

INTERNATIONAL COURT OF JUSTICE

**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 STATEMENT OF
THE UNITED STATES OF AMERICA**

MARCH 1, 2018

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CHAPTER I INTRODUCTION

1.1 In its Order dated July 14, 2017, the Court invited the United Nations and its Member States to submit written statements on the questions referred to the Court by the U.N. General Assembly in its resolution 71/292 of June 22, 2017. The United States appreciates the opportunity to furnish its observations on these questions and to convey its concerns regarding the Court's consideration of the General Assembly's request for an advisory opinion.

1.2 The United States voted against the General Assembly's referral resolution because it concerns a bilateral territorial dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago.¹ The United States believes that this case raises serious questions about the propriety of utilizing the Court's advisory jurisdiction in light of the fundamental principle that a State is not obliged to allow its disputes to be submitted for judicial settlement without its consent. It is clear that the United Kingdom, one of the parties to this bilateral dispute, has not given that consent.²

1.3 This Statement begins, in Chapter II, by briefly describing the context in which the General Assembly's referral resolution should be understood.

1.4 Chapter III identifies compelling reasons why the Court should not provide an advisory opinion in this case. Most notably, to do so would circumvent the fundamental principle that a State is not obliged to submit its disputes to judicial settlement without its consent.

1.5 Chapter IV first identifies several issues the Court would need to consider were it to examine the questions referred, including the problematic framing of those questions. Chapter IV then demonstrates the absence of any international law rule in 1965 that would have made the establishment of the British Indian Ocean Territory (BIOT) unlawful. These considerations help to confirm why the dispute that is the subject of the questions referred is not appropriate to address through the Court's advisory jurisdiction.

1.6 Chapter V concludes the Statement by respectfully requesting that the Court decline to provide the opinion requested.

¹ U.N. Doc. A/71/PV.88 (June 22, 2017) [Dossier No. 6], p. 13. This Statement uses the term "Chagos Archipelago" to describe the group of islands that comprise the British Indian Ocean Territory.

² *See id.*, p. 11.

CHAPTER II

BACKGROUND: THE NATURE OF THE BILATERAL DISPUTE

2.1 The United States anticipates that Mauritius and the United Kingdom will provide the Court with the pertinent background on their dispute concerning sovereignty over the Chagos Archipelago. The United States therefore does not intend to set forth here a comprehensive factual overview.

2.2 Instead, in this Chapter, the United States will describe the context in which the General Assembly's referral resolution should be understood. This context will illustrate the point that the present request for an advisory opinion concerns the longstanding territorial dispute between the two States, and in fact represents an attempt to enlist the Court to adjudicate the same sovereignty claim Mauritius has been pressing in other fora.

2.3 The General Assembly, in its resolution 71/292, requested the Court to render an advisory opinion on the following questions:

(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?

2.4 The United States voted against adoption of this resolution because of concerns that it is not an appropriate subject for an advisory opinion. As the United States explained in the General Assembly debate:

By pursuing the draft resolution, Mauritius seeks to invoke the Court's advisory opinion jurisdiction not for its intended purpose but rather to circumvent the Court's lack of contentious jurisdiction over this purely bilateral matter While Mauritius is attempting to frame this as an issue of decolonization relevant to the international community, at its heart it is a bilateral territorial dispute, and the United Kingdom has not consented to the jurisdiction of the International Court of Justice The advisory function of the International Court of Justice was not intended to settle disputes between States.³

³ *Id.*, p. 13.

2.5 Indeed, the origin of this referral request stems from a State-to-State sovereignty claim by Mauritius against the United Kingdom that arose more than a decade after Mauritius gained its independence in 1968.

2.6 The United Kingdom has exercised sovereignty over the Chagos Archipelago without interruption since the nineteenth century. For most of this time, the United Kingdom administered the islands as a Lesser Dependency of the British colony of Mauritius. In November 1965, the United Kingdom adjusted these administrative arrangements, and since then it has administered the Chagos Archipelago as the BIOT.

2.7 In 1966, the United States entered into a bilateral agreement with the United Kingdom regarding the establishment of a joint U.S.-U.K. military facility in the BIOT.⁴ The 1966 Agreement remains in force today, as amended. Over the years, the United States and United Kingdom have also concluded supplemental agreements.⁵ The 1966 Agreement and supplemental agreements have been registered with the United Nations Treaty Office pursuant to Article 102 of the U.N. Charter, and published in the U.N. Treaty Series.⁶

2.8 In 1968, Mauritius gained its independence; its territorial boundaries did not include the Chagos Archipelago. Over a decade later, Mauritius began asserting a claim to sovereignty over the Chagos Archipelago, including in its annual statements at the opening of the General Assembly.⁷

2.9 Given the joint military facility in the BIOT, Mauritius has raised its territorial claim with the United States on a number of occasions. The United States has been clear in these discussions that the United Kingdom is sovereign over the BIOT. That said, the United States greatly values its warm relations with both Mauritius and the United Kingdom, and has encouraged the two parties to the dispute to resolve the matter on a bilateral basis.

2.10 Prior to this request for an advisory opinion, Mauritius has also pursued its sovereignty claim against the United Kingdom through legal avenues, including by seeking to have the claim adjudicated as a contentious matter with the United Kingdom. Of particular note, Mauritius has sought to bring a contentious dispute against the United Kingdom before

⁴ Agreement Concerning the Availability of Certain Indian Ocean Islands for the Defense Purposes of Both Governments [hereinafter 1966 Agreement], United States-United Kingdom, Dec. 30, 1966, 18 U.S.T. 28, T.I.A.S. 6196, 603 U.N.T.S. 273.

⁵ The 1966 Agreement was amended on June 22 and 25, 1976 (27 U.S.T. 3448, T.I.A.S. 8376) and on November 16, 1987 (1576 U.N.T.S. 179). The 1966 Agreement was supplemented by an agreement in 1972 (Agreement Concerning a Limited United States Naval Communications Facility on Diego Garcia, British Indian Ocean Territory, Oct. 24, 1972, 866 U.N.T.S. 302), which was superseded by a 1976 agreement (Agreement Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory, Feb. 25, 1976, 27 U.S.T. 315, T.I.A.S. 8230, 1018 U.N.T.S. 372). The 1966 Agreement, at Article 11, provides that, absent notice to terminate, after the conclusion of the initial fifty-year period, the Agreement shall continue in force for an additional 20 years. In 2016, there were discussions between the United Kingdom and the United States concerning the continuing importance of the joint base. Neither party gave notice to terminate and the Agreement remains in force until 2036.

⁶ The 1966 Agreement was registered with the United Nations on August 22, 1967; the two above-mentioned supplemental agreements were registered on April 11, 1973 and July 27, 1976, respectively. The 1987 amendment was registered on August 24, 1990.

⁷ See, e.g., Dossier Nos. 269–321.

this Court.⁸ The United Kingdom declined to consent to that procedure for resolving its dispute, preferring instead to engage in direct, bilateral negotiations.

2.11 In 2010, Mauritius initiated arbitral proceedings against the United Kingdom under Annex VII of the U.N. Convention on the Law of the Sea (UNCLOS) of 1982. Those proceedings provide the most complete articulation to date of Mauritius’s sovereignty claim. Mauritius claimed in the proceedings that it possesses sovereignty over the Chagos Archipelago and that any sovereign rights claimed by the United Kingdom are without legal basis.⁹ Mauritius also sought a declaration that “the United Kingdom is not a ‘coastal state’ within the meaning of the 1982 Convention” and that “only Mauritius is entitled to declare an exclusive zone under Part V of the 1982 Convention”¹⁰

2.12 To support its contention, Mauritius argued that the “unlawful excision of the Chagos Archipelago by the UK prior to Mauritius’ independence does not give the UK an entitlement to be considered ‘the coastal State’ in relation to the Archipelago”¹¹ Mauritius went on to argue that:

The detachment of the Chagos Archipelago was, first and foremost, contrary to the right of Mauritius to self-determination. This right—and the duty to recognise it—is a fundamental norm of international law which is enshrined in the UN Charter, in General Assembly resolutions interpreting and applying it, in the law and practice of UN organs and in customary international law.¹²

In making this argument, Mauritius relied for support on the same General Assembly resolutions that are now cited in the request for an advisory opinion currently before the Court.

2.13 The arbitral tribunal, in its Award dated March 18, 2015, recognized that there was a territorial dispute over the Chagos Archipelago between Mauritius and the United Kingdom, and held that it lacked the jurisdiction to decide such a dispute.¹³ It found that it did have jurisdiction to rule on the binding nature of the agreement reached prior to Mauritius’s independence between the United Kingdom and the political representatives of Mauritius concerning the detachment of the Chagos Archipelago.¹⁴

⁸ See, e.g., *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* [hereinafter *Chagos Marine Arbitration*], P.C.A. Case No. 2011-03 (Perm. Ct. Arb. 2015), Rejoinder of the United Kingdom, para. 6.26. Relatedly, the United Kingdom’s declaration recognizing the Court’s compulsory jurisdiction expressly excludes disputes with the government of any country which is or has been a member of the Commonwealth. *Declarations Recognizing the Jurisdiction of the Court as Compulsory: United Kingdom*, available at <http://www.icj-cij.org/en/declarations/gb>.

⁹ *Chagos Marine Arbitration*, *supra* note 8, Memorial of Mauritius, paras. 2.1, 6.36 (contending that “[s]ince, as demonstrated, the excision of the Chagos Archipelago from Mauritius was void, the UK cannot rely on its unlawful act of dismembering Mauritius to base its claim to be the ‘coastal State’ in regard to the Archipelago”).

¹⁰ *Id.*, Notice of Arbitration, para. 11.

¹¹ *Id.*, Memorial of Mauritius, para. 6.2.

¹² *Id.*, Memorial of Mauritius, para. 6.10.

¹³ *Id.*, Award, paras. 207–221; *see also id.*, para. 230.

¹⁴ *Id.*, Award, para. 425 (“The independence of Mauritius in 1968 ... had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in

2.14 When it did not achieve its aim in the UNCLOS arbitration, Mauritius pursued an advisory proceeding before this Court. In July 2016, Mauritius requested that a new item be added to the General Assembly’s agenda under the heading of “Promotion of justice and international law” seeking an advisory opinion from the Court.¹⁵ The records of debate in the Mauritian parliament before, during, and after the addition of the new U.N. agenda item make clear that Mauritius’s goal in seeking an advisory opinion was to advance its sovereignty claim.¹⁶

2.15 Given this context, it is not surprising that the two questions that have been referred to this Court, at the initiative of Mauritius, are a repackaging of Mauritius’s prior sovereignty claim.

2.16 Although the questions refer to the political process of “decolonization,” and do not use the word “sovereignty,” it is difficult, if not impossible, to understand them as raising any issue other than whether it is the United Kingdom or Mauritius that is sovereign over the Chagos Archipelago. Question (a) refers to the “the separation of the Chagos Archipelago from Mauritius” in 1965, which goes to the heart of Mauritius’s claim to sovereignty. If there were any doubt in the framing of Question (a), it is laid to rest by Question (b), which raises the matter of legal consequences of the United Kingdom’s “continued administration” of the Chagos Archipelago. It is difficult to discern how the Court could discuss legal consequences without having adjudicated sovereignty. Indeed, Question (b) refers explicitly to a program by Mauritius to resettle its nationals on the Chagos Archipelago, a prerogative reserved for a sovereign.

2.17 As such, it is clear that the questions are designed to go directly to issues that are central to the bilateral territorial dispute concerning sovereignty.

1965 into an international agreement. In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, the Parties fulfilled the conditions necessary to give effect to the 1965 Agreement and, by their conduct, reaffirmed its application between them.”).

¹⁵ Request for the Inclusion of an Item in the Provisional Agenda of the Seventy-First session, 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, Letter Dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations Addressed to the Secretary-General, U.N. Doc. A/71/142 (July 14, 2016) [Dossier No. 1].

¹⁶ See, e.g., Mauritian Parliamentary Debates of Feb. 26, 2015, 6th National Assembly (Debate No. 5, 1st Session), available at <http://mauritiusassembly.govmu.org/English/hansard/Documents/2015/hansard0515.pdf>, p. 12 (Mauritian Prime Minister stating, in response to a question during parliamentary debate as to whether the Mauritian Government was considering new initiatives at the United Nations including the General Assembly or elsewhere to pursue sovereignty: “Definitely, we are working on it. We are considering the stand that we should take and we want the matter of sovereignty to be thrashed out once and for all.”); Mauritian Parliamentary Debates of May 17, 2016, 6th National Assembly (Debate No. 7, 1st Session), available at <http://mauritiusassembly.govmu.org/English/hansard/Documents/2016/hansard0716.pdf>, pp. 12–13, 15–16, 18 (discussing preparations for, and the purpose of, an advisory opinion by this Court); Mauritian Parliamentary Debates of Nov. 29, 2016, 6th National Assembly (Debate No. 34, 1st Session), available at <http://mauritiusassembly.govmu.org/English/hansard/Documents/2016/hansard3416.pdf>, pp. 14–15 (Mauritian Prime Minister describing discussions between Mauritian and U.K. officials following the item’s addition to the General Assembly’s agenda and stating: “I made it very clear that we want sovereignty, we want our territory back and discussions will be on this and nothing else.”).

2.18 Notably, the record of the General Assembly debate on the referral resolution and the explanations of vote demonstrate that U.N. Member States widely viewed the purpose of the request as an attempt to seek resolution of the bilateral sovereignty dispute between Mauritius and the United Kingdom. The statements of most of the speakers, whether voting for, against, or abstaining on the referral resolution, reflect this understanding.

2.19 For instance, in introducing the draft resolution that became the request for an advisory opinion, the representative of the African Group of States¹⁷ painted a clear picture of the bilateral dispute over sovereignty, explaining the process that led to the General Assembly's consideration of the matter as follows:

- it was at the request of Mauritius that, in 2016, the General Assembly included on its agenda the item entitled “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”;
- the context of the request was Mauritius's effort to “complete its decolonization and *effectively exercise its sovereignty* over the Chagos Archipelago”;
- the United Kingdom requested a delay of consideration of the agenda item;
- an understanding was reached between Mauritius and the United Kingdom, facilitated by the President of the General Assembly, to defer consideration of the item until June 2017 to allow Mauritius and the United Kingdom time to reach a solution; and
- the lack of “progress between the parties” resulted in the General Assembly's consideration of the item.¹⁸

2.20 In supporting the resolution, the representative of the Non-Aligned Movement stated that its Heads of State and Government were

[a]ware that the Government of the Republic of Mauritius is committed to taking all measures necessary to affirm the territorial integrity of the Republic of Mauritius and its sovereignty over the Chagos archipelago under international law, [and that they] decided to support such measures, in particular any action that might be taken in this regard by the General Assembly.¹⁹

2.21 States that voted against the referral resolution, or that abstained, also saw the proposed referral as implicating the bilateral sovereignty dispute; they spoke to the fundamental principle of international law that a State is not obliged to allow its disputes to be submitted for judicial settlement without its consent,²⁰ or urged that the matter be resolved bilaterally.²¹

¹⁷ Four African States did not take part in the vote.

¹⁸ A/71/PV.88, *supra* note 1, p. 5 (emphasis added).

¹⁹ *Id.*, p. 9. Given that only 94 states voted in favor of the referral of the sovereignty dispute to this Court, not all members of the approximately 125-member Non-Aligned Movement supported the referral. *Id.*, pp. 17–18.

²⁰ *See id.*, p. 17 (France: “A sovereignty dispute between States, which is the case here, should be resolved in accordance with the principle of the concerned States’ consent to court adjudication.”); *id.*, p. 16 (Croatia:

2.22 The reluctance of many States to bring this bilateral territorial dispute before the Court through an advisory proceeding, particularly in the face of the opposition of one of the parties to the dispute, is reflected in the vote count: 94 States were in favor, 15 against, and 65 abstained.²² Nineteen States did not vote. In other words, when it came to a vote, over half of the U.N. membership did not support the request for an advisory opinion.

“[W]ith regard to bilateral disputes between States, we believe in the proper application of international law and the use of appropriate avenues for addressing such disputes We shall vote against the draft resolution ... and continue to support the pursuit of direct talks in good faith between Mauritius and the United Kingdom”; *id.*, p. 18 (Germany: “[T]he dispute between Mauritius and the United Kingdom is bilateral in character We note ... that one party to the dispute has expressly not agreed to involve the International Court of Justice in this matter, which is in conformity with the Court’s Statute.”); *id.*, p. 19 (Sweden: “[B]ilateral disputes over sovereignty should be dealt with in accordance with article 36 of the Statute.”); *id.*, p. 20 (Canada: “[I]t is a fundamental principle and key to the effectiveness of the Court’s work that the settlement of a contentious case between States through the International Court of Justice requires the consent of both parties. Seeking the referral of a contentious case between States through the General Assembly’s power to request an advisory opinion circumvents that fundamental principle”); *id.*, p. 18 (Australia: “[I]t is not appropriate for the advisory opinion jurisdiction of the Court to be used to determine the rights and interests of States arising in a specific context.”).

²¹ *Id.*, p. 18 (China: “China calls upon the countries concerned ... to continue to carry out bilateral negotiations”); *id.*, p. 19 (Mexico: “[T]he solution to this case must ... be found at the bilateral level.”); (Indonesia: “[T]o ensure that the outcome of this matter can be obtained through peaceful negotiations ... my delegation abstained”); *id.*, p. 21 (Myanmar: “[O]ngoing bilateral negotiations represent the best way to avoid confrontation and to bring a mutually accepted solution to Mauritius and the United Kingdom.”).

²² *Id.*, pp. 17–18.

CHAPTER III
THIS CASE PRESENTS COMPELLING REASONS FOR THE COURT
TO DECLINE TO PROVIDE THE OPINION REQUESTED

3.1 It is well established that the Court has jurisdiction under Article 65, paragraph 1, of its Statute to render an advisory opinion at the request of the General Assembly on “any legal question.”²³

3.2 Even where the Court’s jurisdiction is established, its authority to issue an advisory opinion is discretionary.²⁴ The Court has recognized that the “discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function.”²⁵ In this regard, and despite this otherwise broad grant of advisory jurisdiction, both this Court and its predecessor, the Permanent Court of International Justice (“Permanent Court”), have recognized inherent limitations stemming from the Court’s judicial character.²⁶ The Court not only has the power to decline an opinion, but also “the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function.”²⁷

3.3 The United States recognizes that the Court, mindful of its responsibilities as the principal judicial organ of the United Nations, has stated that only “compelling reasons should lead the Court to refuse its opinion.”²⁸ The Court has indicated that the lack of an interested State’s consent could present such compelling reasons if responding to a request for an advisory opinion would circumvent the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.²⁹

3.4 The present case falls squarely within the very circumstances envisaged by the Court, such that it is difficult to see how the Court could exercise its advisory jurisdiction without circumventing the fundamental principle of consent to judicial settlement.

²³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [hereinafter *Construction of a Wall*], *Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, para. 14. The Court would need to satisfy itself of its jurisdiction in this case, including that the questions referred can be answered with reference to international law.

²⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [hereinafter *Kosovo*], *Advisory Opinion*, *I.C.J. Reports 2010*, p. 403, para. 29.

²⁵ *Id.*

²⁶ *Status of Eastern Carelia* [hereinafter *Eastern Carelia*], *Advisory Opinion*, 1923, *P.C.I.J., Series B, No. 5*, p. 29 (“The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.”); *Interpretation of Peace Treaties*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 65, 71 (“There are certain limits, however, to the Court’s duty to reply to a Request for an Opinion.”); *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, para. 23 (“The International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions.”).

²⁷ *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 45; *see also Kosovo*, *supra* note 24, *Advisory Opinion*, para. 31.

²⁸ *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 44.

²⁹ *See, e.g., Western Sahara*, *supra* note 26, *Advisory Opinion*, paras. 32–33; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1989*, p. 177, paras. 37–38; *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 47.

3.5 This Chapter is divided into three sections. Section A explains that the Court was not provided advisory jurisdiction to adjudicate disputes between States. Section B discusses the Court’s jurisprudence, which affirms that the advisory function should not be used to adjudicate disputes between States. Section C explains that the Court should decline to respond to the General Assembly’s request in this instance, because the request calls for the adjudication of a bilateral sovereignty dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent.

A. The Court was not provided advisory jurisdiction under its Statute to adjudicate disputes between States.

3.6 The Court’s advisory jurisdiction is limited to “any legal question” asked by an authorized U.N. organ or agency.³⁰ This language reflects a deliberate decision by the drafters of the Statute of the Court to adopt a narrower formulation of the provision granting advisory jurisdiction as compared to that of the Permanent Court.

3.7 Article 14 of the Covenant of the League of Nations empowered the Permanent Court to give an advisory opinion on “any dispute or question referred to it by the Council or by the Assembly.”³¹ As one leading commentator has noted, this formulation envisaged two distinct types of opinion, one on “disputes” and another on “questions.”³²

3.8 The drafters of the provisions that set forth the advisory jurisdiction of this Court, however, quickly dispensed with the phrase “any dispute or question” in favor of the narrower formulation “any legal question.”³³

3.9 The drafters also rejected several proposals that would have extended the right to request an advisory opinion to individual States, either acting alone or in concert with others.³⁴ The Informal Inter-Allied Committee, a group of experts charged with making

³⁰ Statute of the International Court of Justice, art. 65(1).

³¹ League of Nations Covenant, art. 14.

³² I SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005* 276 (4th ed. 2006); *see also* Karin Oellers-Frahm, *Chapter XIV The International Court of Justice: Article 96*, in *2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1897, p. 1978 (Bruno Simma et al. eds., 3d ed. 2012) (explaining that the purpose of Article 14 of the Covenant of the League of Nations “was to create, within the framework of the League of Nations, an additional and flexible means of peaceful settlement of disputes, less binding than judgments in contentious cases between States, but also relating in the first place to interstate controversies”).

³³ *See* United Nations Conference on International Organization, Report of the Rapporteur (Nasrat Al-Farsy, Iraq) of Committee IV/1, 13 U.N. CONF. ON INT’L ORG. 381 (1945), pp. 385–86 (explaining that the committee charged with preparation of a draft of Chapter X of the Charter relating to the International Court of Justice and a draft of the Statute of the Court proposed to vest the authority to make requests for advisory opinions in both the General Assembly and the Security Council, which would be permitted “to request an opinion on any legal question”); I ROSENNE, *supra* note 32, p. 63 (“In a departure from Article 14 of the Covenant of the League of Nations, the advisory competence [of the International Court of Justice] is separated from the specific provisions regarding the settlement of disputes”); *Interpretation of Peace Treaties, supra* note 26, *Advisory Opinion* (separate opinion of Judge Azevedo), para. 9 (“To-day, we are no longer concerned with ‘disputes.’ Beginning with the very first draft, we find no mention of anything but legal ‘questions.’”).

³⁴ I ROSENNE, *supra* note 32, p. 280; *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (1945) [hereinafter *Inter-Allied Committee Report*], reprinted in 39

recommendations on the structure and functions of the International Court of Justice, explained the reason for not allowing an individual State to request an advisory opinion as follows:

[G]iven the authoritative nature of the Court’s pronouncements, *ex parte* applications would afford a means whereby the State concerned could *indirectly impose a species of compulsory jurisdiction* on the rest of the world.³⁵

3.10 States that adhered to the U.N. Charter and the Statute of the International Court of Justice accepted the Court’s authority in principle to render an advisory opinion on “any legal question” when requested by an authorized U.N. organ or agency. But they did so with the understanding that there would be a clear demarcation between the Court’s advisory jurisdiction on the one hand and its contentious jurisdiction on the other.

3.11 Those States, moreover, expected that the Court would preserve and protect its judicial character, including through application of necessary judicial safeguards, such as the fundamental principle of consent to judicial settlement. States did not intend to introduce through the Court’s advisory jurisdiction a nonbinding substitute for the Court’s consent-based contentious jurisdiction. To do so would have meant subjecting States to dispute settlement without their consent, and without the normal procedural safeguards for adjudicating bilateral disputes.³⁶

B. The Court’s jurisprudence affirms that the advisory opinion function should not be used to adjudicate disputes between States.

3.12 It is a fundamental principle that a State is not obliged to allow its disputes to be submitted for judicial settlement without its consent.³⁷ Both this Court and its predecessor have addressed the application of this principle in the advisory opinion context. In *Eastern Carelia*, the Permanent Court found that it could not exercise its advisory jurisdiction because the question put to it “concerns directly the main point of the controversy between Finland and Russia” and because “[a]nswering the questions would be substantially equivalent to

AM. J. INT’L L. Supp. (1945) 1, 22, para. 71. The Informal Inter-Allied Committee also highlighted a number of other important judicial limitations that the Court would be expected to apply, including that the Court would “refuse to allow the procedure by way of advisory opinions to be used as a means of reopening questions already judicially determined, or for pronouncing on questions of municipal law where these lay solely within the competence of domestic tribunals.” *Id.*, para. 73.

³⁵ *Inter-Allied Committee Report*, *supra* note 34, para. 71 (emphasis added).

³⁶ Such procedural safeguards include the ability to raise preliminary objections to the Court’s jurisdiction or the admissibility of the application, Rules of Court, art. 79, and to be consulted by the President of the Court on questions of procedure, *id.*, art. 31. Additionally, States generally have considerably more time to prepare and present written and oral submissions to the Court in contentious proceedings.

³⁷ See, e.g., *Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, 32 (“To adjudicate upon the international responsibility of [a State] without [its] consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.”); *Western Sahara, supra* note 26, *Advisory Opinion*, para. 33 (“[T]he powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute ... afford sufficient legal means to ensure respect for the fundamental principle of consent to judicial settlement.”).

deciding the dispute between the parties.”³⁸ This Court has affirmed the applicability of this principle to advisory proceedings on a number of occasions, including most recently in *Construction of a Wall*.³⁹

3.13 This Court first addressed the important issue of rendering an advisory opinion in the absence of interested States’ consent in *Interpretation of Peace Treaties*, in which Bulgaria, Hungary, and Romania contested the Court’s power to render a response.⁴⁰ There, the Court affirmed the fundamental principle of consent to judicial settlement and stressed the continuing validity of the expression of that principle as set forth in *Eastern Carelia*, but distinguished the facts of that case. It stated:

In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case (Advisory Opinion No. 5), when the Court declined to give an Opinion because it found that the question put to it was *directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties*

As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it *in no way touches the merits of those disputes*

*It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.*⁴¹

3.14 As Judge Azevedo emphasized in his separate opinion, “the compelling reason which had led to the abolition of [the ‘dispute’ clause in Article 14] of the Covenant—i.e. the refusal to make use of the advisory function to decide a genuine dispute at law over the heads of the parties concerned—continues to retain its force, for it is the only means of avoiding a misuse of that function.”⁴²

3.15 Twenty-five years later, in *Western Sahara*, the Court again reaffirmed the fundamental principle of consent to judicial settlement as a constraint on the Court’s advisory function.⁴³ Citing *Interpretation of Peace Treaties*, it stressed that the lack of consent, while not a jurisdictional bar in advisory cases, “might constitute a ground for declining to give the

³⁸ *Eastern Carelia*, *supra* note 26, *Advisory Opinion*, pp. 28–29. Although the Court has since noted that *Eastern Carelia* involved unique circumstances posed by Russia’s non-membership in the League of Nations, that distinction does not undermine the continuing application of the principle as a constraint on the Court’s advisory jurisdiction.

³⁹ *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, paras. 46–47. *See also Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 33; *Interpretation of Peace Treaties*, *supra* note 26, *Advisory Opinion*, pp. 71–72.

⁴⁰ *Interpretation of Peace Treaties*, *supra* note 26, *Advisory Opinion*, p. 70.

⁴¹ *Id.*, p. 72 (emphasis added).

⁴² *Id.*, *Advisory Opinion* (separate opinion of Judge Azevedo), para. 9.

⁴³ *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 32.

opinion if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion.”⁴⁴ The Court explained:

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be 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. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.⁴⁵

3.16 The Court has reaffirmed this language on several occasions, including most recently in *Construction of a Wall*.⁴⁶ In reaching the conclusion in that case that a response would not have the effect of circumventing the principle of consent to judicial settlement, the Court highlighted that “the opinion [was] 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.”⁴⁷

3.17 Importantly, however, as Judge Owada stressed, it remains the case that rendering a response to a request would be incompatible with the Court’s judicial function if doing so would be “tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute.”⁴⁸

C. The Court should decline to respond to the General Assembly’s request because the request calls for the adjudication of a bilateral territorial dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent to judicial settlement by this Court.

3.18 Applying the Court’s jurisprudence to the facts of this request, it is difficult to see how responding to the questions that have been posed would be compatible with the judicial character of the Court.

3.19 There is undoubtedly a bilateral territorial dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago⁴⁹ and the questions referred—however disguised—strike at the core of that dispute.

⁴⁴ *Id.*

⁴⁵ *Id.*, para. 33.

⁴⁶ *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 47; *see also Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *supra* note 29, *Advisory Opinion*, paras. 37–38.

⁴⁷ *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 50.

⁴⁸ *Id.* (separate opinion of Judge Owada), para. 13.

⁴⁹ *See supra* para. 2.13.

3.20 The request does not merely touch on or relate indirectly to the merits of the bilateral territorial dispute between Mauritius and the United Kingdom—it addresses itself to the central elements of that very dispute. When viewed in light of the history of the bilateral dispute discussed in Chapter II above, it becomes clear that the questions referred reflect an attempt on the part of Mauritius to repackage its claim to sovereignty advanced in other fora. As such, the questions put to the Court are “directly related to the main point of a dispute actually pending” between Mauritius and the United Kingdom, and “answering the question[s] would be substantially equivalent to deciding the dispute between the parties.”⁵⁰

3.21 In addition, as the Court noted in *Western Sahara*, the “origin and scope of a dispute ... are important in appreciating, from the point of view of the exercise of the Court’s discretion, the real significance” of a State’s lack of consent.⁵¹ It is notable in this regard that Mauritius first asserted its sovereignty claim against the United Kingdom as a State-to-State dispute over a decade after it gained its independence from the United Kingdom.⁵²

3.22 In contrast to the requests in *Western Sahara* and *Construction of a Wall*, the dispute between Mauritius and the United Kingdom did not arise during the proceedings of the General Assembly and in relation to matters with which the General Assembly was dealing.⁵³ The General Assembly did consider and adopt a resolution pertaining to the Chagos Archipelago *prior* to Mauritius’s independence.⁵⁴ However, when Mauritius’s application for U.N. membership was presented to the U.N. Security Council and General Assembly for consideration in 1968, there was neither any debate nor even mention of the territorial scope of the newly independent State of Mauritius, nor any suggestion of Mauritius’s decolonization as being “incomplete.”⁵⁵

3.23 Mauritius has pursued its sovereignty claim bilaterally since 1980,⁵⁶ twelve years after its independence, and has since raised its claim to the Chagos Archipelago before various U.N. bodies.⁵⁷ As far as the United States is aware, however, no U.N. organ has considered Mauritius or its claim to the Chagos Archipelago as falling within the United

⁵⁰ *Interpretation of Peace Treaties*, *supra* note 26, *Advisory Opinion*, p. 72.

⁵¹ *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 42.

⁵² *See supra* para. 2.5.

⁵³ *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 34; *Construction of a Wall*, *supra* note 23, *Advisory Opinion*, para. 47.

⁵⁴ *See* G.A. Res. 2066 (XX), Question of Mauritius, U.N. Doc. A/RES/2066(XX) (Dec. 16, 1965) [Dossier No. 146]. This resolution is discussed at paras. 4.54–4.57, *infra*.

⁵⁵ U.N. Doc. S/PV.1414 (Apr. 18, 1968) [Dossier No. 261]; U.N. Doc. A/PV.1643 (Apr. 24, 1968) [Dossier No. 264].

⁵⁶ *Chagos Marine Arbitration*, *supra* note 8, Award, para. 209.

⁵⁷ *See, e.g.*, General Debate, Letter Dated 5 December 1983 from the Permanent Representative of Mauritius to the United Nations Addressed to the President of the General Assembly, U.N. Doc. A/38/711 (Dec. 8, 1983) [Dossier No. 280]; Prevention of Discrimination, Letter Dated 15 August 2001 from the Permanent Mission of Mauritius to the United Nations Office at Geneva Addressed to the Chairperson of the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/39 (Aug. 17, 2001) [Dossier No. 352]; Universal Periodic Review, Letter Dated 16 April 2008 from the Ambassador and Permanent Representative of Mauritius Addressed to the President of the Human Rights Council, U.N. Doc. A/HRC/8/G/3 (Apr. 30, 2008) [Dossier 336].

Nations' decolonization agenda since Mauritius gained its independence in 1968, until the request for an advisory opinion was added to the General Assembly's agenda on September 16, 2016.⁵⁸

3.24 The lack of U.N. General Assembly involvement in this matter for the decades following Mauritius's independence, and the fact that a new General Assembly agenda item needed to be created in 2016 for consideration of this referral request, belie any assertion that a response to the General Assembly's request is "necessary for [it] in [its] actions."⁵⁹

3.25 It is quite clear that Mauritius sought an advisory opinion in order to advance its sovereignty claim against the United Kingdom, after failed attempts to seek adjudication of that claim in other fora.⁶⁰ The views expressed by many U.N. Member States during the General Assembly debate on the request for an advisory opinion indicate that they understood this as the purpose of the request.⁶¹

3.26 The centrality of the bilateral dispute to the request for an advisory opinion was also evident in the General Assembly's decision to include the request on its agenda with the understanding that consideration of the request would be deferred until the following year so that the parties to the dispute could continue their efforts to resolve the matter bilaterally.⁶²

3.27 The United States is aware of the Court's disinclination to give weight to the motivation of individual states in seeking a General Assembly referral when assessing the propriety of offering an advisory opinion. This practice follows from the fact that a request is made by the General Assembly as a body and not by individual states. However, it may be important, in assessing whether the questions posed are central to a bilateral dispute, to look to the General Assembly's purpose in making a request for an advisory opinion. In this case, it is highly relevant that the request was widely understood—not only by individual States but

⁵⁸ See U.N. Doc. A/71/PV.2 (Sept. 16, 2016) [Dossier No. 3], p. 6.

⁵⁹ *Construction of a Wall, supra* note 23, *Advisory Opinion*, para. 60 ("As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action."). While the Court has not found in particular cases that a requesting organ lacked a sufficient interest to warrant a response, several judges believed that the record supported such a finding in the *Kosovo* proceedings. See *Kosovo, supra* note 24, *Advisory Opinion* (dissenting opinion of Judge Bennouna), paras. 19–20 (noting that "there was no real debate on the question of the status of Kosovo" when the General Assembly adopted the resolution requesting an advisory opinion, and stating that "[i]t may be questioned, therefore, whether the request for an advisory opinion ... is compatible with the Court's functions as a judicial organ, as defined by the Charter of the United Nations and by the Statute of the Court"); *id.* (declaration of Judge Tomka), paras. 2, 5 (expressing the view that the Court should have declined to respond to the General Assembly's request because, *inter alia*, the General Assembly lacked a sufficient interest in receiving an advisory opinion, and noting in this regard that a new item had to be included on the General Assembly's agenda in order for that body to consider the request).

⁶⁰ See *supra* paras. 2.10–2.17.

⁶¹ See *supra* paras. 2.18–2.22.

⁶² See A/71/PV.88, *supra* note 1, p. 5 (Congo: "This item was included by consensus by the General Assembly on its agenda following an understanding between Mauritius and the United Kingdom, facilitated by the president of the General Assembly, to defer, at the request of the United Kingdom, the consideration of the item until June 2017 in order to allow time to the concerned delegation to reach a solution on the decolonization of Mauritius.").

also by the requesting body, as demonstrated through its own actions—as an effort to seek the Court’s assistance in resolving an outstanding bilateral territorial dispute.

3.28 This inquiry is particularly appropriate when, as discussed in Chapter IV below, the questions referred are not adequately formulated and require clarification as to which legal questions are really in issue.⁶³ An understanding of the General Assembly’s purpose in making the request would help to inform that determination, and hence to discern the type of advice the General Assembly is seeking. Statements made by members of the General Assembly in the context of the adoption of the referral resolution, along with the actions of the requesting body itself, are an important source of that understanding.

3.29 Increased scrutiny is called for in the exercise of the Court’s advisory jurisdiction in this instance because the dispute involves sovereignty over territory. Indeed, the Court emphasized this consideration in *Western Sahara*, where, in discussing Spain’s lack of consent, the Court stated that “[t]he issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today ... ,” and noted that the questions referred did not “relate to a territorial dispute ... between the interested States.”⁶⁴ There, before responding to the General Assembly’s request, the Court first satisfied itself that “the request for an opinion [did] not call for adjudication upon existing territorial rights or sovereignty over territory.”⁶⁵

3.30 In sharp contrast, the questions posed in the present case invite an examination of the validity of the United Kingdom’s exercise of sovereignty over the Chagos Archipelago today, such that it would be difficult to form a response that would not be tantamount to adjudicating on the very subject matter of the territorial sovereignty dispute between Mauritius and the United Kingdom.⁶⁶

3.31 Allowing the advisory opinion process to be used to address territorial disputes—fifty years after the boundaries were established, as here—could open the door to the adjudication of any number of such disputes without the consent of interested parties. This attempt to circumvent the Court’s lack of contentious jurisdiction over a bilateral matter creates a potentially dangerous precedent, and could lead to the normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when the States directly involved have not consented to judicial settlement by the Court.

* * *

3.32 In sum, the United States believes that the dispute referred to the Court by the General Assembly, as reflected in the two questions, is not an appropriate topic for an advisory opinion. The General Assembly’s request invites the Court to adjudicate a bilateral territorial dispute under the guise of a request for an advisory opinion. The Court’s advisory function is not intended to provide a backdoor for individual States—whether acting alone or with the

⁶³ See *infra* paras. 4.8–4.17.

⁶⁴ *Western Sahara*, *supra* note 26, *Advisory Opinion*, paras. 42–43.

⁶⁵ *Id.*, para. 43.

⁶⁶ See *id.*; *Construction of a Wall*, *supra* note 23, *Advisory Opinion* (separate opinion of Judge Owada), para. 13.

support of others—to bring contentious disputes before the Court for adjudication. It is difficult to see how a response to this request could avoid circumventing the fundamental principle of consent to judicial settlement. In accordance with the Court’s jurisprudence and to protect the integrity of its judicial function, the United States requests the Court not to exercise jurisdiction over this matter.

CHAPTER IV CONSIDERATIONS RELATING TO THE QUESTIONS REFERRED

4.1 For the reasons discussed in Chapter III, the Court should refrain from taking up the referral of this bilateral dispute between Mauritius and the United Kingdom. This Chapter identifies some of the issues the Court would need to examine were it to consider responding to the questions referred.

4.2 Section A explains why the questions as framed would not be appropriate inquiries for the Court. For example, Question (a) assumes certain answers to the questions. Therefore, at minimum, the Court would first need to clarify which issues it should and should not address in its response.

4.3 Section B then provides relevant context for interpreting the questions, first by briefly reviewing the General Assembly's policy toward decolonization in the 1960s, and then by explaining that this policy is distinct from the issue of whether a specific legal obligation existed that would have prohibited the establishment of the BIOT in 1965.

4.4 Section C reviews the principles that would be relevant to ascertaining the substantive law applicable to Question (a). Importantly, the Court would need to look to the law as it stood at the time of the relevant events, more than fifty years ago.

4.5 Section D explains why no legal obligation existed at that time that would have prohibited the establishment of the BIOT. Even if Resolution 1514 (XV) were interpreted to relate to the adjustment of colonial boundaries, neither it nor the other resolutions cited in Question (a) were supported by extensive and virtually uniform practice of States undertaken out of a sense of legal obligation (*opinio juris*).

4.6 Before turning to these sections, the United States wishes to offer a few preliminary observations. Question (a) appears to invite the Court to reach conclusions on a wide range of issues related to the bilateral dispute between Mauritius and the United Kingdom. These include, *inter alia*, the role of consent of the elected representatives of Mauritius; Mauritius's reaffirmation, after achieving independence, of the 1965 agreement reflecting this consent; and the applicability of the doctrine of *uti possidetis* in these circumstances.⁶⁷ The United States will not address these issues in this submission.⁶⁸

4.7 If, however, as the United States demonstrates below, international law did not prohibit the establishment of the BIOT, then the answer to Question (a) would be that the process of decolonization of Mauritius was in fact lawfully completed in 1968. Such an answer would obviate the need to address Question (b).

⁶⁷ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, para. 23 (explaining that the principle of *uti possidetis* secures respect for territorial boundaries "at the moment when independence is achieved," including where such boundaries are based on "delimitations between different administrative divisions ... all subject to the same sovereign"). *See also, e.g.*, Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 33, art. 4(b) ("The Union shall function in accordance to with the following principles: ... respect of borders existing on achievement of independence ...").

⁶⁸ Nevertheless, the United States believes the Court could not resolve these issues in a manner that would support a finding that Mauritius's decolonization was not lawfully completed in 1968.

A. The questions in the referral would need to be clarified in order for the Court to address them.

4.8 It is well established that the Court is free to determine that any questions referred to it have not been adequately formulated or that a request for an advisory opinion does not reflect “the legal questions really in issue.”⁶⁹ In this regard, both questions referred to this Court would require clarification. As explained in Chapter II,⁷⁰ although framed as questions about international law and decolonization, they are in reality a repackaging of Mauritius’s bilateral territorial claim to the Chagos Archipelago.

4.9 To address Question (a), it would first be necessary to identify the legal questions that are really in issue. The question reads:

(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?

4.10 First, it is beyond serious dispute that the decolonization of Mauritius was complete as of its independence on March 12, 1968. Mauritius was admitted to the United Nations on April 24, 1968.⁷¹ It thereafter ceased to appear on the list of territories monitored by the United Nations Special Committee on Decolonization.⁷²

4.11 Second, the question on its face requests an opinion regarding the lawfulness of “the process of decolonization.” Decolonization is a political process that results in the termination of a colonial relationship between a State and a territory. To address whether this political process was “lawfully” completed with respect to Mauritius, the Court would need to determine whether any international legal obligations existed at the time that would have applied to the United Kingdom and would have regulated that process.

4.12 In doing so, the Court would need to distinguish the General Assembly’s efforts during the 1960s to advance the political goals of decolonization from the existence of any

⁶⁹ *Kosovo*, *supra* note 24, *Advisory Opinion*, para. 50 (quoting *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion*, *I.C.J. Reports 1980*, p. 89, para. 35).

⁷⁰ *See supra* paras. 2.15–2.22.

⁷¹ G.A. Res. 2371 (XXII), Admission of Mauritius to Membership in the United Nations, U.N. Doc. A/RES/2371(XXII) (Apr. 24, 1968) [Dossier No. 263]. *See also* 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/7623.Rev.1 (1969) [hereinafter 1969 Report of the Special Committee on Decolonization], para. 146 (Special Committee on Decolonization noting that Mauritius had attained independence the prior year and therefore no longer including Mauritius in its report).

⁷² *See, e.g.*, 1969 Report of the Special Committee on Decolonization, *supra* note 71; *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNITED NATIONS YEARBOOK 1969, pp. 627–28 [hereinafter U.N. YEARBOOK 1969] (Mauritius not listed among the territories studied by the Special Committee on Decolonization in 1969).

specific legal obligations on administering States. As is often the case, the political efforts preceded the legal realities.⁷³

4.13 Third, the question appears to suggest that the legally relevant date is 1968, when Mauritius became independent, but the title of the referral resolution refers to the “separation of the Chagos Archipelago from Mauritius in 1965.”⁷⁴ Moreover, Question (a) asks whether the process of decolonization of Mauritius was “lawfully completed ... following the separation of the Chagos Archipelago from Mauritius ... ,”⁷⁵ which occurred in 1965. The United States therefore understands the question to ask whether the establishment of the BIOT by the United Kingdom in 1965 was prohibited by international law.

4.14 Fourth, Question (a), as framed, improperly seeks to prejudge the legal answer.⁷⁶ It does so by suggesting that the General Assembly resolutions referenced therein reflected international legal obligations binding on the United Kingdom that would have constrained its establishment of the BIOT. Yet 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.”⁷⁷

4.15 In light of these considerations, the “legal questions really in issue”⁷⁸ in Question (a) are directly related to the main point of the pending bilateral dispute. Specifically, Mauritius has most recently argued that the 1965 separation of the Lesser Dependency of the Chagos Archipelago from the colony of Mauritius was unlawful because it violated the right of self-determination of the people of Mauritius. Mauritius has asserted that the United Kingdom was legally obligated to respect this right by 1965 and was prohibited from establishing the BIOT in the absence of consent through the freely expressed wishes of the people of Mauritius. Mauritius has also recently argued that the people did not freely express their wishes before the United Kingdom established the BIOT in 1965, and thus the Chagos Archipelago is Mauritian territory.⁷⁹

4.16 Were the Court to answer the questions referred despite the bilateral nature of the dispute, it should be aware that Mauritius’s arguments do not accurately represent the state of international law at the relevant time, as explained below. Even if the Court were to consider the relevant time period to extend to 1968, the analysis and the answer would be the same, as

⁷³ See *infra* paras. 4.18–4.22.

⁷⁴ 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, U.N. Doc. A/RES/71/292 (June 22, 2017) [Dossier No. 7] (emphasis added).

⁷⁵ *Id.*, Question (a) (emphasis added).

⁷⁶ Question (b) similarly seeks to prejudge the answer to Question (a) by assuming that there are “consequences” under international law arising from the United Kingdom’s “continued administration” of the BIOT. *Id.*, Question (b). See also *supra* para. 2.16.

⁷⁷ *Kosovo*, *supra* note 24, *Advisory Opinion*, para. 52.

⁷⁸ *Id.*, para. 50.

⁷⁹ See *supra* paras. 2.11–2.12. See also, e.g., *Chagos Marine Arbitration*, *supra* note 8, Memorial of Mauritius, paras. 6.10, 6.34–6.35; *id.*, Hearing on Jurisdiction and the Merits, Apr. 24, 2014, pp. 242–49; *id.*, May 5, 2014, p. 970.

set forth in Sections C and D, because a relevant legal rule did not crystallize between 1965 and 1968.

4.17 Thus, the appropriate answer to Question (a) is that the process of decolonization of Mauritius was lawfully completed in 1968, following the establishment of the BIOT. Answering Question (a) in the affirmative would obviate the need to address Question (b), which concerns legal consequences.

B. The General Assembly’s decolonization policy is distinct from whether a specific legal obligation existed at the relevant time.

4.18 During the 1950s and 1960s, the General Assembly actively promoted decolonization, as the United Nations welcomed scores of new States as Members. Over the course of several decades, the United Nations, administering States, and the peoples of non-self-governing and trust territories devised different solutions tailored to the unique circumstances of each territory.

4.19 At the center of this important international dialogue was how the Charter’s references to the principle of self-determination⁸⁰ should be understood in the context of decolonization.

4.20 The United States was an active participant in this dialogue, and regards the advancement of decolonization as one of the great success stories of the twentieth century. Indeed, the United States has long championed self-determination as a guiding principle in international relations. One hundred years ago, President Woodrow Wilson articulated principles of self-determination in his Fourteen Points.⁸¹ Addressing the General Assembly in 1961, President John F. Kennedy pledged U.S. “sympathy and . . . support” for the “continuing tide of self-determination,” and committed the United States to active participation “in the peaceful, expeditious movement of nations from the status of colonies to the partnership of equals.”⁸² As scores of newly decolonized States joined the United Nations’ ranks, the United States repeatedly welcomed them as sovereign and equal partners.⁸³

⁸⁰ U.N. Charter, arts. 1(2), 55.

⁸¹ Woodrow Wilson, President of the United States, Address to Joint Session of the Two Houses of Congress (Jan. 8, 1918), in *Rights and Duties of States*, 5 DIGEST OF INT’L LAW (WHITEMAN), “Self-Determination,” pp. 38, 42–43 (1965) (setting forth the Fourteen Points).

⁸² John F. Kennedy, President of the United States, Address in New York City Before the General Assembly of the United Nations (Sept. 25, 1961), available at <http://www.presidency.ucsb.edu/ws/?pid=8352>. *Accord*, e.g., U.N. Doc. A/PV.1061 (Nov. 22, 1961) [Dossier No. 114] (U.S. representative discussing United States’ historical political support for self-determination as “the first nation in modern times to emerge from colonial domination into independence”).

⁸³ *See*, e.g., U.N. Doc. A/PV.937 (Dec. 6, 1960), para. 12 (United States: “When a former colony emerges as a new nation, we instinctively remember our own origin and respond with heartfelt rejoicing.”); *accord* Jewel Lafontant, U.S. Representative, Statement Before the U.N. General Assembly Third Committee (Nov. 23, 1972), in 67 DEP’T OF STATE BULLETIN 740 (1972), p. 740 (similar).

4.21 In *Western Sahara* in 1975, the Court noted efforts undertaken since 1960 to establish a set of “basic principles governing the decolonization policy of the General Assembly.”⁸⁴ Today most States, including the United States, recognize as indisputable that the peoples of non-self-governing territories enjoy an international legal right of self-determination, and that this right includes independence as one of the political status options.⁸⁵

4.22 The Court is not, however, being asked to opine on the General Assembly’s historical policy or on the state of the law today. Rather, in order to answer Question (a), the Court would need to examine whether a new right and a corresponding obligation had crystallized under international law by 1965 that would have prohibited the establishment of the BIOT by the United Kingdom. As discussed below, the historical record does not support any such finding, despite widespread support for the policy of decolonization.

C. To answer the questions referred, the Court would need to determine whether a new rule of international law had emerged at the relevant time.

4.23 If it were to consider Question (a), the Court would need to look to the law as it existed during the relevant time period. As the Court has explained, “the meaning of a juridical notion in a historical context[] must be sought by reference to the way in which that notion was understood in that context.”⁸⁶ In seeking to ascertain whether a particular juridical notion was understood to connote a legally binding obligation, the Court would need to consider the relevant State practice at the time.⁸⁷ The Court should not look to how a juridical notion may later have been understood in light of subsequent developments.⁸⁸

4.24 Thus, the Court would need to ascertain the state of international law in 1965, when the BIOT was established. The international law relevant to this inquiry would take the form of (1) treaty law or (2) customary international law.⁸⁹

⁸⁴ *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 60. See also *Kosovo*, *supra* note 24, *Advisory Opinion*, para. 79; *East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 90, para. 29; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [hereinafter *Namibia*], *Advisory Opinion*, *I.C.J. Reports 1971*, p. 16, para. 52.

⁸⁵ See, e.g., Written Statement of Japan, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, p. 4 (Apr. 17, 2009); Written Statement of the Russian Federation, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, paras. 80–81 (Apr. 16, 2009). Outside the colonial context, however, States have maintained “radically different views” on self-determination, as the Court acknowledged in *Kosovo* and States’ written statements in those proceedings demonstrate. *Kosovo*, *supra* note 24, *Advisory Opinion*, para. 82.

⁸⁶ *South West Africa, Second Phase*, *Judgment*, *I.C.J. Reports 1966*, p. 6, para. 16. *Accord Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 79.

⁸⁷ See *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 80.

⁸⁸ See *South West Africa*, *supra* note 86, *Second Phase*, *Judgment*, para. 16.

⁸⁹ Statute of the International Court of Justice, art. 38(1)(a)–(b). The United States does not set forth in this statement any views on the applicability of “the general principles of law recognized by civilized nations.” *Id.*, art. 38(1)(c).

4.25 As noted above,⁹⁰ Mauritius has argued elsewhere that a relevant and specific right of self-determination had emerged in international law that should have constrained the United Kingdom's actions in establishing the BIOT. However, neither treaty law nor customary international law supplied such a rule as of 1965—or, for that matter, 1968, when Mauritius became independent.

4.26 First, there were no treaties in force at that time that established a right of self-determination that would have prohibited the establishment of the BIOT. Although the Charter contained legal obligations that administering States owed toward non-self-governing territories,⁹¹ it did not regulate or even require a process of decolonization for non-self-governing territories.⁹² Moreover, while the Charter includes the “principle of equal rights and self-determination of peoples” in its purposes and principles,⁹³ it did not specify any implications of this principle for decolonization.⁹⁴ The Human Rights Covenants set forth a right of self-determination for “[a]ll peoples,” and obliged States parties, including those administering non-self-governing and trust territories, to promote and respect that right.⁹⁵ But whatever implications these provisions may later have had for decolonization, these treaties were not adopted until 1966 and did not enter into force until 1976.

4.27 Second, there was no rule of customary international law establishing a right of self-determination that would have prohibited the establishment of the BIOT. Such a new rule could only have existed if, at the time, there was extensive and virtually uniform State practice accompanied by *opinio juris*. In *North Sea Continental Shelf*, the Court set forth the test for determining the existence of a customary international law rule:

[T]wo 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*]. ... The States concerned must therefore feel that

⁹⁰ See *supra* para. 4.15.

⁹¹ U.N. Charter, arts. 73–74. These articles make up Chapter XI of the Charter, the “Declaration Regarding Non-Self-Governing Territories.”

⁹² By contrast, Chapter XII of the Charter obligated States administering trust territories to promote the territories’ “progressive development towards self-government or independence” in accordance with “the freely expressed wishes of the peoples concerned.” *Id.*, art. 76(b). Unlike Chapter XII, moreover, Chapter XI did not establish an institutional architecture for the United Nations to oversee administering States’ administration of non-self-governing territories, beyond the requirement for administering States to transmit information “of a technical nature” on economic, social, and educational conditions. *Id.*, art. 73(e). See also Ulrich Fastenrath, *Chapter XI Declaration Regarding Non-Self-Governing Territories: Article 73*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1829, pp. 1830–31 (Bruno Simma et al. eds., 3d ed. 2012) (contrasting Chapters XI and XII).

⁹³ U.N. Charter, *supra* note 80, art. 1(2). See also *id.*, art. 55.

⁹⁴ As explained below, see *infra* paras. 4.33–4.34, negotiating States could not agree on any specific application of the Charter principle of self-determination.

⁹⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, arts. 1(1), 1(3) (quotation at art. 1(1)); accord International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, arts. 1(1), 1(3) (identical language). Negotiating States’ substantial disagreements about this provision are discussed at paragraphs 4.35–4.40, *infra*.

they are conforming to what amounts to a legal obligation. The frequency[] or even habitual character of the acts is not in itself enough.⁹⁶

The Court in *North Sea Continental Shelf* provided clarification as to what constitutes “settled” practice and *opinio juris*:

[W]ithin 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.⁹⁷

4.28 There is no basis to treat the resolutions cited in Question (a) as legally binding on Member States.⁹⁸ For the Court to conclude that the resolutions cited in Question (a) reflected rules of customary international law, it would need to establish that, at the time, there was extensive and virtually uniform practice of States undertaken out of a sense of legal obligation to act in accordance with principles articulated in such resolutions.⁹⁹

4.29 As explained in the remainder of this Chapter, the resolutions cited in Question (a) do not reveal a meeting of the minds among States—much less an *opinio juris*—on international legal rules establishing a right of self-determination that would have prohibited the establishment of the BIOT. Nor was there the requisite uniformity of State practice, either during the years leading up to Resolution 1514 or through the end of the 1960s. As such, the resolutions did not reflect then-existing rules of international law, and their adoption did not bring such rules into existence.

D. Through the end of the 1960s, no rule had emerged under customary international law that would have prohibited the establishment of the British Indian Ocean Territory.

4.30 As noted in Section A above, Question (a) erroneously refers to “obligations reflected in” Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted in 1960. Resolution 1514 proclaimed, *inter alia*, that “[a]ll peoples have the right to self-determination”¹⁰⁰ and that “[i]mmediate steps shall be taken” in non-self-governing territories “to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire ... in order to enable them to enjoy complete independence and freedom.”¹⁰¹ Resolution 1514

⁹⁶ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 77 (emphasis added).

⁹⁷ *Id.*, para. 74 (emphasis added).

⁹⁸ With limited exceptions not applicable here, General Assembly resolutions are nonbinding. *See, e.g.*, U.N. Charter, arts. 10, 11, 13, 14 (setting forth recommendatory powers of the General Assembly).

⁹⁹ *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 70; *North Sea Continental Shelf, supra* note 96, *Judgment*, para. 77.

¹⁰⁰ G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960) [Dossier No. 55], para. 2.

¹⁰¹ *Id.*, para. 5.

followed several other resolutions on self-determination adopted by the General Assembly since 1952.

4.31 Certain passages of Resolution 1514 are today characterized as articulating some of the basic elements of the right of self-determination, as the right later developed. Nevertheless, the resolution itself did not reflect customary international law either at the time it was adopted or through the end of the 1960s.

1. Prior to Resolution 1514, there was no opinio juris supporting an international legal right of self-determination.

4.32 The international discussions during the fifteen years preceding the adoption of Resolution 1514 highlight the divergences in how members of the international community approached self-determination and decolonization.

4.33 During U.N. Charter negotiations in 1945, several States initially expressed concerns about proposals to include a provision on self-determination, fearing such a provision could encourage civil unrest and secessionist claims.¹⁰² The ultimate inclusion of the principle of self-determination in Articles 1(2) and 55 of the Charter does not reveal a meeting of the minds on any specific obligations entailed by this concept.¹⁰³

4.34 The articles of the Charter that do set forth obligations on administering States—those contained in Chapters XI, XII, and XIII—do not mention self-determination and, as noted above, do not contain requirements related to the independence of non-self-governing territories.¹⁰⁴ These omissions were no accident: the consensus of States did not support binding obligations that might limit administering States' territorial sovereignty over non-self-governing territories,¹⁰⁵ including obligations that would prohibit administering States from adjusting administrative boundaries.

4.35 The discussions on self-determination that took place during negotiations of the Human Rights Covenants from 1950 to 1955 were “characterized by fundamental differences of opinion.”¹⁰⁶ In 1950, the Soviet Union proposed inclusion of a “right” of self-

¹⁰² ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 39–40 (1995); *see also, e.g.*, United Nations Conference on International Organization, Summary Report of the Sixth Meeting of Committee I/1 [hereinafter 1945 Report of Committee I/1], 6 U.N. CONF. ON INT’L ORG. 296 (1945) (noting the position of some delegations that the principle of self-determination would only “conform[] to the purposes of the Charter” if it did not imply a right of secession).

¹⁰³ *See* CASSESE, *supra* note 102, pp. 38–43 (citing, *inter alia*, debates of the First Committee of First Commission of the San Francisco Conference, May 14–15 and June 11, 1945); *see also, e.g.*, 1945 Report of Committee I/1, *supra* note 102, p. 455.

¹⁰⁴ *See supra* para. 4.26.

¹⁰⁵ *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 111 (1994) (reflecting on the development of the Charter and stating: “There were, certainly, recognized duties that colonial powers had towards the peoples they governed. But at that time that did not clearly include any duty to grant independence. The common assumption that the UN Charter underwrites self-determination in the current sense of the term is in fact a retrospective rewriting of history.”).

¹⁰⁶ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 10 (2d ed. 2005).

determination.¹⁰⁷ Several States supported the idea of including such a right.¹⁰⁸ Other States opposed it, with concerns expressed about secession and about the scope of the right.¹⁰⁹

4.36 In Resolution 545 (VI) of 1952, on a 47–7–5 vote, the General Assembly directed the inclusion of an article on self-determination in both Covenants and specified several substantive elements.¹¹⁰ This was the first Assembly resolution to include the language “[a]ll peoples shall have the right of self-determination.”¹¹¹

4.37 Debate continued for three additional years. A significant number of States continued to voice misgivings.¹¹² Some asserted that any right of self-determination must apply not only

¹⁰⁷ Draft First International Covenant on Human Rights and Measures of Implementation, Union of Soviet Socialist Republics: Amendments to Joint Draft Resolution Submitted by Brazil, Turkey and United States (A/C.3/L.75), U.N. Doc. A/C.3/L.96 (Nov. 6, 1950), p. 2.

¹⁰⁸ See CASSESE, *supra* note 102, pp. 48–49. After the Soviet proposal, the General Assembly adopted, on a contested vote, a resolution calling for the Commission on Human Rights to study self-determination in its work on the Covenants. G.A. Res. 421 (V), Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights, U.N. Doc. A/RES/421(V) (Dec. 4, 1950), para. 6; U.N. Doc. A/PV.317 (Dec. 4, 1950), para. 170 (vote was 38–7–12).

¹⁰⁹ See, e.g., Draft International Covenants on Human Rights, Annotation Prepared by the Secretary-General, U.N. Doc. A/2929 (July 1, 1955), ch. IV, para. 3 (noting concerns, *inter alia*, that self-determination was a political principle but not a legal right); U.N. Doc. A/C.3/SR.400 (Jan. 23, 1952), para. 19 (Australia advancing this argument); U.N. Doc. A/C.3/SR.399 (Jan. 23, 1952), para. 27 (France calling self-determination a “political right”); U.N. Doc. A/C.3/SR.312 (Nov. 13, 1950), para. 5 (Nicaragua arguing that self-determination “was a purely national and political question and outside the scope of human rights”); U.N. Doc. A/C.3/SR.361 (Dec. 7, 1951), para. 13 (Belgium: “It was impossible to speak of the right of self-determination without also providing for the right of secession.”). Several States argued that a collective right would be out of place in a treaty on individual rights. See, e.g., U.N. Doc. A/C.3/SR.400, *supra*, para. 30 (Turkey: “The concept of self-determination itself would be weakened if classified in a category of rights designed to define relations between the sovereign States and the individuals falling under [their] jurisdiction.”); *accord*, e.g., U.N. Doc. A/C.3/SR.401 (Jan. 24, 1952), para. 27 (United Kingdom); U.N. Doc. A/C.3/SR.400, *supra*, para. 15 (Canada); U.N. Doc. A/C.3/SR.398 (Jan. 22, 1952), para. 40 (the Netherlands); U.N. Doc. A/C.3/SR.367 (Dec. 12, 1951), para. 8 (New Zealand); U.N. Doc. A/C.3/SR.309 (Nov. 9, 1950), para. 62 (France).

¹¹⁰ G.A. Res. 545 (VI), Inclusion in the International Covenant or Covenants on Human Rights of an Article Relating to the Right of Peoples to Self-Determination, U.N. Doc. A/RES/545(VI) (Feb. 5, 1952); U.N. Doc. A/PV.375 (Feb. 5, 1952), para. 83 (plenary vote count—without roll call—on full resolution, as amended to simplify a request to the Commission on Human Rights for recommendations); see also *id.*, paras. 70–82 (contested votes on each component of the resolution). In the Third Committee, the vote had been 33–9–10. U.N. Doc. A/C.3/SR.403 (Jan. 25, 1952), para. 58 (roll-call vote). Voting “no” were Australia, Belgium, Canada, France, the Netherlands, New Zealand, Turkey, the United Kingdom, and the United States; abstaining were Chile, China, Colombia, Cuba, Denmark, Ecuador, Israel, Norway, Peru, and Sweden. In remarks after the Committee vote, China called the resolution “seriously defective both in form and substance.” *Id.*, para. 65. Colombia agreed it was “an unsound document not only in form but in substance.” *Id.*, para. 82. Cuba called it “confused and incoherent.” *Id.*, para. 71.

¹¹¹ G.A. Res. 545 (IV), *supra* note 110, para. 1. In the Third Committee, the provision of Resolution 545 directing the inclusion of this language in the Covenants was adopted on a 36–11–12 vote, with Australia, Belgium, Brazil, Canada, Denmark, France, Luxembourg, the Netherlands, New Zealand, the United Kingdom, and the United States voting “no”; and Argentina, China, Colombia, Costa Rica, Honduras, Iceland, Israel, Norway, Sweden, Turkey, Uruguay, and Venezuela abstaining. U.N. Doc. A/C.3/SR.403, *supra* note 110, para. 78.

¹¹² See, e.g., U.N. Doc. A/C.3/SR.647 (Oct. 28, 1955), para. 1 (Greece remarking on States’ “profound disagreement”); U.N. Doc. A/C.3/SR.650 (Nov. 2, 1955), para. 13 (Ecuador fearing the provision “as it stood was bound to raise the greatest difficulties”); U.N. Doc. A/C.3/SR.649 (Nov. 1, 1955), para. 6 (Turkey’s concerns made it “unable to agree to the inclusion of the article”); U.N. Doc. A/C.3/SR.648 (Oct. 31, 1955), paras. 1–5 (Colombia criticizing several aspects of the draft). States argued, for example, that the prospective obligations would be unclear if key terms such as “peoples” and “self-determination” were left undefined. See,

to colonial peoples, but also to those within States oppressed by their own government.¹¹³ Some States called for the provision's deletion entirely.¹¹⁴ Many delegations, from all regions of the world, supported postponing a vote on the provision due to the persistent divergence of views. Postponement failed on a narrow vote.¹¹⁵

4.38 After contested votes on each component,¹¹⁶ the Third Committee adopted Article 1 of the Covenants in 1955 on a vote of 33–12–13.¹¹⁷ There continued to be a lack of common understanding about the article. Denmark, for example, lamented that Article 1 was “vague and imperfect and did not meet the requirements of a legal instrument intended to be binding and enforceable under international law.”¹¹⁸ Lebanon opined that Article 1 “needed improvement.”¹¹⁹ Pakistan felt it “left much to be desired.”¹²⁰ Cuba thought it required “further study.”¹²¹

4.39 Article 1, and its attendant ambiguities, remained substantively unchanged until the General Assembly adopted the Covenants in 1966.¹²² States' discussions surrounding the adoption did not reconcile these ambiguities.

e.g., U.N. Doc. A/C.3/SR.649, *supra*, para. 5 (Turkey); U.N. Doc. A/C.3/SR.646 (Oct. 27, 1955), paras. 5–7 (Pakistan); U.N. Doc. A/C.3/SR.643 (Oct. 25, 1955), para. 9 (Belgium); U.N. Doc. A/C.3/SR.641 (Oct. 21, 1955), para. 18 (Sweden). Some believed inclusion of a collective right was inappropriate in a treaty on individual rights. *See, e.g.*, U.N. Doc. A/C.3/SR.650, *supra*, para. 20 (Ecuador); U.N. Doc. A/C.3/SR.645 (Oct. 27, 1955), para. 1 (Canada); U.N. Doc. A/C.3/SR.644 (Oct. 26, 1955), para. 3 (Denmark). Others distinguished the *principle* of self-determination from a legal right. *See, e.g.*, U.N. Doc. A/C.3/SR.647 (Oct. 28, 1955), para. 18 (Australia); U.N. Doc. A/C.3/SR.642 (Oct. 24, 1955), para. 11 (United Kingdom).

¹¹³ *See, e.g.*, Eleanor Roosevelt, U.S. Representative to the U.N. General Assembly, The Universal Validity of Man's Right to Self-Determination (Nov. 18, 1952), in 27 DEP'T OF STATE BULLETIN 917 (1952), p. 919 (address before Third Committee); *see also* U.N. Doc. A/C.3/SR.447 (Nov. 18, 1952), para. 30 (summarizing these U.S. views). *Accord, e.g.*, U.N. Doc. A/C.3/SR.644, *supra* note 112, para. 2 (Denmark); U.N. Doc. A/C.3/SR.642, *supra* note 112, para. 2 (China).

¹¹⁴ Draft International Covenants on Human Rights, Report of the Third Committee, U.N. Doc. A/3077 (Dec. 8, 1955), para. 47 (Brazil, Australia, the Netherlands, United Kingdom).

¹¹⁵ U.N. Doc. A/C.3/SR.676 (Nov. 29, 1955), para. 14 (vote to reject postponement prevailed on 28–25–5 vote). States favoring postponement included, *inter alia*, Brazil, Burma, China, Colombia, Cuba, Ethiopia, Honduras, Lebanon, Liberia, Panama, Paraguay, and Turkey. States abstaining were Bolivia, Dominican Republic, Iran, Israel, and Venezuela.

¹¹⁶ U.N. Doc. A/C.3/SR.676, *supra* note 115, paras. 17–26.

¹¹⁷ *Id.*, para. 27. States voting “no” were Australia, Belgium, Canada, France, Luxembourg, the Netherlands, New Zealand, Norway, Sweden, Turkey, the United Kingdom, and the United States. Abstaining States were Brazil, Burma, China, Cuba, Denmark, the Dominican Republic, Ethiopia, Honduras, Iceland, Iran, Israel, Panama, and Paraguay.

¹¹⁸ *Id.*, para. 33; *accord* U.N. Doc. A/C.3/SR.677 (Nov. 30, 1955), paras. 13, 24 (similar concerns of the Netherlands and France); U.N. Doc. A/C.3/SR.676, *supra* note 115, para. 42 (similar concerns of New Zealand); U.N. Doc. A/C.3/SR.677, *supra*, para. 9 (Norway calling Article 1 “defective, both in substance and in form”). *See also id.*, para. 8 (Norway “could not accept the idea of stating a political principle in covenants dealing with individual human rights”); *id.*, paras. 6, 17 (similar concerns of Luxembourg and Sweden).

¹¹⁹ U.N. Doc. A/C.3/SR.676, *supra* note 115, para. 34.

¹²⁰ *Id.*, para. 39.

¹²¹ *Id.*, para. 35.

¹²² G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966); U.N. Doc. A/C.3/SR.1451 (Dec. 7, 1966),

4.40 As such, the Covenants could not provide evidence of a rule of customary international law in the time period relevant to this case (1965, or at the latest, 1968). Moreover, as noted above,¹²³ they did not enter into force until 1976, and so had not attained the status of treaty law during the relevant period.

4.41 Other General Assembly resolutions involving self-determination, such as Resolution 637 (VII) (1952)¹²⁴ and Resolution 1188 (XII) (1957),¹²⁵ likewise did not represent a substantive consensus regarding binding legal obligations.

2. Resolution 1514 did not reflect opinio juris about a right of self-determination or territorial integrity for non-self-governing territories.

4.42 Resolution 1514 was introduced in November 1960.¹²⁶ Its drafters intentionally limited the text to statements of principles rather than specific prescriptions for applying them.¹²⁷ The General Assembly plenary discussions reflected Member States' view of Resolution 1514 as an aspirational document—distinguished in nature from the binding obligations in the Charter itself—intended to promote the completion of decolonization.¹²⁸

part A, paras. 8–9 (unanimous votes in the Third Committee); U.N. Doc. A/PV.1496 (Dec. 16, 1966), paras. 58–59 (unanimous votes in the General Assembly).

¹²³ See *supra* para. 4.26.

¹²⁴ G.A. Res. 637 (VII), The Right of Peoples and Nations to Self-Determination, U.N. Doc. A/RES/637(VII) (Dec. 16, 1952). Opinions on Resolution 637 were “sharply divided.” Human Rights: Recommendations Concerning International Respect for the Self-Determination of Peoples, Report of the Third Committee, U.N. Doc. A/2309 (Dec. 13, 1952), para. 8. Some States, for example, felt the resolution failed to adequately take account of the “particular circumstances of each Territory.” *Id.*, para. 9. Others complained about the lack of clear definitions for the terms “peoples,” “nations,” and “right of self-determination.” *Id.*, para. 10. Several States voted “no” and several abstained. U.N. Doc. A/PV.403 (Dec. 16, 1952), para. 210 (adopting Resolution 637, part A, on a 40–14–6 vote, with Ecuador, Israel, Nicaragua, Paraguay, Thailand, and Turkey abstaining); see also, e.g., *id.*, para. 149 (U.S. delegate Eleanor Roosevelt explaining that the United States had to vote “no” due to unacceptable defects in the resolution, notwithstanding its “wholehearted[]” belief in the principle of self-determination).

¹²⁵ G.A. Res. 1188 (XII), Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, U.N. Doc. A/RES/1188(XII) (Dec. 11, 1957), para. 1(a)–(b) (calling upon administering States to “promote the realization of” the right of self-determination in non-self-governing territories, and upon States generally to “give due respect” to the right “in their relations with one another”). States in negotiations expressed “diverging opinions . . . on the legal nature and scope of self-determination.” Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, Report of the Third Committee, U.N. Doc. A/3775 (Dec. 9, 1957), para. 13. The resolution was adopted with 13 abstentions. U.N. Doc. A/PV.727 (Dec. 11, 1957), para. 87 (adopting Resolution 1188 on a 65–0–13 vote).

¹²⁶ U.N. Doc. A/PV.926 (Nov. 28, 1960), [Dossier No. 57], para. 9 (Cambodia introducing draft resolution).

¹²⁷ See U.N. Doc. A/PV.946 (Dec. 14, 1960) [Dossier No. 73], para. 46 (Iran: “We have tried, in the text now before you, to state as clearly as possible the principles that we wanted to defend . . . [F]or reasons which will . . . derive from the special circumstances of each State, we did not want to be specific how these principles should be applied.”).

¹²⁸ See, e.g., U.N. Doc. A/PV.944 (Dec. 13, 1960) [Dossier No. 71], para. 135 (India asserting that the resolution contains “no attempt at recrimination” and “no attempt to place responsibility on anyone but the United Nations as a whole”); U.N. Doc. A/PV.929 (Nov. 30, 1960) [Dossier No. 60], para. 92 (Colombia supporting the resolution “not in the spirit of recrimination that some would attach to it, but rather with the noble aim of making this a further step forward on the road to human freedom”); U.N. Doc. A/PV.935 (Dec. 5, 1960) [Dossier No. 66], para. 125 (Malaya describing the aim of the resolution to “assist and accelerate” the wave of decolonization already underway); U.N. Doc. A/PV.933 (Dec. 2, 1960) [Dossier No. 64], para. 81 (Australia:

4.43 Member States, including the United States, expressed virtually universal political and moral support for the resolution's underlying ideals.¹²⁹ But States repeatedly raised concerns over ambiguous, suggestive, inaccurate, or otherwise problematic language, with some concluding that the text was contrary to the Charter.¹³⁰ Administering States also sharply objected to language suggesting they were not complying with their obligations under the Charter.¹³¹

4.44 Against this backdrop of general political support but sharp divergence about substance, Resolution 1514 was adopted by a vote of 89–0–9.¹³² Many States that voted in favor did so despite misgivings,¹³³ and only after carefully delineating the scope of their support. These States underscored the resolution's broad focus on decolonization in general and not on particular mechanisms of implementation.¹³⁴

"This declaration is different from the Charter. The Charter, as I say, is a treaty obligation and precisely worked out [T]his declaration, not being able to override the Charter or go beyond the powers of this Assembly, represents rather a general statement of agreed aspirations."); *id.*, para. 118 (Israel: "[W]e shall vote for [the resolution] and support *its aspirations*." (emphasis added)); U.N. Doc. A/PV.932 (Dec. 2, 1960) [Dossier No. 63], para. 12 (New Zealand: "What is here contemplated is not a treaty instrument, every stipulation of which would have to be minutely weighed by each country that contemplated adherence Rather it is the object of a declaration to capture and reflect faithfully ideals and principles"); U.N. Doc. A/PV.929, *supra* note 128, para. 25 (Libya describing the draft declaration as "expressing the *wish* of all the peoples of the earth to get rid of colonialism once and for all" (emphasis added)); U.N. Doc. A/PV.928 (Nov. 30, 1960) [Dossier No. 59], para. 17 (Ethiopia describing the resolution as "a consolidation of ideals and principles").

¹²⁹ See, e.g., U.N. Doc. A/PV.947 (Dec. 14, 1960) [Dossier No. 74], para. 142 (United States: "The support of freedom is a concept springing from deeply-held beliefs of the American people. We accordingly welcomed the underlying purpose of this resolution sponsored by the forty-three delegations, which we understand to be the advancement of human freedom in the broadest sense.").

¹³⁰ See U.N. Doc. A/PV.947, *supra* note 129, paras. 47–48 (United Kingdom: "[W]e would like to have been able to vote for the declaration But in a matter as important as this, we have felt bound to look more closely at the wording of the resolution, and, to our regret, we came to the conclusion that its wording in certain respects was not such that we could support it."); *id.*, para. 144 (United States: "[T]here are difficulties in the language and thought of this resolution . . . which made it impossible for us to support it, because they seem to negate certain clear provisions of the United Nations Charter."); U.N. Doc. A/PV.945 (Dec. 13, 1960) [Dossier No. 72], paras. 171–79 (Denmark providing several examples where the resolution's wording could be clarified and improved upon).

¹³¹ See, e.g., U.N. Doc. A/PV.947, *supra* note 129, paras. 49–52 (United Kingdom describing its strict adherence to the Charter in administering its remaining territories and objecting to the resolution's implications to the contrary); U.N. Doc. A/PV.945, *supra* note 130, para. 142 (France emphasizing that it recognized and respected its obligations under the Charter and objecting to the admonitions implicit in the draft); U.N. Doc. A/PV.932, *supra* note 128, para. 13 (New Zealand: "To take its place among the great documents of the United Nations, [the resolution] must also be scrupulously fair and must not attribute to administering Powers motives and intentions which are the antithesis of their settled policies and the results they have already achieved.").

¹³² U.N. Doc. A/PV.947, *supra* note 129, para. 34.

¹³³ See *id.*, para. 60 (the Netherlands: "Our agreement with the principles of the resolution does not mean that we are entirely happy about all of its wording."); U.N. Doc. A/PV.946, *supra* note 127, para. 12 (Sweden expressing similar concerns); U.N. Doc. A/PV.945, *supra* note 130, para. 188 (Austria voicing support for the resolution while noting frankly "certain misgivings with regard to some of the expressions used in the declaration, some of the requests made and some of the procedures envisaged in it").

¹³⁴ See U.N. Doc. A/PV.935, *supra* note 128, para. 134 (China: "I hope that the present debate will be useful in hastening the end of colonialism everywhere. I am, however, certain that it is not, and cannot be, a substitute for the systematic study of particular concrete colonial questions."); U.N. Doc. A/PV.933, *supra* note 128, paras. 92–94 (Japan: "It may, therefore, be unreasonable to expect a mechanically uniform implementation of the declaration in all territories of the world.").

4.45 Supporting States also reiterated that their interpretations of the resolution did not contemplate new legal obligations beyond those already affirmed in the Charter.¹³⁵ For example, some States interpreted the phrase “[i]mmediate steps shall be taken ... to transfer all powers to the peoples of those territories” to mean that administering States should not unduly delay initiating implementation of their Charter obligations to progressively develop self-government over time.¹³⁶

4.46 For Paragraph 2, which declared a “right to self-determination,” concerns were voiced again that any such right had yet to be defined in a universally acceptable form.¹³⁷

4.47 Paragraph 6 also proved problematic. The paragraph states that “[a]ny attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” States expressed a variety of views on the meaning of this language, and on the relevance of territorial integrity to the process of decolonization. Some States saw paragraph 6 as a reaffirmation of Article 2, paragraph 4 of the Charter, and others emphasized that newly independent states were entitled to territorial integrity.¹³⁸

¹³⁵ See, e.g., U.N. Doc. A/PV.946, *supra* note 127, para. 16 (Sweden: “We understand [the resolution] to be meant as a statement of general objectives and not as an act of legislation which would place immediate juridical obligations on Member States and which is designed to be applied literally.”); U.N. Doc. A/PV.935, *supra* note 128, para. 134 (China: “If the purpose of the present debate is to achieve a general agreement on the principles relating to colonialism, such debate does not seem particularly necessary The principles relating to colonialism are all enshrined in the Charter of the United Nations, to the fulfilment of which we are all legally and morally committed.”)

¹³⁶ See, e.g., U.N. Doc. A/PV.945, *supra* note 130, para. 178 (Denmark: “It appears from statements made by responsible speakers that it is recognized that the meaning of the words ‘immediate steps shall be taken’ is that we shall proceed toward the goal and shall not allow ourselves to be stopped by unnecessary hindrance.”); U.N. Doc. A/PV.936 (Dec. 5, 1960) [Dossier No. 67], para. 21 (Iceland: “[T]he Icelandic delegation wishes to stress the importance of the words ‘immediate steps’, which mean that independence cannot come like lightning from the skies but only through evolution and progressive development. These words, in our opinion, mean that such evolution should commence immediately and the first steps should be taken without delay.”).

¹³⁷ See U.N. Doc. A/PV.947, *supra* note 129, para. 53 (United Kingdom: “[M]embers of the Assembly will be familiar with the difficulties which have arisen in connexion with the discussions of the draft International Covenants on Human Rights and in defining the right to self-determination in a universally acceptable form. These difficulties have not yet been finally resolved by the Assembly, and we feel it might have been better not to make the attempt now in a rather different context.”).

¹³⁸ See, e.g., U.N. Doc. A/PV.930 (Dec. 1, 1960) [Dossier No. 61], para. 73 (Pakistan: “Lest our fellow Members be inclined to think that, in putting forth these imperatives without clarification, we are becoming oblivious to certain related demands of international security and a stable world order, we would point out the provisions of paragraph 6. This paragraph embodies an important safeguard against any attempt to disrupt the national unity and territorial integrity of a country.”); U.N. Doc. A/PV.926, *supra* note 126, para. 71 (Iran: “Member States, and especially the former Administering Powers, must, moreover, refrain from any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country. Thus, it would be desirable if, in the declaration on the termination of colonialism, all Member States would solemnly reaffirm the undertaking they assumed under the United Nations Charter never in any way whatever to violate the national sovereignty and territorial integrity of another State.”); U.N. Doc. A/PV.929, *supra* note 128, para. 126 (Tunisia: “[T]he colonial Powers must give a firm undertaking to refrain from any action that may cause disturbances in the liberated countries and avoid any attempt to create difficulties for the new governments. They must strictly respect the independence, sovereignty and territorial integrity of the new States.”).

4.48 Late in the negotiations, Guatemala proposed inserting language immediately after paragraph 6 aimed at excluding a right of self-determination for the people of contested territories, in order to support its claim to sovereignty over British Honduras (Belize).¹³⁹ Guatemala withdrew the amendment after Indonesia, which also had asserted sovereignty over the non-self-governing territory of West Irian, assured Guatemala that existing language in paragraph 6 reflected Guatemala's concerns.¹⁴⁰ The Netherlands rejected Indonesia's interpretation as inconsistent with paragraph 2's reference to the right of "all peoples" to self-determination.¹⁴¹

4.49 Paragraph 6 was adopted without a common understanding as to its meaning.

4.50 The Court has recognized that Resolution 1514 marked an "important stage" in the development of international law regarding self-determination.¹⁴² Nevertheless, while the resolution may have provided a key aspirational foundation for the General Assembly's decolonization policy, it did not reflect States' acceptance of new international legal obligations relevant to the process by which decolonization would be achieved, or on the adjustment of colonial boundaries during the period of colonial administration.

3. This lack of opinio juris continued through the end of the 1960s.

4.51 During the 1960s, the General Assembly adopted resolutions on decolonization with increasing regularity. States also engaged in six years of negotiations on what would eventually be adopted in 1970 as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations ("Friendly Relations Declaration"), which contains a significant section on self-determination that differs in material aspects from Resolution 1514. Although some of these resolutions reference Resolution 1514, their content and the conditions of their adoption do not indicate that Member States had accepted the principles of Resolution 1514 as articulations of international law.

¹³⁹ The proposed amendment would have inserted after paragraph 6 the following language: "The principle of self-determination of people may in no case impair the right of territorial integrity of any state *or its right to the recovery of territory.*" Declaration on the Granting of Independence to Colonial Countries and Peoples, Guatemala: Amendments to the Draft Resolution Contained in Document A/L.323 and Add.1-6, U.N. Doc. A/L.325 (Dec. 7, 1960) (emphasis added); *see also* U.N. Doc. A/PV.933, *supra* note 128, paras. 133–34 (Guatemala expressing its wish that the United Kingdom return British Honduras (Belize) to Guatemala out of respect for Guatemala's territorial integrity).

¹⁴⁰ *See* U.N. Doc. A/PV.947, *supra* note 129, paras. 9–11 (Indonesia explaining that, as one of the sponsors of the resolution, it had brought paragraph 6 into the draft with the situation of West Irian in mind); *id.*, para. 64 (Guatemala withdrawing amendment based on the statement made by Indonesia and "on the understanding that the rights it was seeking to safeguard would be duly protected by paragraph 6"). *See also* U.N. Doc. A/PV.946, *supra* note 127, para. 31 (Afghanistan explaining that Guatemala's amendment was covered by paragraph 6); *id.* at para. 54 (Iran expressing similar views). On West Irian, *see infra* note 180.

¹⁴¹ *See* U.N. Doc. A/PV.947, *supra* note 129, para. 62 (the Netherlands confirming its interpretation of paragraph 6 only as a reaffirmation of article 2, paragraph 4 of the Charter). The Soviet Union also felt Guatemala's amendment would improperly limit the applicability of paragraph 2 of Resolution 1514. *See* U.N. Doc. A/PV.945, *supra* note 130, para. 128.

¹⁴² *Western Sahara*, *supra* note 26, *Advisory Opinion*, para. 56 (quoting *Namibia*, *supra* note 84, *Advisory Opinion*, para. 52).

4.52 In 1960, one day after the adoption of Resolution 1514, the General Assembly adopted Resolution 1541 (XV) on a vote of 69–2–21.¹⁴³ Resolution 1514 had focused solely on independence and called for administering States to take immediate steps to transfer all powers “without any conditions or reservations.” By contrast, Resolution 1541 recognized that peoples of non-self-governing territories could enter into free association or integrate with an independent State through democratic processes, which could take time to develop.¹⁴⁴ States did not elaborate on, much less attempt to reconcile, the inconsistencies between these two resolutions.¹⁴⁵

4.53 The next year, the General Assembly adopted Resolution 1654 (XVI) on a vote of 97–0–4.¹⁴⁶ Resolution 1654 created a Special Committee “to examine the application of [Resolution 1514], to make suggestions and recommendations on the progress and extent of the implementation of [Resolution 1514], and to report to the General Assembly”¹⁴⁷ In debating the resolution, Member States recognized that while decolonization was an important goal, the specific process of decolonization for any given territory was not, and should not be, uniform.¹⁴⁸

4.54 Question (a) refers to three General Assembly resolutions in addition to Resolution 1514: 2066 (XX), 2232 (XXI), and 2357 (XXII), all of which were adopted in the

¹⁴³ U.N. Doc. A/PV.948 (Dec. 15, 1960) [Dossier No. 79], para. 88.

¹⁴⁴ G.A. Res. 1541 (XV), Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73 e of the Charter, U.N. Doc. A/RES/1541(XV) (Dec. 15 1960) [Dossier No. 78], Annex, principles VI–IX.

¹⁴⁵ The Fourth Committee, in which Resolution 1541 was drafted, was aware of the ongoing negotiations over Resolution 1514 and proceeded with negotiations on several territory-specific resolutions with the understanding that they would not be submitted to the General Assembly until a decision had been taken on Resolution 1514. Information from Non-Self-Governing Territories, Dissemination of Information on the United Nations in Non-Self-Governing Territories, Participation of the Non-Self-Governing Territories in the Work of the United Nations and of the Specialized Agencies, Offers by Member States of Study and Training Facilities for Inhabitants of Non-Self-Governing Territories, Report of the Fourth Committee, U.N. Doc. A/4650 (Dec. 14, 1960), para. 12. On December 15, 1960, the General Assembly took up these Fourth Committee resolutions, including Resolution 1541, for consideration. *See* U.N. Doc. A/PV.948, *supra* note 143, paras. 46–112.

¹⁴⁶ U.N. Doc. A/PV.1066 (Nov. 27, 1961) [Dossier No. 117], para. 149.

¹⁴⁷ G.A. Res. 1654 (XVI), 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) (Nov. 27, 1961) [Dossier No. 101], para. 4. According to Pakistan, one of the resolution’s sponsors, Resolution 1654 was intended to establish machinery in the United Nations to “hasten the process of decolonization.” U.N. Doc. A/PV.1061, *supra* note 82, para. 14.

¹⁴⁸ *See, e.g.*, U.N. Doc. A/PV.1061, *supra* note 82, para. 11 (Pakistan: “Each dependent territory has to be considered in light of its own peculiar conditions and circumstances.”); *id.*, para. 93 (Iran expressing similar views); *id.*, paras. 131–33 (United States noting that “[t]he nature of United Nations action must vary with the types of situations presented which, as we have seen, are radically different in different places,” and citing some examples) (quotation at para. 131); *id.*, paras. 175–77 (New Zealand also pointing out differences among territories and emphasizing the need to develop the capacity of territories before the people decided on independence or another status); U.N. Doc. A/PV.1066, *supra* note 146, para. 9 (Mexico stating the view that “independence should [not] be granted as a matter of blind, mechanical routine on a fixed date and under conditions which are the same in all cases” and that the remaining dependent territories “present an extraordinary range of possible conditions and the same procedure cannot be followed in all cases”); *id.*, para. 137 (El Salvador: “[I]t is an undeniable fact that not all peoples of these territories are yet in a position to attain full self-government, and still less full independence.”).

mid-1960s. These resolutions likewise do not reflect a legally binding obligation that would have prohibited the establishment of the BIOT.

4.55 Resolution 2066 states that “any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of [Resolution 1514], and in particular of paragraph 6 thereof”¹⁴⁹ It further “[i]nvites the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity”¹⁵⁰

4.56 This language does not represent the articulation of a binding legal obligation. First, Resolution 2066 states that the detachment of the Chagos Archipelago would be in contravention of another nonbinding General Assembly resolution, not with any independent international law obligation.¹⁵¹

4.57 Second, this interpretation of paragraph 6 of Resolution 1514 did not represent a consensus view in either the Fourth Committee¹⁵² or the General Assembly. In the Assembly, votes on Resolutions 2066, 2232, and 2357, included, respectively, eighteen, twenty-four, and twenty-seven abstentions.¹⁵³ As previously discussed,¹⁵⁴ this interpretation was not a common understanding when Resolution 1514 was adopted.

4.58 States disagreed particularly sharply over language on territorial integrity in the context of the adoption of Resolutions 2232 and 2357. The Assembly held a separate vote on paragraph four of Resolution 2232, which “reiterate[d]” that disruptions of national unity and territorial integrity of colonial territories, and the establishment of military bases and installations in territories, are incompatible with both Resolution 1514 and Charter principles. Eighteen States voted “no” and twenty-seven abstained.¹⁵⁵ When the identical operative

¹⁴⁹ U.N. Doc. A/RES/2066(XX), *supra* note 54, pmbl. para. 5.

¹⁵⁰ *Id.*, para. 4.

¹⁵¹ As noted above, General Assembly resolutions are nonbinding, except in very limited circumstances not applicable here. *See supra* note 98.

¹⁵² *See, e.g.*, U.N. Doc. A/C.4/SR.1570 (Nov. 26, 1965) [Dossier No. 154], para. 6 (Denmark stating that it was “not convinced that steps envisaged by the administering Power, in full agreement with the Government of Mauritius, with respect to certain small islands in the Indian Ocean was in conflict with General Assembly resolution 1514”); *id.*, para. 18 (United Kingdom stating similar views); *id.*, para. 30 (vote of 77–0–17 in Fourth Committee).

¹⁵³ U.N. Doc. A/PV.1398 (Dec. 16, 1965) [Dossier No. 148], para. 110 (Resolution 2066 adopted on 89–0–18 vote, without roll call); U.N. Doc. A/PV.1500 (Dec. 20, 1966) [Dossier No. 172], para. 110 (Resolution 2232 adopted on 93–0–24 vote, by roll call); U.N. Doc. A/PV.1641 (Dec. 19, 1967) [Dossier No. 199], para. 150 (Resolution 2357 adopted on a 86–0–27 vote, by roll call).

¹⁵⁴ As discussed in paras. 4.47–4.49 *supra*, States expressed a variety of views on the meaning of paragraph 6.

¹⁵⁵ U.N. Doc. A/PV.1500, *supra* note 153, para. 109. States voting “no” on the territorial integrity paragraph were Australia, Belgium, Canada, Denmark, France, Greece, Iceland, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Philippines, Portugal, South Africa, Sweden, the United Kingdom, and the United States. Those abstaining were Argentina, Austria, Bolivia, Brazil, China, Costa Rica, Dominican Republic, Ecuador, El Salvador, Finland, Guatemala, Haiti, Iran, Ireland, Israel, Italy, Ivory Coast, Laos, Madagascar, Maldives, Nicaragua, Paraguay, Peru, Thailand, Turkey, Uruguay, and Venezuela. The text of the draft resolution appears in Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Territories Not Considered Separately, Report of the Fourth Committee, U.N. Doc. A/6628 (Dec. 19, 1966) [Dossier No. 173], pp. 9–10.

paragraph of Resolution 2357 was put to a separate vote, it received sixteen “no” votes and sixteen abstentions.¹⁵⁶

4.59 Significantly, after Mauritius became independent and applied for U.N. membership, no objections to the BIOT arrangements were pressed in the General Assembly.¹⁵⁷ Thereafter, Mauritius no longer appeared on the list of non-self-governing territories.¹⁵⁸

4.60 For the next half-century, as far as the United States is aware, neither the Special Committee on Decolonization nor the General Assembly considered another resolution concerning the BIOT until the General Assembly debated the request now before the Court.¹⁵⁹

4.61 Although the period after Mauritius gained independence is not directly relevant to consideration of Question (a) referred to the Court, it is notable that there continued to be a lack of consensus among States regarding a right of self-determination through at least the end of the 1960s. In 1964, States began negotiating the text adopted in 1970 as the Friendly Relations Declaration.¹⁶⁰ In contrast to Resolution 1514, negotiations over the Friendly Relations Declaration occurred methodically over six years.¹⁶¹ Importantly, also unlike Resolution 1514, it was adopted by consensus.¹⁶²

4.62 During the negotiations, several States pushed for language that differed from analogous formulations in Resolution 1514.¹⁶³ Resolution 1514’s unconditional call for

¹⁵⁶ U.N. Doc. A/PV.1641, *supra* note 153, para. 149. States voting “no” on the territorial integrity paragraph were Australia, Austria, Belgium, Canada, Denmark, Greece, Iceland, Japan, Luxembourg, the Netherlands, New Zealand, Philippines, Portugal, Sweden, the United Kingdom, and the United States. Those abstaining were Bolivia, Brazil, China, Costa Rica, Dahomey, Finland, France, Ireland, Israel, Italy, Malawi, Malaysia, Maldives Islands, Norway, Panama, and Turkey. The text of the draft resolution appears in Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Territories Not Considered Separately, Report of the Fourth Committee, U.N. Doc. A/7013 (Dec. 18, 1967) [Dossier No. 200], pp. 22–23.

¹⁵⁷ See generally U.N. Doc. A/PV.1643, *supra* note 55.

¹⁵⁸ See, e.g., 1969 Report of the Special Committee on Decolonization, *supra* note 71; U.N. YEARBOOK 1969, *supra* note 72, pp. 627–28.

¹⁵⁹ See *supra* para. 3.23.

¹⁶⁰ See G.A. Res. 1815 (XVII), Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/RES/1815(XVII) (Dec. 18, 1962), para. 2 (resolving to undertake a study of principles of international law concerning friendly relations and cooperation among States); G.A. Res. 1966 (XVIII), Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/RES/1966(XVIII) (Dec. 16, 1963), para. 1 (establishing a Special Committee to conduct this study); Piet-Hein Houben, *Principles of International Law Concerning Friendly Relations and Co-operation Among States*, 61 AM. J. INT’L L. 703, 704 (1967) (this Special Committee held its first session in 1964).

¹⁶¹ “[I]n view of the general importance and the technical aspect” of the study, the General Assembly recommended that States members of the Special Committee “appoint jurists as their representatives.” See G.A. Res. 1966, *supra* note 160, para. 2.

¹⁶² U.N. Doc. A/PV.1883 (Oct. 24, 1970), para. 8.

¹⁶³ The relevant reports of the Special Committee on Friendly Relations detail States’ divergent proposals for self-determination language and sharp disagreements about key aspects. Some of these disagreements remained unresolved until shortly before the Declaration’s adoption in October 1970. See 1966 Report of the Special Committee on Friendly Relations, U.N. Doc. A/6230 (June 27, 1966), paras. 456–521; 1967 Report of the Special Committee on Friendly Relations, U.N. Doc. A/6799 (Sept. 26, 1967), paras. 171–235; 1968 Report of

independence was replaced by language making it clear that the status choice— independence, free association, integration, or “any other political status”—was up to the freely expressed wishes of the people in a given territory.¹⁶⁴ And although the Friendly Relations Declaration repeats Resolution 1514’s call to bring a “speedy” end to colonialism, it eschews Resolution 1514’s call for *immediate* transfer of all powers to non-self-governing territories.

4.63 The Friendly Relations Declaration also introduced new elements not found in Resolution 1514. For example, it specifies that non-self-governing territories have a separate status from the territory of the administering State. It also introduced a “safeguard clause” aimed at precluding actions that would impair the territorial integrity of sovereign States “conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”¹⁶⁵

4.64 Indeed, Resolution 1514 is not even mentioned in the Friendly Relations Declaration. Material differences between the Friendly Relations Declaration and Resolution 1514 make it even more difficult to conclude that Resolution 1514 reflected an *opinio juris* about existence of an international legal right of self-determination that would have applied to the establishment of the BIOT in 1965 because States were still manifestly disagreeing about key elements of self-determination until at least until the end of the 1960s.

4. State practice was not extensive and virtually uniform until at least the end of the 1960s.

4.65 The above sections reveal the absence of evidence demonstrating an *opinio juris* that the principles expressed in or attributed by some to Resolution 1514 amounted to legal obligations. This lack of *opinio juris*, by itself, compels the conclusion that customary international law did not prohibit the establishment of the BIOT. Importantly, however, 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 time period.¹⁶⁶

4.66 To demonstrate State practice supporting the proposition that a particular interpretation of Resolution 1514 reflected international law, it would need to be shown that States were acting virtually uniformly in conformity with that principle at the relevant time. Although the factual circumstances of each situation of decolonization were different, State

the Special Committee on Friendly Relations, U.N. Doc. A/7326 (1968), paras. 135–203; 1969 Report of the Special Committee on Friendly Relations, U.N. Doc. A/7619 (1969), paras. 137–92; 1970 Report of the Special Committee on Friendly Relations, U.N. Doc. A/8018 (1970), paras. 61–78.

¹⁶⁴ In this sense, it harkens back to Resolution 1541, adding the “catch-all” phrase at the end. *See supra* para. 4.52; *see also, e.g.*, Richard H. Gimer, U.S. Representative, Statement to the General Assembly (Sept. 24, 1970), in 63 DEP’T OF STATE BULLETIN 623 (1970), p. 626 (lauding the ultimate listing of these several alternatives as “the correctly stated rule”); *see also* U.N. Doc. A/C.6/SR.1190 (Sept. 24, 1970), para. 25 (summarizing these U.S. views).

¹⁶⁵ G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970), Annex, “The Principle of Equal Rights and Self-Determination of Peoples,” para. 7.

¹⁶⁶ *See North Sea Continental Shelf, supra* note 95, *Judgment*, para. 74.

practice during the 1950s and 1960s diverged in material ways from some of Resolution 1514's key provisions, often with U.N. approval or acquiescence. These differences demonstrate how it would be ahistorical to interpret that resolution as accurately reflecting the emergence of clear, legally binding rules.

4.67 A few examples illustrate this absence of extensive and virtually uniform State practice. Several territories changed their boundaries before or upon independence, and such changes were not considered inconsistent with paragraph 6 of Resolution 1514, concerning territorial integrity.¹⁶⁷ For example, the trust territories of British Cameroons and Ruanda-Urundi were each split into two and each part took a different path to independence. The relevant decisions regarding status of these territories occurred both before and after the adoption of Resolution 1514 and were endorsed by the United Nations.¹⁶⁸

4.68 A few years before Jamaican independence, the United Kingdom made administrative changes to the colony of Jamaica by separating from it the Cayman Islands and the Turks and Caicos Islands.¹⁶⁹ Despite the separation, Jamaica retained governing authority over both territories, to varying degrees, until 1962.¹⁷⁰ When Jamaica opted for independence in 1962, the two territories respectively reaffirmed their desire to remain U.K. colonies.¹⁷¹ The United

¹⁶⁷ G.A. Res. 1514 (XV), *supra* note 100, para. 6 (declaring that “[a]ny attempt aimed at the partial or total disruption of national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”).

¹⁶⁸ In 1959, the United Nations recommended that separate plebiscites be held in the Northern and Southern regions of the British Cameroons in order to determine the wishes of the people. G.A. Res. 1350 (XIII), The Future of the Trust Territory of the Cameroons under United Kingdom Administration, U.N. Doc. A/RES/1350(XIII) (Mar. 13, 1959), para. 1. Voters in each region were only given a choice between joining Nigeria or joining the Republic of Cameroon. G.A. Res. 1473 (XIV), The Future of the Trust Territory of the Cameroons under United Kingdom Administration: Organization of a Further Plebiscite in the Northern Part of the Territory, U.N. Doc. A/RES/1473(XIV) (Dec. 12, 1959), para. 3; G.A. Res. 1352 (XIV), The Future of the Trust Territory of the Cameroons under United Kingdom Administration: Organization of the Plebiscite in the Southern Part of the Territory, U.N. Doc. A/RES/1352(XIV) (Oct. 16, 1959), para. 2. Voters in the North chose to join Nigeria, and voters in the South chose to join Cameroon. G.A. Res. 1608 (XV), The Future of the Trust Territory of the Cameroons under United Kingdom Administration, U.N. Doc. A/RES/1608(XV) (Apr. 21, 1961). At no point did the United Nations offer the people of the entire territory an opportunity to make a decision as a unified group, or present them with the option of independence as a unified territory. The General Assembly concluded that these votes reflected the freely expressed wishes of the people of the territory, and the Trusteeship Agreement for the British Cameroons was terminated. *Id.*, para. 3.

With respect to Ruanda-Urundi, the General Assembly initially recommended that the territory become independent as a single state. G.A. Res. 1743 (XVI), Question of the Future of Ruanda-Urundi, U.N. Doc. A/RES/1743(XVI) (Feb. 23, 1962), pmbl. para. 7. However, after reviewing a report on the political realities in the territory, the General Assembly endorsed the division of the territory and emergence of two separate sovereign and independent states, Rwanda and Burundi. G.A. Res. 1746 (XVI), The Future of Ruanda-Urundi, U.N. Doc. A/RES/1746(XVI) (June 27, 1962), pmbl. para. 2, para. 2. In doing so, it recalled Resolution 1514. *Id.*, pmbl. para. 8.

¹⁶⁹ IAN HENDRY & SUSAN DICKSON, BRITISH OVERSEAS TERRITORIES LAW 312, 344 (2011) (citing Cayman Islands and Turks and Caicos Islands Act 1958, 6 & 7 Eliz. 2 c. 13 (United Kingdom)).

¹⁷⁰ *Id.*, pp. 312, 344 (Cayman Islands were “governed from Jamaica” and Turks and Caicos Islands had an administrator “under the authority of the Governor of Jamaica” from 1959 to 1962).

¹⁷¹ See, e.g., *Turks, Caicos No Longer Share Governor*, SUNDAY GLEANER (Jamaica), May 27, 1962, p. 1, available at <https://newspaperarchive.com/kingston-gleaner-may-27-1962-p-1/> (reporting decision by Turks and Caicos Legislative Assembly “re-affirming their desire to remain under British administration as a colony after Jamaica’s [i]ndependence”); Information from Non-Self-Governing Territories: Summaries of Information Transmitted Under Article 73 e of the Charter of the United Nations: Report of the Secretary-General:

Nations admitted Jamaica to membership and thereafter treated the Cayman Islands and the Turks and Caicos Islands as separate non-self-governing territories.¹⁷² Neither the United Nations nor Member States apparently complained that the separation of these territories from Jamaica and their maintenance as U.K. territories was inconsistent with Resolution 1514.

4.69 These examples demonstrate that even if Resolution 1514 were interpreted to address the adjustment of colonial boundaries, it did not do so in a manner that reflected State practice, either before or after Resolution 1514's adoption.

4.70 State practice differed materially from the aspirational language of Resolution 1514 in other ways. For example, despite Resolution 1514's call for independence as the only outcome for all trust and non-self-governing territories,¹⁷³ several territories—both before and after Resolution 1514—chose another status. The international community welcomed or acquiesced in the results. Among these territories are Alaska (1959), Hawaii (1959), and Puerto Rico (1952),¹⁷⁴ as well as British Togoland (1956)¹⁷⁵ and the Northern Mariana Islands (1976).¹⁷⁶

Caribbean and Western Atlantic Territories: Cayman Islands, U.N. Doc. A/5080/Add.12 (Apr. 27, 1962), p. 4 (United Kingdom, in report under Article 73(e) of the U.N. Charter, noting the unanimous Caymans Legislative Assembly resolution opting to remain under British administration); *Cayman Islands to Seek Internal Self-Government*, DAILY GLEANER (Jamaica), Jan. 22, 1962, p. 2, available at

<https://newspaperarchive.com/kingston-gleaner-jan-22-1962-p-2/> (quoting this resolution, which read in part: "It is the wish of the Cayman Islands ... [t]o continue their present association with ... the United Kingdom.").

¹⁷² See, e.g., G.A. Res. 1750 (XVII), Admission of Jamaica to Membership in the United Nations, U.N. Doc. A/RES/1750(XVII) (Sept. 18, 1962); G.A. Res. 2069 (XX), Question of American Samoa, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, 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/2069(XX) (Dec. 16, 1965) (including the Turks and Caicos Islands and the Cayman Islands among several other non-self-governing territories in an omnibus resolution on decolonization).

¹⁷³ Resolution 1514 provides that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations" G.A. Res. 1514 (XV), *supra* note 100, para. 5; see also *id.*, para. 4 (referring to dependent peoples' "right to complete independence").

¹⁷⁴ All these territories chose to integrate into the United States. The General Assembly thereafter removed each from the list of non-self-governing territories. G.A. Res. 1469 (XIV), Cessation of the Transmission of Information Under Article 73 e of the Charter in Respect of Alaska and Hawaii, U.N. Doc. A/RES/1469(XIV) (Dec. 12, 1959), para. 4; G.A. Res. 748 (VIII), Cessation of the Transmission of Information Under Article 73 e of the Charter in Respect of Puerto Rico, U.N. Doc. A/RES/748(VIII) (Nov. 27, 1953), para. 6. For a discussion of U.S. notifications to the United Nations about Alaska's, Hawaii's, and Puerto Rico's respective self-determination decisions, see 1 DIGEST OF INT'L LAW (WHITEMAN) (1963), pp. 390–406.

¹⁷⁵ In 1956, the General Assembly called for a plebiscite in the U.K. trust territory of British Togoland that would give the people the option to choose between integration with the neighboring U.K. colony of Gold Coast or continuation as a separate trust territory; independence was not presented as an option. G.A. Res. 944 (X), The Togoland Unification Problem and the Future of the Trust Territory of Togoland Under British Administration, U.N. Doc. A/RES/944(X) (Dec. 15, 1955), para. 2. After a majority opted for integration, the United Nations approved of British Togoland's integration with Gold Coast. See G.A. Res. 1044 (XI), The Future of Togoland Under British Administration, U.N. Doc. A/3905 (Dec. 13, 1956), pmbler. para. 4, para. 1.

¹⁷⁶ See, e.g., S.C. Res. 683 (1990), U.N. Doc. S/RES/683(1990) (Dec. 22, 1990), pmbler. para. 7 (expressing satisfaction that the people of the Northern Mariana Islands had "freely exercised their right of self-determination" in approving commonwealth status); U.S. Public Law 94-241 (Mar. 24, 1976) (U.S. Congress

4.71 Moreover, despite Resolution 1514's declaration that "all peoples have the right of self-determination" by which they may "freely determine their political status,"¹⁷⁷ in several instances the political status of a non-self-governing territory changed without a prior attempt to ascertain the freely expressed wishes of the people of the territory. Examples include the former Portuguese territories of Goa, Daman, Diu (1961),¹⁷⁸ and São João Batista de Ajuda (1961);¹⁷⁹ the former Dutch territory of West Irian (1962);¹⁸⁰ and the former Spanish territory

approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands); *id.*, pmbler. para. 4 (noting that the Covenant had been "approved by the unanimous vote of the Mariana Islands District Legislature on February 20, 1975 and by 78.8 per centum of the people of the Northern Mariana Islands voting in a plebiscite held on June 17, 1975").

¹⁷⁷ G.A. Res. 1514 (XV), *supra* note 100, para. 2 (emphasis added).

¹⁷⁸ On December 18, 1961, Indian military forces took over Goa, Daman, and Diu. Pritam T. Merani, *The Goa Dispute*, 14 J. PUB. L. 142 (1965), p. 166. During a Security Council meeting to discuss Portugal's complaint that India had violated the Charter in using force against Portugal's sovereign territory, some States called for an assessment of the freely expressed wishes of the peoples of the territories. U.N. Doc. S/PV.988 (Dec. 18, 1961), para. 14 (Ecuador stating that the peoples of non-self-governing territories "should be free to exercise their right of self-determination in deciding whether to join another State or to set themselves up as an independent State"); *id.*, para. 30 (Chile emphasizing that both Portugal and India should take into consideration the wishes of the inhabitants of the territories). India responded that self-determination was not necessary in some cases, but did not address how this interpretation would be consistent with Resolution 1514's reference to the right of "all peoples" to self-determination. *Id.*, paras. 84–85. The majority of the Security Council supported a resolution calling on India to withdraw and for both parties to negotiate a peaceful resolution, but it was vetoed by the Soviet Union. *Id.*, para. 129. The following year, Goa, Daman, and Diu were removed from the list of non-self-governing territories. Compare G.A. Res. 1542 (XV), Transmission of Information Under Article 73 e of the Charter, U.N. Doc. A/4684 (Dec. 15, 1960), para. 1 (identifying "Goa and dependencies, called the State of India" as non-self-governing territories under Portuguese administration) with Report of the Special Committee on Territories Under Portuguese Administration, U.N. Doc. A/5160 (Aug. 25, 1962), para. 6 (noting that "Goa and dependencies were no longer under the administration of Portugal, having been nationally united with ... India" and deciding that they no longer came within the Committee's purview).

¹⁷⁹ São João Batista de Ajuda was integrated into Benin. See Report of the Special Committee on Territories Under Portuguese Administration, *supra* note 178, para. 6 (noting that São João Batista de Ajuda was nationally united with Dahomey (Benin)).

¹⁸⁰ After Indonesia's independence, the Netherlands administered West Irian as a separate non-self-governing territory despite Indonesia's claim to the territory. See, e.g., U.N. Doc. A/C/1/SR.726 (Nov. 23, 1954), paras. 79–93; *The Question of West Irian (West New Guinea)*, UNITED NATIONS YEARBOOK 1957, pp. 77–78. The Netherlands argued that the territory's political status should be decided by the West Irianese people. *Id.*, para. 78. In 1961, the Netherlands proposed a study into the possibility of a plebiscite but the idea did not attract sufficient support. See The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Netherlands New Guinea, Netherlands: Draft Resolution, U.N. Doc. A/L.354 (Oct. 9, 1961), para. 2. Ultimately, the parties agreed to transfer administration *without* first ascertaining the wishes of the West Irianese people. Agreement (with Annex) Concerning West New Guinea (West Irian), Aug. 15, 1962, 437 U.N.T.S. 292. The General Assembly concluded that "Indonesia and the Netherlands ha[d] resolved their dispute" through "peaceful settlement." G.A. Res. 1752 (XVII), Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), U.N. Doc. A/RES/1752(XVII) (Sept. 21, 1962), pmbler. paras. 1–2. U.N. Doc. A/PV.1127 (Sept. 21, 1962), para. 197 (adopted by a vote of 89–0–14).

West Irianese wishes would only be ascertained in 1969 through a process that only gave the people two choices: remain part of Indonesia or sever ties with it. See Agreement (with Annex) Concerning West New Guinea (West Irian), *supra*, Art. XVIII(c). The Assembly resolution noting the vote's preference for remaining with Indonesia garnered 30 abstentions, with several States expressing concerns about the vote's undemocratic elements. See G.A. Res. 2504 (XXIV), Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), U.N. Doc. A/RES/2504(XXIV) (Nov. 19, 1969). U.N. Doc. A/PV.1813 (Nov. 19, 1969), para. 182 (adopted by a vote of 84–0–30); see also, e.g., *id.*, para. 13 (Gabon questioning, *inter alia*, "why the principle of 'one man, one vote' ... was not adopted"); *id.*, para. 31 (Togo expressing doubts about the vote's compatibility with Resolution 1514 and "whether what has happened in West

of Ifni (1969).¹⁸¹ Also noteworthy is the 1952 placement of Eritrea within a federation with Ethiopia upon recommendation by the General Assembly,¹⁸² and Ethiopia's unilateral dissolution of Eritrea's autonomy in 1962, without discernible U.N. complaint.¹⁸³

4.72 These examples illustrate some of the ways in which the status of non-self-governing and trust territories changed during the 1950s and 1960s in a manner inconsistent with the principles expressed in or attributed by some to Resolution 1514. Decolonization was a complicated political process that was implemented in a wide variety of ways. These examples also illustrate why deeming the establishment of the BIOT unlawful could call into question the lawfulness and stability of the political borders established for numerous other former colonies that gained their independence through decolonization processes.

* * *

4.73 This Chapter has focused on why it would be ahistorical to attribute a legally binding character to the principle of self-determination in the 1960s and apply it to the decolonization process resulting in Mauritius's independence in 1968. In particular:

- there was no treaty in force in 1965 or 1968 that established a new legally binding rule of international law that would have prohibited the establishment of BIOT;
- with respect to customary international law, through the period relevant to this case, there was no *opinio juris* supporting a new rule of international law that would have prohibited the establishment of the BIOT;
- the resolutions of the General Assembly dealing with decolonization did not reflect a consensus either on international law or on specific decolonization rules, including with respect to territorial boundaries; and

Irian was really an act of free choice by the population"); *id.*, paras. 63–64, 147 (Zambia and the Democratic Republic of the Congo expressing concerns with the vote).

¹⁸¹ Ifni was integrated into Morocco. *See* Information from Non-Self-Governing Territories Transmitted under Article 73 e of the Charter, Report of the Secretary-General, U.N. Doc. A/7753 (Nov. 7, 1969), p. 2 of Annex (noting that Ifni had been retroceded by Spain to Morocco by treaty).

¹⁸² G.A. Res. 390 (V), Eritrea: Report of the United Nations Commission for Eritrea; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea, U.N. Doc. A/RES/390(V) (Dec. 2, 1950), para. A.1 (Ethiopia “shall constitute an autonomous unit federated with Ethiopia under the Ethiopian Crown”); G.A. Res. 617 (VII), Eritrea: Report of the United Nations Commissioner in Eritrea, U.N. Doc. A/RES/617(VII) (Dec. 17, 1952), para. 1 (welcoming the establishment of the federation). The General Assembly adopted Resolution 390 despite conflicting evidence about whether the people of Eritrea desired union with Ethiopia or independence, as demonstrated by disagreements among the five members of a U.N. Commission set up to ascertain Eritreans' wishes. *See* Report of the U.N. Commission for Eritrea, U.N. Doc. A/1285 (Jun. 8, 1950), para. 132 (Burmese, Norwegian, and South African Commissioners concluding jointly that “it is not unlikely that a majority of the Eritreans favour political association with Ethiopia” but conceding that “[i]n the circumstances obtaining in Eritrea, ... accurate figures cannot be compiled”) *with id.*, para. 173 (Norwegian Commissioner concluding separately that “the overwhelming majority of the people of Eritrea” favored union) *and id.*, para. 205 (Guatemalan and Pakistani Commissioners concluding that a majority wanted independence).

¹⁸³ *See* Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian–Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 115–17 (1997).

- actual state practice regarding decolonization, including changes to territorial boundaries prior to independence, was not extensive and virtually uniform.

As a result, the General Assembly resolutions referenced in Question (a) must be understood as steps toward the development of a broader international consensus, not reflections of then-existing international law.

4.74 It is worth repeating, however, that to answer the questions referred, the Court would also need to address a variety of legal issues particular to the pending dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago. These include, but are not limited to, such issues as the role of consent of the elected representatives of Mauritius and the reaffirmation of this agreement by Mauritius after achieving independence. These purely bilateral issues, along with the other issues in dispute between Mauritius and the United Kingdom, serve to reinforce why the case would not be appropriate for the exercise of advisory opinion jurisdiction.

4.75 Should the Court nevertheless decide to address the questions in the referral, the United States believes that the absence of any newly established obligation under international law in 1965 that would have prohibited the establishment of the BIOT provides an independent basis to answer Question (a) in the affirmative—namely, that the establishment of the BIOT was lawful. This result, in turn, would obviate the need to answer Question (b).

CHAPTER V CONCLUSION

5.1 As described above, the request before the Court presents fundamental challenges to the integrity of the Court's advisory proceedings and to the preservation of the critical distinction between its advisory and contentious jurisdiction. The United States believes that a decision to render an opinion on the merits would undermine the Court's advisory function and circumvent the right of States to determine for themselves the means by which to peacefully settle their disputes.

5.2 The United States acknowledges that in prior advisory proceedings, the Court has not found it necessary to exercise the discretion provided by Article 65, paragraph 1 of its Statute to decline a referral. In its jurisprudence regarding advisory opinions, however, the Court has set forth circumstances that may merit such a course of action. Those very circumstances are clearly present in this case. In particular:

- the case is, at its core, about an ongoing bilateral dispute concerning sovereignty over territory;
- one of the parties to that dispute, the United Kingdom, has not consented to judicial settlement of the dispute by this Court;
- the legal questions really in issue are directly related to the main point of that dispute; and
- answering the questions would be substantially equivalent to deciding the dispute between the parties.

5.3 As a result, it is difficult to see how the Court could address the questions referred by the U.N. General Assembly without disregarding the fundamental principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. Indeed, it is difficult to imagine a clearer instance in which the Court's exercise of its discretion to decline a referral is warranted.

5.4 For the foregoing reasons, the United States respectfully requests that the Court decline to provide the opinion requested.

