

### **Question put by Judge Cançado Trindade:**

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.

### **Written reply of the United States of America:**

Question (a) of the U.N. General Assembly's request for an advisory opinion referred to "obligations reflected in" a number of General Assembly resolutions.<sup>1</sup> However, as framed, Question (a) improperly seeks to prejudge the legal answer.<sup>2</sup> It does so by suggesting that the General Assembly resolutions referenced therein reflected international legal obligations binding on the United Kingdom that would have prohibited it from establishing the British Indian Ocean Territory (BIOT). As the Court explained in *Kosovo*, 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."<sup>3</sup> The Court must therefore reach its own determination as to whether the resolutions cited in the request for an advisory opinion reflected international legal obligations.

Under the terms of the U.N. Charter, General Assembly resolutions—with limited exceptions not applicable here—are not themselves legally binding.<sup>4</sup> The fact that the General Assembly cited particular resolutions in the question referred to the Court does not alter the resolutions' nonbinding nature. Nor do General Assembly resolutions themselves create customary international law. General Assembly resolutions may provide evidence of a rule of customary international law if they reflect an *opinio juris* among States that existed at the

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<sup>1</sup> U.N.G.A. 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 (June 22, 2017).

<sup>2</sup> See United States Written Statement, para. 4.14.

<sup>3</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 52.

<sup>4</sup> United States Written Statement, para. 4.14, n. 98.

relevant time,<sup>5</sup> provided such *opinio juris* was accompanied by “extensive and virtually uniform” state practice.<sup>6</sup> Only where these two elements are satisfied can the Court identify a rule of customary international law.<sup>7</sup>

As explained in the United States written submissions and oral presentation, there was no *opinio juris* at the time Resolution 1514 was adopted, or through the end of the 1960s, to support the conclusion that customary international law prohibited the United Kingdom from establishing the BIOT.<sup>8</sup> This lack of *opinio juris*, by itself, compels the conclusion that the General Assembly resolutions cited did not reflect international legal obligations. Moreover, here, the other prerequisite for a rule of customary international law was also missing: there was not extensive and virtually uniform State practice during the relevant period.<sup>9</sup>

Thus, the resolutions cited in the questions were not themselves binding, nor did they reflect relevant customary international law existing at the time the BIOT was established or when Mauritius became independent, and could not give rise to legal consequences.

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<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 70. See United States Written Statement, para. 4.28; United States Written Comments, para. 3.14.

<sup>6</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 77.

<sup>7</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), I.C.J. Reports 2012*, p. 99, para. 55.

<sup>8</sup> See United States Written Statement, paras. 4.32-4.64.

<sup>9</sup> See United States Written Statement, paras. 4.65-4.72.