Request by the United Nations General Assembly for an Advisory Opinion on the "Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965"

Written comments of the United States of America on States' Written Replies of September 11, 2018 to the questions posed by Judge Cancado-Trindade

1. The United States offers three observations on the Written Replies of States to the questions posed by Judge Cançado-Trindade on September 5 (hereinafter, "the replies").

2. First, in their replies some States assert that a relevant rule of customary international law existed at the relevant time, without supporting evidence or regard for the appropriate methodology for determining such a rule's existence. The Court's longstanding jurisprudence holds that in order to find the existence of a rule of customary international law, "two conditions must be fulfilled. Not only must the acts concerned amount to a *settled practice*, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it [i.e., *opinio juris*]."[1] In other words, "within the period in question … State practice, including that of States whose interests are specially affected, should have been both *extensive and virtually uniform* in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[2]

3. Despite many expressions of political and moral support for decolonization, including by the United States and other administering powers, there was no *opinio juris* or "extensive and virtually uniform" State practice at the time Resolution 1514 was adopted, or through the end of the 1960s, evidencing a specific customary international law rule that would have prohibited the United Kingdom from establishing the British Indian Ocean Territory (BIOT).[3] The lack of *opinio juris* is underscored by continued disagreements among States about key elements of self-determination through April 1970, as the negotiating records of

[1] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 77 (emphasis added). *See also* United States Written Statement of March 1, 2018, para. 4.27.

[2] *Id.*, para. 74 (emphasis added).

[3] *See* United States Written Statement, paras. 4.32–4.72.

the Friendly Relations Declaration show.[4] Therefore, contrary to the assertions submitted by a number of States in their replies, neither Resolution 1514 nor the other resolutions cited in the General Assembly's questions reflected specific and relevant rules of customary international law applicable at the relevant time.

4. States advancing these assertions likewise did not properly apply the Court's methodology for determining the relevance of General Assembly resolutions to the formation of customary international law. General Assembly resolutions may provide evidence of *opinio juris* supporting the existence of a rule of customary international law. To determine whether a particular resolution provides such evidence, the Court has stressed that "it is necessary to look at its content and the conditions of its adoption."[5] The best evidence of States' contemporaneous attitude toward a resolution are the statements they make during negotiation and adoption.[6] Expressions of moral and political support are not enough, nor is the absence of votes against a resolution.[7] The fact that several States abstained on these resolutions reflects the lack of consensus among States.[8] Instead, the Court must be presented with evidence sufficient to establish that States at the relevant time believed that international law *required* the conduct in question. As set forth in detail in the United States Written Statement and Oral Presentation,[9] the negotiation and adoption records of the resolutions cited in the questions do not demonstrate such a belief.

5. Second, the United States reiterates that, under the terms of the U.N. Charter, General Assembly resolutions—with limited exceptions not applicable here—are not themselves

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[4] *See* United States Written Comments, paras. 3.19–3.27.

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

[6] *See* Report of the International Law Commission, 68th Sess., U.N. Doc. A/71/10 (2016), ch. V: "Identification of Customary International Law," p. 107, Commentary to Draft Conclusion 12, para. 6.

[7] United States Oral Presentation, para. 49.

[8] As we explained in our oral presentation, States are often able to support resolutions, or at least to not vote against them, even where they do not agree with all of their terms, precisely because the resolutions are not binding and States can explain their understanding of the resolution on the record. *Id.*, para. 49. *See also, e.g., Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 2016*, p. 552, para. 53 (addressing Pakistan's argument based on the parties' voting records on General Assembly resolutions: "[S]ome resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.").

[9] *See* United States Written Statement, paras. 4.42–4.48; United States Oral Presentation, paras. 45-55.

legally binding.[10] Therefore, States are mistaken when they characterize the resolutions cited in the questions as articulating "rules" or imposing "obligations," or otherwise requiring "obligatory compliance." The fact that "mandatory terms," such as "right" and "shall," may appear in a resolution is not legally dispositive.[11] Many General Assembly resolutions that are indisputably nonbinding use such terms.[12]

6. Finally, because the resolutions cited in the questions were not themselves binding and did not reflect a rule of customary international law that would have prohibited the establishment of the BIOT, there are no legal consequences arising from them. As such, the United States does not address the legal consequences proposed by a number of States in their replies.

[10] United States Written Statement, para. 4.28, n. 98.

[11] *See* United States Written Comments, para. 3.29.

[12] *See id.* nn. 103–05 and sources cited therein.