Written comments on the written replies of the participants to the question put by Judge Cançado Trindade

MAURITIUS

PERMANENT MISSION OF THE REPUBLIC OF MAURITIUS TO THE UNITED NATIONS

MISSION PERMANENTE DE LA AEPUBLIQUE DE MAURICE AUPRES DES NATIONS UNIES

13 September 2018

Dear Sir,

I have the honour to refer to the Registry's Note Verbale dated 11 September 2018 transmitting one full set of the written replies to the question put by Judge Can ado Trindade to all the participants to the oral proceedings concerning the request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* /965 and to forward to you the written comments of the Republic of Mauritius on the replies of the United Kingdom and the United States.

Please accept, Sir, the assurances of my highest consideration.

Jagdish D. Koonjul, G.O.S.K.
Ambassador Extraordinary and Plenipotentiary
Permanent Representative

Mr. Philippe Couvreur
Registrar
International Court of Justice (ICJ)
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WRITTEN COMMENTS OF THE REPUBLIC OF MAURITIUS ON THE RESPONSES OF THE UNITED KINGDOM AND THE UNITED STATES TO JUDGE CANÇADO TRINDADE'S QUESTION

The United Kingdom and the United States have replied to Judge Cançado Trindade's question by repeating their arguments that General Assembly resolutions 1514(XV), 2066(XX), 2232(XXI), and 2357(XXII) did not reflect customary international law at the time the Chagos Archipelago was detached from Mauritius, were not legally binding on the administering power and other States, and could not give rise to legal consequences.[1] Mauritius notes that neither the administering power nor the United States has made any effort to respond to the submissions made by various States and the African Union during the recent hearings, including in relation to positions taken by each State which contradicts their position in this matter. In response, Mauritius wishes to make the following brief comments, which are confined to matters raised in Judge Cançado Trindade's question:

1. As Mauritius and many States, as well as the African Union, demonstrated in their written and oral submissions,[2] Resolution 1514(XV) reflected a rule of customary international law already in 1960, conferring on the peoples of colonial territories the right to self-determination, including the associated right of territorial integrity. The process of

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[1] *See, e.g.*, United Kingdom of Great Britain and Northern Ireland, Response to Question Put By Judge Cançado Trindade (10 Sept. 2018); United States of America, Response to Question Put By Judge Cançado Trindade (10 Sept. 2018).

[2] *See, e.g.* Written Statement of the Republic of Mauritius (1 Mar. 2018), paras. 6.20-6.61; Written Comments of the Republic of Mauritius (15 May 2018), paras. 3.7-3.67 (summarising the positions of numerous other States on this issue), Oral Submissions of the Republic of Mauritius, Verbatim Record (3 Sept. 2018), paras. 5-17 (Ms Macdonald); Oral Submissions of the Argentine Republic, Verbatim Record (4 Sept. 2018), paras. 11-28 (Mr Kohen); Oral Submissions of Belize, Verbatim Record (4 Sept. 2018), paras. 9-28 (Mr Juratowitch); Oral Submissions of Brazil, Verbatim Record (4 Sept. 2018), paras. 10-17 (Ms. Dunlop); Oral Submissions of Guatemala, Verbatim Record (5 Sept. 2018), paras. 23-29 (Ms Sánchez de Vielman), Oral Submissions of Nigeria, Verbatim Record (5 Sept. 2018), paras. 20, 25 (Mr Apata); Oral Submissions of the Republic of Vanuatu, Verbatim Record (6 Sept. 2018), paras. 10-11, 18, 21 (Mr McCorquodale); Oral Submissions of the Republic of Zambia, Verbatim Record (6 Sept. 2018), paras. 7-12 (Mr Akande), Oral Submissions of the Republic of India, Verbatim Record (5 Sept. 2018), para. 20 (Mr Rajamony); Oral Submissions of the Republic of Botswana, Verbatim Record (4 Sept. 2018), paras. 4-21 (Mr Nchunga Nchunga); Oral Submissions of the Republic of Cyprus, Verbatim Record (4 Sept. 2018), para. 3 (Mr Polyviou); Oral Submissions of the Republic of Kenya, Verbatim Record (5 Sept. 2018), paras. 22-32 (Ms Mcharo); Oral Submissions of the Marshall Islands, Verbatim Record (5 Sept. 2018), paras. 19, 36 (Mr Christopher); Oral Submissions of the Republic of Nicaragua, Verbatim Record (5 Sept. 2018), paras. 39-43 (Mr Argüello Gómez); Oral Submissions of the Republic of Serbia, Verbatim Record (6 Sept. 2018), para. 33 (Mr Gajic); Oral Submissions of the Republic of South Africa, Verbatim Record (3 Sept. 2018), paras. 21, 23, 26 (Ms de Wet), Oral Submissions of the African Union, Verbatim Record (6 Sept. 2018), paras. 7-13 (Mr Mbengue); Written Submission of the Republic of Djibouti (1 Mar. 2018), paras. 27-34; Written Statement of the Netherlands, para. 3.7.

decolonisation, including the decolonisation of Mauritius, was governed by that rule, binding under international law.[3]

2. The only two States to argue that there was no obligation to respect the right of self-determination at the time the Chagos Archipelago was detached from Mauritius are the administering power and the United States. Yet, contemporaneously with the adoption of Resolution 1514(XV), and subsequently, they have taken the opposite position in making statements that recognise the existence of the right to self-determination, and voting for resolutions that reaffirmed the existence of this right.[4] In 2009 the United Kingdom declared

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[3] Resolution 1514(XV) reflected *opinio juris communis*, as demonstrated by the fact that 89 countries voted in favour, and none voted against. The nine states that abstained, including the United Kingdom and United States, did not contest the existence of the right to self-determination or its application to the peoples of non-self-governing territories. Among the abstaining States, only the United Kingdom, Portugal and the United States gave explanations of vote. The United Kingdom and Portugal did not contest the existence of the right to self-determination, and the United States accepted the existence of the right. *See* U.N. General Assembly, 15th Session, 947th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.947 (14 Dec. 1960), p. 1283, para. 145 ("One thing is clear, however. This resolution applies equally to all areas of the world which are not free... It proclaims that all people have the *right* to self-determination") (United States) **(Dossier No. 74)** (emphasis added). *See also, e.g.*, U.N. General Assembly, 15th Session, 933rd Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.933 (2 Dec. 1960), p. 1093, para. 87 ("The Prime Minister of Australia said in this very Assembly hall on 5 October 1960: 'we regard ourselves as having a *duty* to produce as soon as it is practicable an opportunity for complete self-determination for the people of Papua and New Guinea'") (Australia) **(Dossier No. 64)** (emphasis added); U.N. General Assembly, 15th Session, 946th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.946 (14 Dec. 1960), p. 1266, para. 13 (accepting the "*unimpeachable* principle" that "all peoples have an inalienable *right* to complete freedom, the exercise of their sovereignty and the integrity of their national territory", but observing that its application could lead to controversy) (Sweden) **(Dossier No. 73)** (emphasis added); U.N. General Assembly, 15th Session, 947th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.947 (14 Dec. 1960), p. 1276, para. 62 (accepting the right to self-determination, and questioning Indonesia's application of the right to Netherlands New Guinea) (Netherlands) **(Dossier No. 74)**. The *opinio juris* in regard of the character of the right of self-determination as a right under customary international law was also accompanied by widespread State practice reflected in the fact that some thirty non-self-governing and Trust Territories achieved independence prior to the adoption of Resolution 1514 *See, e.g.*, Written Statement of the Netherlands, para. 3.7.

[4] For example, the United Kingdom, during the debate on Gibraltar before the Committee of 24, in 1964, noted "the ultimate irony . . . that Spain should attempt to take over the people of Gibraltar under the cover of General Assembly resolution 1514 (XV), which proclaimed the *right* of all peoples to self-determination". U.N. General Assembly, 19th Session, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/5800/Rev.1 (1964-1965), para. 143 **(Dossier No. 251)** (emphasis added). The United Kingdom also noted, in that same session of the Committee in that same period, that paragraph 2 of the Colonial Declaration "quite rightly stated that all peoples had the right of self-determination". *Ibid.*, para. 149. Both the United States and the United Kingdom voted for Security Council resolution 183 of 11 December 1963, which "[r]eaffirms the interpretation of self-determination laid down in General Assembly resolution 1514 (XV) as follows: All peoples have *the right* to self-determination". U.N. Security Council, *Question relating to Territories under Portuguese administration*, U.N. Doc. S/RES/183 (11 Dec. 1963). *See also, e.g.*, United Nations, *Official Records of the General Assembly, Twenty-second Meeting*, Fourth Committee, 1741st meeting, U.N. Doc. A/C.4/SR.1741 (7 Dec. 1967), para. 31 (in which the United Kingdom reaffirmed as a "basic principle" the "wholeness and indivisibility of Territories which had been administered as a single unit", as protected by the rule on territorial integrity in paragraph 6 of resolution

before this Court that "[t]he principle of self-determination was articulated as *a right of all colonial countries and peoples by General Assembly resolution 1514 (XV)*."[5]

3. The legal obligations set out in Resolution 1514(XV), which are addressed to "all States", including Members of the United Nations and administering Powers, were reaffirmed in resolutions 2066(XX), 2232(XXI) and 2357(XXII). These condemned the dismemberment of non-self-governing territories, including Mauritius, as contraventions of Resolution 1514(XV), making it clear that compliance with these resolutions is obligatory as a matter of international law.[6]

1514 (XV)); U.N. Security Council, *Southern Rhodesia*, U.N. Doc. S/RES/217 (20 Nov. 1965); U.N. Security Council, *Southern Rhodesia*, U.N. Doc. S/RES/232 (12 Dec. 1966); U.N. General Assembly, 15th Session, 925th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.925 (28 Nov. 1960), p. 983, para. 32 (**Dossier No. 56**); *ibid*., p. 985, para. 50, U.N. General Assembly, 15th Session, 947th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.947 (14 Dec. 1960), paras. 47, 53 (**Dossier No. 74**); U.N. General Assembly, 15th Session, 937th Plenary Meeting, *Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/PV.937 (6 Dec. 1960), p. 1158, para. 27 (**Dossier No. 68**); *ibid*., p. 1159, para. 27; U.N. General Assembly, 19th Session, *Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/5800/Rev.1 (1964-1965), paras. 143, 146, 148-149 and 151 (**Dossier No. 251**); U.N. General Assembly, 24th Session, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. Doc. A/7619, Supplement No. 19 (1969), p. 51; U.N. General Assembly, 22nd Session, 1641st Plenary Meeting, *Agenda Item 23: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/PV.1641 (19 Dec. 1967), para. 97 (**Dossier No. 199**); U.N. General Assembly, 22nd Session, *Agenda Item 23: Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/6700/Add.9 (28 Nov. 1967), para. 36; U.N. General Assembly, 17th Session, *Permanent sovereignty over natural resources*, A/RES/1803(XVII) (14 Dec. 1962), Preamble; Oral Submissions of the Republic of Zambia, Verbatim Record (6 Sept. 2018), paras. 10-11 (Mr Akande); Oral Submissions of the Republic of Mauritius, Verbatim Record (3 Sept. 2018), para. 13 (Ms Macdonald); Written Comments of the Republic of Mauritius (15 May 2018), paras. 3.31-3.55.

[5] *See Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Written Statement of the United Kingdom (17 Apr. 2009), para. 5.21 (emphasis added).

[6] *See* U.N. General Assembly, 20th Session, *Question of Mauritius*, U.N. Doc. A/RES/2066(XX) (16 Dec. 1965), preambular para. 5 & para. 4 (in which the General Assembly considered that "any step taken by the administering Power to detach certain islands from the Territory of Mauritius... would be *in contravention of the Declaration*, and in *particular paragraph 6 thereof*" and invited the United Kingdom "*to take no action which would dismember the Territory of Mauritius and violate its territorial integrity*") (**Dossier No. 146**) (emphasis added). The obligation to maintain the territorial integrity of Mauritius was repeated in resolutions 2232 (XXI) and 2357 (XXII). *See* U.N. General Assembly, 21st Session, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, U.N. Doc. A/RES/2232(XXI) (20 Dec. 1966), preambular para. 4 and para. 4 (after expressing its deep concern about the continuation of policies aimed at the disruption of the territorial integrity of non-self-governing territories, the General Assembly "*[r]eiterates* its *declaration* that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories.. is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV).") (**Dossier No. 171**) (emphasis added); U.N. General Assembly, 22nd Session, *Question of American Samoa, Antigua*

4. As a matter of general international law, the breach of an obligation gives rise to legal consequences. The breaches of the obligations set forth in Resolutions 1514(XV), 2066(XX), 2232(XXI), and 2357(XXII) give rise to legal consequences for the United Kingdom, as the administering Power, and for all other States and international organisations. This is as set out in the written and oral submissions of Mauritius,[7] and in Mauritius' answer to Judge Cançado Trindade's question, submitted to the Court on 10 September 2018.[8] Mauritius will not burden the Court by repeating those consequences here.

Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St Lucia, St. Vincent, Seychelles, Solomon Islands, Swaziland, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands, U.N. Doc. A/RES/2357(XXII) (19 Dec. 1967), preambular para. 6 & para. 4 (to the same effect) (**Dossier No. 198**). Other resolutions also called for strict compliance with and implementation of resolution 1514(XV). *See, e.g.*, U.N. General Assembly, 20th Session, *Question of South West Africa*, U.N. Doc. A/RES/2074(XX) (17 Dec. 1965), para. 5 (in which the General Assembly considered, in respect of South West Africa, that "any attempt to partition the Territory or to take any unilateral action, directly or indirectly, preparatory thereto constitutes a violation of... resolution 1514 (XV)".). *See also ibid.*, para. 10; U.N. General Assembly, 15th Session, *Question of Algeria*, U.N. Doc. A/RES/1573(XV) (19 Dec. 1960), para. 2; U.N. General Assembly, 16th Session, *Question of Algeria*, U.N. Doc. A/RES/1724(XVI) (20 Dec. 1961), Preamble (in which the General Assembly recognized, in respect of Algeria, the need "to ensure the successful and just implementation of the right of self-determination on the basis of respect for the unity and territorial integrity of Algeria"); U.N. General Assembly, 16th Session, *The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples*, U.N. Doc. A/RES/1654(XVI) (27 Nov. 1961), preambular para. 6 (in which the General Assembly expressed its deep concern that, contrary to paragraph 6 of the Declaration on the granting of independence to colonial countries and peoples, "acts aimed at the partial or total disruption of national unity and territorial integrity" were being carried out in the process of decolonization), U.N. General Assembly, 17th Session, *Question of Basutoland, Bechuanaland and Swaziland*, U.N. Doc. A/RES/1817(XVII) (18 Dec. 1962), para. 6; U.N. General Assembly, 18th Session, *Question of Basutoland, Bechuanaland and Swaziland*, U.N. Doc. A/RES/1954(XVIII) (11 Dec. 1963), para. 4 (in which the General Assembly warned South Africa against any attempt to encroach upon the territorial integrity of Basutoland, Bechuanaland or Swaziland in any way).

[7] *See* Written Statement of the Republic of Mauritius (1 March 2018), Chapter 7, Written Comments of the Republic of Mauritius (15 May 2018), Sections III and IV; Oral Submissions of the Republic of Mauritius, Verbatim Record (3 Sept. 2018), paras. 33-57 (Mr Reichler).

[8] Republic of Mauritius, Response to Question Put By Judge Cançado Trindade (10 Sept. 2018), para. 8. *See also* Argentine Republic, Response to Question Put By Judge Cançado Trindade (10 Sept. 2018), paras. 6-10; Oral Submissions of Belize, Verbatim Record (4 Sept. 2018), para. 62 (a)-(e) (Mr Juratowitch); Republic of Botswana and Republic of Vanuatu, Response to Question Put By Judge Cançado Trindade, p. 2; Republic of Nicaragua, Response to Question Put By Judge Cançado Trindade (10 Sept. 2018), p. 2.

AFRICAN UNION

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Date: 13 September 2018

Dear Sir,

I have the honour to refer to your letter dated 5 September 2018 relating to the question put to all participants to the oral proceedings by Judge Cançado Trindade at the end of the afternoon's public sitting of 5 September 2018 and to forward to you the written comments of the African Union on the replies of other participants.

Yours sincerely,

Ambassador Dr. Namira Negm
The Legal Counsel
African Union

To: Mr. Philippe Couvreur
Registrar
International Court of Justice
The Hague
Netherlands

WRITTEN REPLY OF THE AFRICAN UNION TO JUDGE CANÇADO TRINDADE'S QUESTION

"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 in those General Assembly resolutions?"

1. As the African Union emphasised in its Written Statement, its Written Observations as well as its Oral Statement of 6 September 2018 , the evolution of the principle of self-determination of colonial peoples and territories from 1945 until the adoption of Resolution 1514 (XV) in 1960, suggests that there existed, under general international law, a right to self-determination at the time of the adoption of the Resolution. Resolution 1514 crystallised the customary international law on decolonisation and self-determination.

2. The opinio juris communis of States was subsequently confirmed in 1965 in Resolution 2066(XX) of 16 December 1965 but also in other Resolutions such as Resolutions 2232(XXI) of 20 December 1966 and Resolution 2357(XXII) of 19 December 1967.

3. In particular, as the African Union stated during its Oral Statement, Resolution 2066 (XX) was indicative and confirmative of the prescriptions enshrined in Resolution 1514. Resolution 2066 clearly recalled that any attempt aimed at partial disruption of the territorial unit of Mauritius would be contrary to international law.

4. In this regard, the African Union reiterates and fully endorses the positions taken by Argentina, Botswana and Vanuatu as well as Mauritius regarding the legal consequences ensuing from the customary nature of the obligations enshrined in Resolutions 1514(XV), 2066(XX), 2232(XXI) and 2357(XXII).

5. First, the Administering Power is under an obligation to cease its unlawful conduct and any action or omission contrary to the principle of self-determination and territorial integrity of Mauritius.

6. Secondly, by virtue of the customary nature of the right to self-determination and the violation of such right by the administering Power, all States shall refrain from recognising the illegal administration of the Chagos Archipelago and any other action or omission pertaining to such unlawful administration.

7. Thirdly, all international organisations, such as the African Union, must ensure that their members act in compliance with the customary prescriptions of the above-mentioned Resolutions aimed at ending colonialism and by the same token ensuring promotion of peaceful regional integration.

8. Fourthly, the African Union is of the view that the obligation to ensure compliance with international law is also placed upon the system of the United Nations to advance further its mandate on decolonisation in compliance with the above-mentioned Resolutions.

9. To conclude, the African Union respectfully submits that all legal consequences should be drawn from the incomplete decolonisation process of Mauritius and the unlawful continued administration of Chagos by the United Kingdom:

i. consequences for the United Kingdom under the customary rules of state responsibility;
ii. consequences for Mauritius, and in particular, reparations that are due to the Chagossians by the United Kingdom;
iii. consequences for members of the United Nations;
iv. consequences for third states;
v. consequences for the United Nations System, including the General Assembly; and
vi. consequences for the international community as a whole.

UNITED STATES OF AMERICA

United States Department of State

Washington, D.C. 20520

September 13, 2018

Sir,

With reference to your Note Verbale No. 151056 of September 11, 2018 regarding the question put to the States participating in the oral proceedings concerning the request for an advisory opinion on the *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* by Judge Cançado Trindade, I have the honor to forward to you the written comments of the United States of America on the replies of other participants in these proceedings.

Accept, Sir, the assurances of my highest consideration.

Richard C. Visek
Principal Deputy Legal Adviser

Enclosure:
As stated.

Mr. Philippe Couvreur
Registrar,
International Court of Justice,
Peace Palace,
The Hague

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 Cançado-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

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[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.[1] 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.