INTERNATIONAL COURT OF JUSTICE

COUR INTERNATIONALE DE JUSTICE

LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965 (REQUEST FOR ADVISORY OPINION)

EFFETS JURIDIQUES DE LA SEPARATION DE L'ARCHIPEL DES CHAGOS DE MAURICE EN 1965 (REQUETE POUR AVIS CONSULTATIF)

Judge Cancado Trindade: As recalled in paragraph (a) of the U.N. General Assembly's request for an Advisory Opinion of the International Court of Justice (General Assembly resolution 71/292 of 22.06.2017), the General Assembly refers to obligations enshrined into successive pertinent resolutions of its own, as from 1960, namely: General Assembly resolutions 1514(XV) of 14.12.1960, 2066(XX) of 16.12.1965, 2232(XXI) of 20.12.1966, and 2357(XXII) of 19.12.1967.
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?*

Response of the United Kingdom of Great Britain and Northern Ireland

1. The UK's central contention remains that the Court should exercise its discretion so as not to give an Advisory Opinion in answer to the request put to it by the General Assembly further to its Resolution 71/292, adopted on 22 June 2017. The UK's response to the present question is without prejudice to that position.

2. The question is understood to concern the relevance, if any, of four General Assembly resolutions in the present advisory proceedings. The United Kingdom has dealt with this matter at length in its written and oral statements[1].

3. In particular, the United Kingdom stated:
    a. General Assembly resolutions are, subject to very few exceptions, not binding under international law and only recommendatory in nature[2]. The Court itself has

[1] StGB, paras. 8.27-8.54, 9.6-9.7; CoGB, paras. 2.95, 3.21, 4.20-4.26, 4.35-4.43, 4.50; CR 2018/21; CR 2018/21, p. 27, para. 5 (Wordsworth); pp. 45-46, paras. 14-16; pp. 47-50, paras. 22-27; p. 52, para. 33 (Webb).

urged "all due caution" in examining the content and conditions of a resolution to ascertain whether there is a gradual evolution of *opinio juris*[3].

b. Resolution 1514(XV) (1960): The negotiating records and explanations of vote reveal that there were divided views to its meaning that were not resolved by the time of its adoption[4]. The United Kingdom itself expressed concerns several times during the negotiations[5]. Nine States abstained, including colonial powers (Belgium, France, Portugal, Spain, United Kingdom, and United States). Even States that voted in favour expressed misgivings or emphasised that the resolution was aspirational[6]. When it came to negotiating the Friendly Relations Declaration in 1970, resolution 1514 was considered and then deliberately omitted[7]. Resolution 1514 marked an important "stage" in the development of international law on self-determination[8], but it did not reflect States' acceptance of a customary obligation at that time.

c. Resolution 2066(XX) (1965): This resolution uses non-binding language, including when referring back to resolution 1514(XV) ("request[ed]" that the provisions of the resolution be observed in relation to Mauritius). It contains no condemnation of the United Kingdom nor any statement that it acted in breach of binding international law[9]. It was adopted with 18 abstentions, including the United Kingdom.

d. Resolutions 2232(XXI) (1966) and 2357(XXII) (1967): These were omnibus resolutions on 25 Territories expressing "deep concern", but not creating any binding legal obligations for Member States[10].

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[2] StGB, paras. 8.32 and 8.67; CoGB, para. 4.20.
[3] StGB, para. 8.32; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 at para. 188; Report of the International Law Commission on its 70th Session, UN Doc. A/73/10 (31 August 2018), p. 148, para. (6) of the commentary to draft conclusion 12.
[4] StGB, paras. 8.40 -8.44; CoGB, paras. 4.20-4.23; CR 2018/21, p. 48, para. 24 (Webb).
[5] StGB, para. 8.45.
[6] UN Doc. A/PV.947 (Dec. 14, 1960), para. 60 (The Netherlands) (UN Dossier No. 74); UN Doc. A/PV.946 (Dec. 14, 1960), para. 12 (Sweden) (UN Dossier No. 73); UN Doc. A/PV.945 (Dec. 13, 1960), para. 188 (Austria) (UN Dossier No. 72); ; CR 2018/21, p. 48, para. 24 (Webb).
[7] StGB, paras. 8.47-8.48.
[8] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at para. 56 (quoting *Legal Consequences of the Continued Presence of South Africa in Namibia (Sauth West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p.16, at para. 52).
[9] StGB, paras. 8.49-8.54; CoGB, para. 4.50;
[10] StGB, para. 8.7.

4. Even if one or more of the four resolutions provided some evidence of an emerging *opinio juris*, that evidence is not of "the significant presence of *opinio juris communis*". It is, moreover, not supported by the extensive and virtually uniform State practice required for the formation of customary international law[11]. As the International Law Commission's Draft Conclusions on the Identification of Customary International Law provide, "A provision in a resolution adopted by an international organization ... may reflect a rule of customary international law if it is established that the provision corresponds to a *general practice* that is accepted as law (*opinio juris)*".[12] Notably, the General Assembly passed no further resolutions regarding Mauritius and the Chagos Archipelago from 1967 to 2017.

5. The question also asks about the legal consequences for ensuring compliance with the (implied) "obligations stated in those General Assembly resolutions". The United Kingdom observes that the wording of this question ("stated") goes further than the Request in implying that resolutions generate binding obligations under customary international law. Questions (a) and (b) of the Request refer to "obligations reflected in General Assembly resolutions" (emphasis added).

6. In the United Kingdom's view, the General Assembly's Request in resolution 71/292 (2017) does not provide a legal basis for concluding that the four General Assembly resolutions cited in Question (a) "reflected" customary international law at the time they were adopted (1960-1967). As the Court stated in the *Kosovo* Advisory Opinion, where a matter is capable of affecting the answer to the question posed, "[i]t would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly."[13]

7. The United Kingdom has explained in its written pleadings that this wording seems chiefly to be aimed at pointing the Court to what those who drafted the question

[11] CR 2018/21, p. 48, para. 23 (Webb).
[12] Report of the International Law Commission on its 70th Session, UN Doc. A/73/10 (31 August 2018), p. 121, draft conclusion 12(3) (emphasis added). Paragraph (8) of the commentary (p 149) points out that "A provision of a resolution cannot be evidence of a rule of customary international law if practice is absent, different or inconsistent."
[13] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at para. 52.

(Mauritius) see as part of the applicable law[14]. In doing so, it incorrectly and inappropriately assumes that the content of obligations, if any, "reflected" in the named General Assembly resolutions are legally binding on States, including the United Kingdom[15]. This is not the case because of their status as Assembly resolutions, their text, their context, and the circumstances of their adoption[16].

8. As the Court observed in the *Namibia* Advisory Opinion, resolution 1514 (XV) was a "further important stage" in the development of international law on self-determination[17]; it was not the culmination of that evolution. To the extent that the language in these resolutions may reflect important steps in the development of customary international law on self-determination, the resolutions do not demonstrate that it was binding customary international law in the period 1960-1967.

9. If this approach is somehow wrong (it is not) and there were obligations under customary international law reflected in the resolutions in 1960-1967, no legal consequences would ensue in relation to the detachment of the Chagos Archipelago because Mauritius consented to the detachment and reaffirmed its consent on multiple occasions post-independence[18].

10. If all the above were somehow wrong (it is not), then the legal consequences would have to be based on the 1965 Agreement as interpreted by the Arbitral Tribunal in its binding Award of 18 March 2015, and in this respect the United Kingdom respectfully refers to paragraph 9.20 of its Written Statement of 15 February 2018.

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[14] StGB, paras. 8.7, 9.7.
[15] StGB, para. 9.7; see also cites to pleadings in footnote 1 above.
[16] *Ibid.*
[17] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52.
[18] StGB, paras 3.38-3.50; CoGB, paras. 2.86-2.96; CR 2018/21, p. 9, para. 18; p. 15, para. 41; pp 21-41, paras. 66-77 (Buckland); pp. 29-30, para. 8; p. 34, para. 15, p. 37, para. 22; p. 39, para. 27; p. 40, para. 30 (Wordsworth); p. 44, para. 8 (Webb); p. 54, para. 6; pp. 57-58, paras. 14-18 (Wood)