court to take cognizance of the above-mentioned doctrine and the fact that the geographical areas (the international boundary) that constituted Mauritius during colonialism and which necessarily included the Chagos and other islands that make up the Archipelago are still the same geographical areas that should constitute Mauritius' territory at independence. It therefore logically follows that, in the absence of any evidence to the contrary, during the liberation period the Chagos Archipelago naturally constituted Mauritius' territory so that the separation of Chagos should be regarded as violation of international law.

18. The Court is also to consider the legal principle of *uti possidetis* in holding that from the date of granting of independence by Britain to Mauritius, the international boundary of Mauritius, which necessarily includes the maritime boundary encompassing the Chagos Archipelago remains

sacrosanct and cannot be changed, unless by an agreement. Thus in the absence of a valid agreement between Britain and Mauritius recognizing Britain's right to occupy the Archipelago or to establish a marine protected area (MPA) on it, Britain has no any legal right to hold unto the Archipelago. The concept is deeply linked to colonization (in which case resolution 1514 of 14 December 1960 is instructive), self-determination, territorial integrity, sovereignty, statehood, creation of States and territorial boundaries.

19. The purpose of the concept was to maintain territorial stability of newly created or independent States at the time of decolonization and also to resolve issues related to title, boundary demarcation and delimitation of maritime areas in situations in which treaty did not exist or did not explicitly deal with such issues. Nigeria urges this Court to hold that this principle is applicable in this case and in favour of the Republic of Mauritius.

7. Illegality of occupation in international law

20. May I also speak about the illegality of occupation under international law. Mr. President, Madam Vice-President, Members of the Court, Nigeria respectfully submits that forceful evacuation of Chagossians from their ancestral homes and their excise from Mauritius sovereignty notwithstanding the compendium of international law provisions in regard thereto, constitute occupation of the Chagos Archipelago by Great Britain. This in our view negates the intendment and purpose of resolution 1514 and other pertinent laws cited hereunder, and is against the wish of the Republic of Mauritius. This no doubt violates the territorial integrity and sovereignty of Mauritius, all of which are illegal in international law — may I refer to the Kellogg-Briand's Pact of 1928 and the *Western Sahara* case, which had been mentioned many times in these proceedings, Article 4, paragraphs *(f)* and *(g)* of the Constitutive Act of the African Union, paragraphs *(a)-(c)* of the Preamble to the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970 and paragraphs 1, 6 and 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA resolution 1514 (XV) of 14 December 1960).

21. Nigeria submits that gone are the days when discovery, annexation/occupation of *terra nullius* (empty unoccupied land) or colonialism are valid means of acquisition of title to territory (I also refer to the *Western Sahara* case). Occupation is also contrary to Article 2 (4) of the United Nations Charter. Traditionally, other means of acquisition of title to territory was through cession — which is transfer. I also mention the case of *Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, prescription — acquisition of territory through a continuous and undisputed exercise of sovereignty over it — conquest, accretion and which are not applicable in the case.

8. Relevant portions of the United Nations Convention on the Law of the Sea

22. Mr. President, Nigeria submits that in deciding to render an advisory opinion as requested in this case, that cognizance be had to the provisions of Article 2 of the United Nations Convention on the Law of the Sea (UNCLOS), which establishes the sovereignty of a coastal State over its adjacent territorial sea, including the sea-bed, the subsoil and the airspace thereof. For archipelagic States, such as Mauritius, (i.e. a State constituted wholly by one or more archipelagos and may include other islands), Article 49 of UNCLOS confers sovereignty over its adjacent archipelagos, including the sea-bed, the subsoil and the airspace above coastal States. By virtue of Article 56 of UNCLOS, coastal States are granted sovereign rights and jurisdiction over a portion of their adjacent sea known as the Exclusive Economic Zone up to a distance of 200 nautical miles. Similarly, by Article 77 of UNCLOS, a coastal State is granted sovereign right and jurisdiction over its adjacent continental shelf. No doubt, the Chagos Archipelago falls within Mauritius maritime zones as defined by UNCLOS.

23. All the provisions cited foreclose the possibility of other States exercising similar sovereignty, sovereign rights and jurisdiction over other States' maritime spaces. The continuous occupation of the Chagos Archipelago or attempt to establish a marine protected area within the Mauritius maritime zones violates the Articles of UNCLOS referred to above and they constitute failure to adhere to or breach of obligations undertaken under Articles 56 (2) and 194 (4) of UNCLOS.

24. On this basis and in attempt to decide whether or not to render the advisory opinion being requested, Nigeria urges the Court to take cognizance of these very important provisions and the agony of the Chagossians driven away from their ancestral lands and as such should render the opinion requested by the General Assembly of the United Nations.

9. Respect for territorial integrity

25. The Court is also advised to hold that the principle of respect of territorial integrity of States have long been part of the most fundamental principles of international law. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity, sovereignty or political independence of another State was re-echoed in paragraphs *(a)–(c)* of the preamble to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970 and paragraphs 1, 6 and 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA res. 1514 (XV) of 14 December 1960).

10. Conclusion

26. In conclusion, Sir, Nigeria urges this Court to render the opinion being requested and to also hold that the continued presence of the United Kingdom of Great Britain and Northern Ireland in the Chagos Archipelago, including its establishment of a marine protected area on it violates all the principles of international law enunciated above and as such should attract consequences against States including the United Kingdom of Great Britain.

I want to thank you very much for the opportunity given to me. Thank you very much.

Le PRESIDENT :

Je remercie la délégation de la République fédérale du Nigéria pour sa présentation.

Avant de clore l'audience de ce jour, j'aimerais donner la parole à M. le juge Cançado Trindade, qui a exprimé le souhait de poser une question à tous les participants à la présente procédure orale. Monsieur le juge Cançado Trindade, vous avez la parole.

M. le juge CANÇADO TRINDADE : Merci, Monsieur le président.

«Ma question est adressée à toutes les délégations des participants dans cette procédure consultative orale.

Comme il est rappelé dans le paragraphe *a)* de la requête de l'Assemblée générale des Nations Unies pour un avis consultatif de la Cour internationale de Justice (A/RES/71/292 du 22 juin 2017), l'Assemblée générale fait référence aux obligations inscrites dans ses résolutions successives pertinentes, à savoir : les résolutions de l'Assemblée générale 1514 (XV) du 14 décembre 1960, 2066 (XX) du 16 décembre 1965, 2232 (XXI) du 20 décembre 1966, et 2357 (XXII) du 19 décembre 1967.

Au cours de la présente procédure consultative orale, plusieurs délégations de participants ont souvent fait référence à ces résolutions.

A votre avis, quelles sont les conséquences juridiques découlant de la formation du droit international coutumier, notamment la présence significative de l'*opinio juris communis*, pour assurer le respect des obligations énoncées dans ces résolutions de l'Assemblée générale ?»

Je passe à l'autre langue de la Cour.

"My question is addressed to all delegations of participants in these oral advisory proceedings.

As recalled in paragraph *(a)* of the UN General Assembly's Request for an advisory opinion of the International Court of Justice, General Assembly resolution 71/292 of 22 June 2017, the General Assembly refers to obligations enshrined into successive pertinent resolutions of its own, as from 1960, namely: 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.

In the course of the present oral advisory proceedings, references were often made to such resolutions by several delegations of Participants.

In your understanding, what are the legal consequences ensuing from the formation of customary international law with the significant presence of *opinio juris communis* for ensuring compliance with the obligations stated in those General Assembly resolutions?"

Thank you, Mr. President.

Le PRESIDENT : Je remercie M. le juge Cançado Trindade. Le texte de cette question sera communiqué, par écrit, à l'ensemble des participants qui ont pris et prendront part aux audiences à la présente procédure orale. Les réponses de ceux, parmi les participants, qui souhaitent répondre à cette question devront être soumises à la Cour, par écrit, avant le lundi 10 septembre, à 18 heures au plus tard.

Tout commentaire, toute observation de la part des participants à la présente procédure orale sur les réponses données par un autre participant devra être soumis à la Cour le jeudi 13 septembre, à 18 heures au plus tard. Tant les réponses que les commentaires ou observations sur ces réponses devront se limiter exclusivement à la question telle qu'elle a été formulée par le juge Cançado Trindade.

Nous en arrivons maintenant au terme des audiences de ce jour. La Cour se réunira de nouveau demain à 10 h 40 pour entendre la Serbie, la Thaïlande et Vanuatu sur la demande d'avis consultatif adressée par l'Assemblée générale. La séance est levée.

L'audience est levée à 17 h 45.

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