

## **SEPARATE OPINION OF JUDGE ROBINSON**

*Right to self-determination under customary international law — Importance of pre-1960 General Assembly resolutions in the development of the right to self-determination as a rule of customary international law — Role of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)) in the development of the right to self-determination as a rule of customary international law — Whether purported consent to the detachment of the Chagos Archipelago was a free and genuine expression of the will of the people of Mauritius including the Chagossians — Right to self-determination as a norm of jus cogens — The need to find a solution for the plight of the Chagossians.*

1. I have voted in favour of all the findings in the operative paragraph of the Court's Opinion. The purpose of this separate opinion is to address issues that have either not been dealt with in the Court's Advisory Opinion or, in my view, not sufficiently stressed, clarified or elaborated.

2. Part I will be devoted to an analysis of General Assembly resolutions in the period 1950 to 1957 and the Declaration on the Granting of Independence to Colonial Countries and Peoples resolution 1514 (hereinafter "1514") with a view to demonstrating their impact on the development of the right to self-determination as a rule of customary international law. Part II will address the status of the right to self-determination as a norm of *jus cogens*. Part III will examine the question of Mauritius' "consent" to detachment against the background of the requirement that decolonization must reflect the free and genuine will of the peoples concerned. Part IV will be devoted to the situation of the Chagossians.

### **INTRODUCTION**

3. These proceedings present a snapshot of the classic workings of a political and economic system — European colonialism — that, in its application, wrought more death, injury, suffering and injustice than any other in the history of mankind. But man's basic humanity came to the fore and was reflected in the growth and maturation of a right whose basis is respect for the inherent dignity and worth of the human person. This right — the right to self-determination and independence — effected the release of more than one third of the population of the world from the chokehold that colonialism had placed on almost every continent.

### **PART I: GENERAL ASSEMBLY RESOLUTIONS IN THE PERIOD 1950 TO 1957 AND RESOLUTION 1514**

#### **General Assembly resolutions in the period 1950-1957**

4. From 1950 to 1957 the General Assembly on several occasions addressed the right to self-determination. The Advisory Opinion has not sufficiently addressed the significance of these resolutions and their contribution to the development of the right to self-determination as a rule of customary international law.

5. An important part of the history of the development of the right to self-determination as a rule of customary international law is that the United Nations has always been very clear in treating it as a fundamental human right. Thus, the first set of United Nations resolutions addressing this subject relate to the inclusion in the proposed International Covenants on Human Rights of an

article on the right to self-determination. The significance of this approach is that the right has the same basis as all other fundamental human rights, that is, respect for the inherent dignity and worth of the human person.

6. Resolution 421 (V) of 1950 called on the Commission of Human Rights to “study ways and means which would ensure the right of peoples and nations to self-determination”. Section D of the resolution which was specifically devoted to this study was adopted by 30 to 9 votes with 13 abstentions.

7. In the preamble of resolution 545 (VI) of 1952, the General Assembly recognized the right to self-determination as a fundamental human right and decided that an article on the right should be included in the proposed International Covenants on Human Rights as follows: “All peoples shall have the right of self-determination.” The preamble was adopted by 41 votes in favour, 7 against, and 2 abstentions. The article for inclusion in the proposed Covenant was adopted by 36 votes in favour, 11 against and 12 abstentions.

8. In 1952, at its seventh session the General Assembly adopted resolution 637 A (VII), which stated in its preamble that the right of peoples and nations to self-determination is a “prerequisite to the full enjoyment of all fundamental human rights”. The resolution urged Member States to “recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories”. It also stated that the freely expressed wishes of the peoples should be “ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations”. Resolution 637 A (VII) was adopted by 40 votes in favour, 14 against with 6 abstentions. Also, resolution 637 C (VII) called on the Commission of Human Rights to make recommendations concerning international respect for the right of peoples to self-determination. Resolution 637 C (VII) was adopted with 42 in favour, 7 against and 8 abstentions.

9. In 1953 the General Assembly adopted resolution 738 (VIII) “inviting the Commission on Human Rights to make recommendations concerning international respect for the right of peoples and nations to self-determination”. The resolution was adopted by 43 votes in favour with 9 against and 5 abstentions.

10. In 1954, in resolution 837 (IX) the General Assembly stepped up the pressure on the Commission on Human Rights by requesting it to “complete its recommendations concerning international respect for the right of peoples and nations to self-determination, including recommendations concerning their permanent sovereignty over their natural wealth and resources”. This resolution was adopted with 41 votes in favour, with 11 against and 3 abstentions.

11. Notably, from as early as 1955 the view was being expressed by the United Nations Secretariat that the General Assembly “had already recognized the right of peoples and nations to self-determination; the next step was to formulate an appropriate article by which States would undertake a solemn obligation to promote and respect that right”<sup>1</sup>.

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<sup>1</sup> United Nations General Assembly, Tenth Session: Annotation on Draft International Covenants on Human Rights, UN doc. A/2929, 1 July 1955, Chap. IV, p. 40, para.4.

12. In 1955, the Third Committee of the General Assembly adopted a provision to be inserted in the two draft Covenants on Human Rights in identical language, acknowledging that “all peoples have the right of self-determination”. What is to be noted here is the difference between this formulation and the earlier formulation in resolution 545 (VI) in 1952 that “[a]ll peoples shall have the right to self-determination”<sup>2</sup>. The formulation in the 1955 resolution is declaratory of an existing right. The provision also stipulated that all “States Parties, including those having responsibility for the administration of Non-Self-Governing . . . Territories [should] promote the realization of [that] right”. The records of the Third Committee reveal a marked difference in the position of those States supporting the right to self-determination and its inclusion in the two draft Covenants on Human Rights and those States, principally colonial Powers, opposing that position.

13. Perhaps the most important resolution adopted in the period, and certainly the one that received the greatest support, was resolution 1188 (XII) of 11 December 1957. In that resolution, which was adopted by 65 votes to none with 13 abstentions, the General Assembly reaffirmed that “Member States shall, in their relations with one another, give due respect to the right of self-determination”.

14. Thus, between 1950 and 1957, the General Assembly adopted eight resolutions on the right of peoples and nations to self-determination and independence. Each resolution was adopted by a majority of the membership of the United Nations. The records reveal that with the exception of one year the votes trended towards an increase in the majority supporting the resolutions. Generally, the resolutions called for respect for and implementation of the right to self-determination by States, particularly by including in the two proposed Covenants on Human Rights an article on that right. The seven-year period from 1950 to 1957 ended with the adoption of a resolution, with no negative votes, calling for States to respect the right to self-determination.

15. One can see in the resolutions the strong determination of the General Assembly to affirm the existence of the right to self-determination and to ensure that colonial Powers understood that they had an obligation to respect that right. An interesting feature of the debates in that seven-year period was the recognition that the right to self-determination was a human right and one that was indispensable for the enjoyment of all human rights. At the same time the States promoting the right to self-determination, no doubt inspired by the foundational principle in Article 1, paragraph 2, of the United Nations Charter (hereinafter “the Charter”), made a strong connection between the self-determination of peoples and the development of friendly relations among nations. That Article, along with Article 55 of the Charter, shows that the Charter saw self-determination as a basis for the development of friendly relations among all nations.

16. The General Assembly was unrelenting in the attention that it paid to the development of the right to self-determination. The resolutions adopted in the seven-year period instilled confidence in peoples under colonial domination. Between 1957 and 1960, and prior to the adoption of 1514 on 20 December 1960, 18 countries under colonial domination became independent.

17. It is arguable that the analysis of the flurry of General Assembly resolutions over the seven-year period 1950 to 1957 shows that State practice and *opinio juris* combined to establish the right to self-determination as a rule of international law by 1957 and that, consequently, when these

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<sup>2</sup> United Nations General Assembly: Report of the Third Committee, Draft International Covenants on Human Rights, UN doc. A/3077, 8 Dec. 1955.

18 countries — all African with the exception of one — became independent, they did so in exercise of an existing right under international law. Addressing the South African Parliament in February 1960, the British Prime Minister, Sir Harold MacMillan, speaking of the growth of African independence, said: “The wind of change is blowing through this continent and whether we like it or not, this growth of national consciousness is a political fact.”<sup>3</sup> Sir Harold, in this famous speech, accurately foresaw that the momentum towards independence that had been building up — no doubt due in part to the activity of the General Assembly — would lead to the independence of dozens of African countries. In September of 1960 alone, 15 countries became independent.

### **Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples**

18. The right to self-determination, the nascent beginnings of which could be witnessed from the Covenant of the League of Nations, and the development of which progressed steadily from 1945 to 1950, experienced a very rapid growth from 1950 to 1957 and reached a crescendo when the landmark 1514 was adopted on 20 December 1960<sup>4</sup>. 1514 and resolution 2625 of 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter the “Friendly Relations Declaration”) are among the greatest achievements of the United Nations, and their adoption at such a relatively early period in the life of the United Nations shows an admirable sensitivity on the part of that body to global issues relating to equality, justice, development and peace. They both reflect customary international law. Today the United Nations consists of 193 Members and about one half of that membership can with confidence trace their independence to rights and obligations established by 1514.

19. I set out below brief comments on 1514.

#### **Preamble**

20. Perhaps the most important preambular paragraph is the very last in which the General Assembly “*solemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”. European colonialism had been in existence for over 400 years and had resulted in inequality, loss of liberty, untold human suffering, immeasurable loss of life and, generally, flagrant violations of fundamental human rights in Africa, Asia, the Americas and the Caribbean. This preamble makes it clear that the United Nations was resolute in its requirement that colonialism as a political and economic system had to end as quickly as possible.

21. Brief comments on the operative paragraphs of 1514 are set out below:

#### **Paragraph 1**

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the

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<sup>3</sup> Souvenir of visit by the Rt. Hon. Harold Macmillan, Prime Minister of the United Kingdom to the Houses of Parliament, Cape Town on Wednesday 3 February 1960, pp. 5-14 (with Verwoerd’s Vote of Thanks, pp. 15-17) (Cape Town: *Cape Times*, 1960).

<sup>4</sup> Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted 20 December 1960).

United Nations and is an impediment to the promotion of world peace and co-operation.”

22. In 1955, 29 countries from Africa and Asia met in Bandung, Indonesia to discuss Western Colonialism and other related issues. Paragraph 1 of 1514 repeats verbatim paragraph 1 (b) of the Final Communiqué of that Conference<sup>5</sup>.

23. Not much attention was paid during the proceedings to this paragraph, which enures for the benefit of dependent peoples. In the oral hearing, only one participant commented on it. But in my view it is of fundamental importance in understanding what 1514 seeks to achieve. Alien subjugation, alien domination and alien exploitation are the classic features of colonialism. In this paragraph, 1514 neatly encapsulates the horrors of colonialism. Exploitation is at the epicentre of colonialism. It was a political and economic system of governance that was wholly exploitative of dependent peoples; when it was twinned with the enslavement of people of African descent, as it was in Mauritius for over 100 years, and in North and South America and the Caribbean for hundreds of years, its ugly underbelly was exposed. In 1753, Jamaica was Britain’s most valuable colony. The average white Jamaican was 52.3 times wealthier than the average white person in England and Wales<sup>6</sup>. This apparent asymmetry was due to raw exploitation through enslavement, the economic crutch of colonialism.

24. Paragraph 1 provides the rationale for 1514, which must be read and interpreted against that background. The paragraph identifies three features of the subjection of peoples to alien subjugation, domination and exploitation. First, the subjection is a denial of fundamental human rights. It is therefore a denial of rights that exist under customary international law, some of them of a peremptory character. The paragraph stresses the link between the right to self-determination and the enjoyment of human rights that the resolutions adopted in the seven-year period between 1950 and 1957 also emphasized. Colonialism, seen through the prism of 1514, breaches customary international law. Second, the subjection of peoples to alien subjugation, domination and exploitation is contrary to the Charter; in particular it would be contrary to the purposes and principles of the Charter. Third, it is an impediment to the promotion of world peace and co-operation. Again, the principles set out in Article 1 of the Charter address the maintenance of peace and the achievement of international co-operation. In short this paragraph proclaims that colonialism is contrary to international law.

25. As envisaged by 1514, the three classic features of colonialism — alien subjugation, exploitation, and domination — are to be eliminated through the exercise of the right to self-determination.

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<sup>5</sup> Final Communiqué of the Asian-African Conference of Bandung (24 April 1955).

<sup>6</sup> Burnard, Trevor Mastery, *Tyranny and Desire: Thomas Thistlewood and His Slaves in the Anglo-Jamaican World*, University of North Carolina Press, 2004, p. 15, p. 104. Thomas Thistlewood was an Englishman who came to Jamaica to make his fortune. He worked on several sugarcane plantations and eventually owned one. He kept a diary recording his daily activities for the entirety of his life in Jamaica. His favourite punishment for a runaway enslaved person was to coerce another enslaved person to defecate in the runaway’s mouth, which was then gagged for four to five hours. This is an example of what is meant by alien subjugation and domination, condoned and legitimated by the political, economic and legal systems established by colonialism. See also Douglas Hall, *In Miserable Slavery: Thomas Thistlewood in Jamaica, 1750-86*, University of the West Indies Press, 1999.

## **Paragraph 2**

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

26. As important as paragraph 1 is, paragraph 2 is the central pillar on which the entire resolution is structured. All the other paragraphs acquire meaning in light of this paragraph. In particular, the ills identified in paragraph 1 are to be remedied by the exercise of the right to self-determination, proclaimed by, and defined in this paragraph, which could easily have been placed first.

27. This paragraph enures for the benefit of dependent peoples and must be read against the background of several General Assembly resolutions that prodded the Human Rights Commission to include in the two draft Covenants on Human Rights, a provision on the right to self-determination. The language of this paragraph is similar to the wording recommended by the Third Committee to the General Assembly in 1955, and differs from the wording of the 1952 resolution which read: “All peoples shall have . . .” The paragraph is declaratory of an existing right. An important feature of this paragraph is that it tells us what self-determination means: self-determination finds expression through the freedom of peoples to determine their political status. It therefore sets the standard by which the transition from colonial to independent status is to be measured. For self-determination to be lawful, it must accord with the free and genuine expression of the will of the peoples as to their political status.

## **Paragraph 3**

“Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”

28. The paragraph makes clear that the exercise of the right to self-determination, reflected in the freedom of all peoples to determine their political status, is not to be delayed on the basis of inadequate preparedness. It directly addresses the conduct of colonial Powers. The background to the paragraph is the colonial practice of using lack of preparedness as a pretext for delaying independence. The mantra of colonial administrations was that dependent peoples cannot be independent until they had gone through a myriad of preparatory constitutional stages, the last of which was usually internal self-government. Gradualism in relation to the right of dependent peoples to independence through their freely expressed will was a basic feature of colonialism. It was outlawed by 1914. There is a subtle relationship between this paragraph and Article 73 (b) of the Charter, in which administering Powers are mandated to assist non self-governing territories “in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement”. This embrace of gradualism, which may have been warranted in 1945, is rejected by 1914. The distance between 1945 and 1960 is remarkable.

## **Paragraph 4**

“All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.”

29. This paragraph shows a sensitivity on the part of the General Assembly to the imbalance in the power relationship between a colonial administration and a dependent people. Again, it directly addresses the conduct of colonial Powers. It is very blunt in the obligations it imposes on colonial Powers not to use repressive measures to prevent dependent peoples exercising their right to self-determination and independence. Importantly, it also tells colonial Powers that they must respect the integrity, that is, the wholeness of the national territory of dependent peoples.

### **Paragraph 5**

“Immediate 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, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”

30. Again, as in the case of the two previous two paragraphs, the addressees of this paragraph are the colonial Powers. It requires colonial States to transfer all powers to colonized peoples in conformity with their freely expressed will so that they can become free and independent. It is very relevant to this case. It has a temporal element in that it requires that colonial Powers take immediate steps to ensure that this is achieved.

31. When this paragraph is read in conjunction with paragraph 7, which requires all States to observe faithfully and strictly the provisions of the Declaration, it becomes clear that the attainment of independence by colonized peoples is not a grant or gift from the colonizing State. Rather, independence results from the discharge by the colonizing State of an obligation imposed on it by international law. It is also clear from this paragraph, as well as from paragraph 2, that the basis for the transfer of power from colonizer to colonized is the freely expressed will of the peoples. The Court said as much in *Western Sahara* when it held, in construing paragraphs 2 and 5, that the “application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned”<sup>7</sup>. Action by a colonial Power that prevents the transition from colonial domination to independence from taking place in accordance with the free and genuine expression of the will of the peoples is unlawful. However, the freely expressed will of dependent peoples is not only a criterion by which the lawfulness of the application of the right to self-determination is measured; it is also the basis for the exercise of that right, that is, it requires that, when colonial peoples through their freely expressed wishes, call for self-determination and independence, power should be transferred to them by the colonial authorities forthwith.

### **Paragraph 6**

“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

32. Again, the addressees of this paragraph are colonial Powers. It deals with the important question of the integrity of the national territory of dependent peoples. Territorial integrity is addressed four times in 1514. The last preambular paragraph speaks of the inalienable right that all peoples have to the integrity of their national territory. The fourth paragraph requires that colonial States respect the integrity of the national territory of dependent peoples. Paragraph 6 goes a step

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<sup>7</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 55.

further by declaring that an attempt by an administering Power to dismember partially or totally the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter. This paragraph incorporates a very serious and solemn declaration. The fourth reference to territorial integrity is in paragraph 7, which calls for respect for the sovereign rights of all peoples and their territorial integrity. The relevance of this paragraph to this case is that it clarifies that the unit for self-determination for colonial peoples is their territory in its entirety.

33. Territorial integrity is presented in this paragraph and elsewhere as a critically important element of the right to self-determination. There are three references to the Charter in 1514, namely, in paragraphs 1, 6 and 7. Of the three, paragraph 6 is the only one that directly speaks of incompatibility with the purposes and principles of the Charter. Since these purposes and principles are generally recognized as reflecting customary international law, and by some, as embodying norms of *jus cogens*, 1514 has placed a breach of respect for the territorial integrity of dependent peoples at the very highest level in international law.

34. The United Kingdom argued that the right to self-determination did not become customary international law until the adoption of the Friendly Relations Declaration in 1970, which it agrees reflects customary international law. It stressed that the Friendly Relations Declaration was adopted by consensus after six years of negotiations and, hence, was more carefully considered than 1514, which was adopted within a shorter period. It also contended that there was a significant difference between paragraph 6 of 1514 and paragraph 7 of the Friendly Relations Declaration. Whereas the former addresses the territorial integrity of a “country”, the United Kingdom notes that paragraph 7 speaks of the territorial integrity or political unity of sovereign and independent States. Accordingly the United Kingdom argued that what was protected by customary international law was the territorial integrity of sovereign States and not the territorial integrity of a non-self-governing territory prior to independence. However, it is not surprising that resolution 2625 references States while 1514 does not. This is so because 1514 is wholly concerned with the rights of colonial peoples to self-determination and independence, while the subject of resolution 2625 is the rights and duties of sovereign States. In any event, although resolution 2625 does not set out to deal with colonial peoples, the 14th preambular paragraph treats with their situation as follows: “*Convinced* in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter.” This provision is a replica of paragraph 6 of 1514 except that there is a reference not only to the territorial integrity of a country, but also that of a State. It is made abundantly clear that the right to self-determination has a territorial dimension that colonial Powers are obliged to respect. The unit for self-determination is the territory of colonial peoples in its entirety.

## **Paragraph 7**

“All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”

35. This paragraph addresses an obligation that is imposed on all States. That 1514 is normative and binding is reflected in this paragraph which requires all States to observe “faithfully and strictly” the provisions of the resolution as well as those of the Charter and the Universal Declaration of Human Rights. 1514 is in good company when it is placed alongside those two instruments of such seminal and pivotal importance. It occupies the same lofty space as those two instruments. Certainly the Universal Declaration of Human Rights reflects customary international

law. By placing 1514 in the same bracket as the Universal Declaration, the General Assembly sent a clear message as to how it was to be viewed by the international community.

36. While 1514, in a general sense, is addressed to the international community as a whole, there are some paragraphs in respect of which the direct addressees are colonial Powers, and these paragraphs specifically identify their obligations in respect of dependent peoples; other paragraphs enure more specifically for the benefit of dependent peoples, identifying the rights which they have on the road to independence. Of course, all the paragraphs directly implicate both dependent peoples and the colonial Powers as well as the international community at large.

#### **Status of resolution 1514 (XV) and the right to self-determination as customary international law**

37. 1514 was adopted with a vote of 89 in favour, none against and 9 abstentions. That 89 States supported 1514 and not a single State voted against it must count for something in assessing its legal status; it must be taken as strong evidence of the international community's acceptance, not only of its content and but also of the normative value of that content. In fact, the lack of negative vote is strong evidence of the element of *opinio juris* required for the formation of customary international law.

38. In *Legality of the Threat or Use of Nuclear Weapons*<sup>8</sup>, the Court found that resolutions adopted with substantial numbers of negative votes and abstentions did not have the *opinio juris* necessary for the formation of customary international law. That finding has absolutely no application to 1514, which had no negative votes and relatively few abstentions — only 9 — about 10 per cent of the total votes. After commenting that the number of abstentions was relatively low, Rosalyn Higgins, later to become a Member and President of the Court, concluded that “[t]he Resolution must be taken to represent the wishes and beliefs of the full membership of the United Nations”<sup>9</sup>. Plainly speaking, by the end of 1960, the colonial Powers recognized that the movement of colonial peoples to independence had become irreversible. The wind of change of which Sir Harold MacMillan had spoken ten months before had, by the end of 1960, taken on the force of a hurricane.

39. The development of the right to self-determination, which had commenced even before adoption of the Charter in 1945, reached a watershed with the adoption of 1514 in December 1960.

40. 1514 expresses in solemn form the right that had developed from the mandate system after the first World War, was enshrined in Article 1, paragraph 2, of the Charter and reflected in a number of General Assembly resolutions between 1950 and 1957. These resolutions played an important role in the development of the right as a rule of customary international law. In *Legality of the Threat or Use of Nuclear Weapons*, the Court held that “a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”<sup>10</sup>. It may be argued that the eight General Assembly resolutions adopted over a period of seven years show the evolution of the *opinio juris* required for the establishment of the right to self-determination as a rule of customary international law, and general practice sufficient to meet the requirement for the formation of a rule of customary international law.

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<sup>8</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 255, para. 71.

<sup>9</sup> Higgins, Rosalyn, *The Development of International Law through Political Organs of the United Nations*, Oxford University Press (OUP), 1963, p. 101.

<sup>10</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 255, para. 70.

41. The main difference between 1514 and the pre-1960 resolutions is that the latter did not fully define the right to self-determination. It was left to 1514 to demarcate the contours of that right. Nonetheless, 1514's relationship and connectedness with that group of resolutions cannot be overlooked. The largest number of countries to become independent in a single year did so in 1960, prior to the adoption of 1514, and achieved their independence on the back of these eight resolutions. Thus while they did not fully define the right to self-determination, they certainly laid the foundation for 1514's historic achievement in defining with greater clarity than had been done before the content and scope of the right to self-determination. In paragraph 150 of the Advisory Opinion — after noting that 28 countries achieved independence in the 1960s — the Court expressed the view that “there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption”. This is certainly a fair conclusion but, by the same token, would it not be equally true to speak of a clear relationship between the eight resolutions and the achievement of independence by 18 countries prior to the adoption of 1514? The fact that the pre-1960 resolutions do not fully define the right to self-determination does not mean that they do not have normative elements. For example, the resolutions recognize the right to self-determination as a fundamental human right, and envisaged it as a “prerequisite to the full enjoyment of all human rights”, urged Member States to recognize and promote the right of self-determination of the people of non-self-governing countries. They also stated that the freely expressed wishes of the people should be ascertained through recognized democratic means and declared that all peoples have the right to self-determination, implying that the right is existing. Moreover, one resolution called on States to give due respect to the right to self-determination, a resolution that had no negative votes and 13 abstentions. In light of the foregoing the pre-1960 resolutions should not be overlooked as they include normative elements contributing to the growth of the right to self-determination into a customary rule of international law.

42. Even though it is arguable that the right to self-determination became a rule of customary international law in 1957, it may be safer to conclude that its crystallization as a rule of customary international law took place in 1960 with the adoption of 1514. In 1963, Rosalyn Higgins concluded that 1514, “taken together with seventeen years of evolving practice by the United Nations organs, provides ample evidence that there now exists a legal right to self-determination”<sup>11</sup>.

43. In 1966, the General Assembly adopted by consensus the International Covenant on Economic Social and Cultural Rights (hereinafter “ICESCR”) and the International Covenant on Civil and Political Rights (hereinafter “ICCPR”). Common Article 1 of both Covenants provides that “all peoples have the right of self-determination by virtue of which they freely determine their political status and freely pursue their economic social and cultural development”. This is precisely the language used in 1514. Written in the present tense, this is very strong and forceful language, declaratory of existing rights. Indeed the entire Declaration is clear and unequivocal in the language it uses. Rosalyn Higgins captures very well the essence and spirit of the resolution when she commented that “the right to self-determination is regarded not as a right enforceable at some future time in indefinite circumstances, but a legal right here and now”<sup>12</sup>.

44. The question of the relationship between the right to self-determination in the context of decolonization and its broader application outside that context is addressed by the Court in paragraph 144. The Court clarified that its Advisory Opinion is confined to the right to self-determination in the context of decolonization. However, the fact that the right to self-determination set out in paragraph 2 of 1514 is not only included in the two Covenants, but included as the first article in both, speaks to its significance not merely as a fundamental human

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<sup>11</sup> Higgins, Rosalyn, *op. cit.*, p. 104.

<sup>12</sup> *Ibid.*, p. 100.

right, but as one that is seen as indispensable for the enjoyment of all the rights set out in the two Covenants. During the drafting of the two Covenants some countries, principally western colonial Powers, opposed the insertion of the right to self-determination in the two Covenants on the basis that it was a collective right. However, at the instigation of other countries, mainly developing countries, the right was included in the two Covenants on the basis that it was indispensable for the enjoyment of the individual rights set out in the two Covenants.

45. The incorporation of the right to self-determination as the first article in the two international covenants, which have received widespread ratifications, solidifies its development as a fundamental human right, and indeed, the foundation for all other human rights. There is a unity in the right to self-determination that serves the purposes of 1514 — the right of all peoples to determine their political status through their freely expressed will in the context of decolonization — and the right to self-determination that serves the purposes of the two Covenants — the enjoyment of fundamental rights by every individual. This unity is achieved by the existence of a common basis applicable to both purposes, namely, respect for the inherent dignity and worth of the human person.

46. The development of the right to self-determination as a basic human right is wholly consistent with the post-Second World War focus on individual human rights, itself the greatest advance in international law since 1945. The right is therefore located at the very centre of this great normative development. In that regard, the Court held that 1514 “provided the basis for the process of decolonization which has resulted since 1960 in the creation of many States”<sup>13</sup>.

47. In conclusion, 1514 is a normative laden declaration, rich with ore protective of values fundamental to the international community. The resolution is as potent a force for liberation and justice as was emancipation following the abolition of enslavement in many parts of the world in the 1830s.

## **PART II: THE STATUS OF THE RIGHT TO SELF-DETERMINATION AS A NORM OF JUS COGENS**

48. This part commences with an examination of the Court’s case law on *jus cogens* with a view to ascertaining the assistance that it offers in considering this question. The opinion will then examine the *jus cogens* character of the right to self-determination from the point of view of the law of treaties and the law of State responsibility.

49. An interesting feature of the Court’s Advisory Opinion is that it offers no comment on the question of the status of the right to self-determination as a norm of *jus cogens*. This feature is remarkable in light of the fact that a high number of participants in the proceedings argued that the right to self-determination is a norm of *jus cogens*. While the Court is not obliged to address all the arguments raised in proceedings brought before it, one would have expected that in view of the obvious importance attached by so many participants to the characterization of the right to self-determination as a norm of *jus cogens*, it would have devoted some time to this question. In its Advisory Opinion the Court is content to follow its earlier characterization in the case concerning *East Timor* of the right as one that establishes obligations *erga omnes*.

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<sup>13</sup> *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 57.

50. This approach might appear to be an example of what some see as a general reluctance on the part of the Court to engage fully with the concept of *jus cogens*. However, an examination of the Court's case law shows that in the past it has made reference to *jus cogens* on many occasions and has actually pronounced on its application in a number of cases. In my view, the Court's case law, State practice and *opinio juris*, and scholarly writing are sufficient to warrant characterizing the right to self-determination as a norm of *jus cogens*, and to justify the conclusion that it possessed that status in the relevant period 1965-1968.

51. Before commencing an examination of the Court's case law on *jus cogens*, it is useful to comment briefly on three cases that are relevant to the issues raised by the norm of *jus cogens* in these proceedings.

52. The *Reservations to the Convention on the Crime of Genocide* Advisory Opinion, 1951 is cited because, although not addressing *jus cogens* in explicit terms, it contains a passage that has been interpreted as highlighting features of that norm. Below is the passage:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) . . .

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention"<sup>14</sup>.

There are four propositions in this statement which, as will be seen later, have been considered very relevant to the identification of a norm of *jus cogens*. First, genocide is a crime that shocks the conscience of mankind. Secondly, the principles underlying the Genocide Convention are accepted as binding on all States, even in the absence of a treaty. Third, condemnation of the crime of genocide is universal. Fourth, the Genocide Convention has a "purely humanitarian purpose"<sup>15</sup> that reflects "the most elementary principles of morality"<sup>16</sup>.

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<sup>14</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

53. In 1966 in the *South West Africa* cases<sup>17</sup> the Court, by the casting vote of its President, found that Ethiopia and Liberia had no *jus standi* to bring a claim against South Africa for its violation of the various provisions of the Covenant of the League of Nations and the terms of the Mandate in respect of South West Africa, including practising apartheid in its administration of South West Africa. It is fair to say that no decision of the Court has received greater criticism than this Judgment. James Crawford, as he then was, described the criticism as “severe and deserved”<sup>18</sup>.

54. Four years later, in the *Barcelona Traction* case, Belgium brought a claim against Spain by way of diplomatic protection in respect of losses allegedly suffered by Belgian shareholders of the Barcelona Traction Light and Power Company, that was incorporated in Canada and which had been declared bankrupt by a court in Spain. The central issue was whether Belgium had standing to bring its claims on behalf of Belgian shareholders. In a famous dictum the Court explained the difference between obligations in the performance of which all States have an interest and those in the performance of which all States do not have an interest. The Court held that:

“In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.”<sup>19</sup>

55. The significance of the *Barcelona Traction* case is its recognition that some rights and obligations do not only exist at a bilateral level or even multilateral level; there are rights and obligations in the protection and observance of which all States have a legal interest. In that regard the Court referred to obligations *erga omnes* relating to “the basic rights of the human person”. It also cited a passage from its Advisory Opinion in *Reservations to the Convention on the Crime of Genocide*<sup>20</sup> (see paragraph 52 above). The dictum therefore means that there is a wider public, communitarian interest that international law recognizes and protects. In fact the examples given by the Court indicate that the essence of obligations *erga omnes* is that they protect the fundamental values of the international community, such as those relating to respect for the inherent dignity and worth of the human person, the prohibition of aggression and genocide.

56. Many scholars see this finding — which was not absolutely necessary for the Court’s reasoning in the Judgment — as the Court compensating for its decision in the 1966

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<sup>17</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 347.

<sup>18</sup> 2013 Dreamers of the Day: Australia and the International Court of Justice, *Melbourne Journal of International Law*, Vol. 14, p. 537.

<sup>19</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33-34.

<sup>20</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

*South West Africa* cases, a decision that ignored the developments which had taken place in international law in the field of decolonization and, more generally, wider communitarian interests. According to James Crawford, as he then was, the Court “was in effect apologizing for getting it wrong in 1966”<sup>21</sup>. It has been suggested that in *Barcelona Traction* the Court very much wanted to address *jus cogens*, but avoided doing so and instead introduced the concept of obligations *erga omnes*.

### The Court’s case law on *jus cogens*

57. In the *North Sea Continental Shelf* cases in 1969 the Court made it clear that it did not wish to enter into a discussion of *jus cogens* or even less, to pronounce on it. While it would not have been necessary for the Court to rule on the application of *jus cogens* in that case, one can detect a kind of reluctance to engage with the topic of *jus cogens* that many would say has become a feature of its work. Although the *North Sea Continental Shelf* cases were decided a few months before the adoption of the Vienna Convention on the Law of Treaties, (hereinafter “VCLT”), the Court would undoubtedly have been familiar with the 1966 Report of the International Law Commission on the Law of Treaties. That Report included a draft Convention on the Law of Treaties, Article 50 of which addressed *jus cogens*.

58. In the *Military and Paramilitary Activities in and against Nicaragua* case the Court addressed *jus cogens* as follows:

“A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens* (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-11, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations ‘has come to be recognized as *jus cogens*’. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a ‘universal norm’, a ‘universal international law’, a ‘universally recognized principle of international law’, and a ‘principle of *jus cogens*’<sup>22</sup>.

59. The Court’s reasoning on the status of the prohibition of the use of force is in three stages. First, the statements of many State representatives confirm that the prohibition of the use of force is a rule of customary international law. Second, these statements also confirm that the prohibition is “a fundamental or cardinal principle of that law”. Here the Court might be understood as implying that the prohibition of the use of force is a norm of *jus cogens*. Third, that latter conclusion is supported by the Court apparently citing with approval the observation of the International Law Commission that the prohibition of the use of force is a norm of *jus cogens*.

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<sup>21</sup> *Multilateral Rights and Obligations in International Law. Collected Course of the Hague Academy of International Law*, Brill, Leiden, Vol. 319, pp. 410-411.

<sup>22</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 100-101, para. 190.

60. Even though it is fair to infer from this paragraph that the Court endorses the view that the prohibition of the use of force is a norm of *jus cogens*, again, one can detect a slight hesitancy to become fully engaged in a discussion of that norm. Certainly, the Court does not delve deeply into the content of the norm of *jus cogens*, and its recognition that the prohibition of the use of force is a norm of *jus cogens* can only be described as oblique.

61. In *Armed Activities on the Territory of the Congo*, the Court had to consider the relationship between peremptory norms of general international law and consent to its jurisdiction. The Court referred to the following passage from its 1951 Advisory Opinion on *Reservations to the Convention on the Crime of Genocide* (see paragraph 52, above) that may be said to provide an insight into the Court's views on the jurisprudential underpinnings of a norm of *jus cogens*:

“The first consequence arising from this conception is that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention).”<sup>23</sup>

In the very same paragraph, that is, paragraph 64 of *Armed Activities on the Territory of the Congo*, the Court observed that the prohibition of genocide was “assuredly” a norm of *jus cogens*. The Court identified two principal features of *jus cogens*, namely it is a norm that is recognized as binding on States, irrespective of a treaty obligation to do so, and it has a universal character in that it is applicable to all States.

62. In his separate opinion in *Armed Activities on the Territory of the Congo*<sup>24</sup>, Judge *ad hoc* Dugard commented that this was the first time the Court had expressly embraced the concept of *jus cogens*, pointedly adding that this was so even though it had in the past endorsed the notion of obligations *erga omnes*<sup>25</sup>.

63. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>26</sup>, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>27</sup>, the Court, by referring to its earlier finding in *Armed Activities on the Territory of the Congo* that the prohibition of genocide was “assuredly” a peremptory norm of international law, must be taken as confirming that finding. In fact, in its 2015 Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court went further and found that “the prohibition of genocide has the character of a peremptory norm (*jus cogens*)”<sup>28</sup>. It also cited the well-known passage from the 1951 *Reservations to the Convention on the Crime of Genocide* Advisory Opinion (see paragraph 52, above) which has been frequently relied on for its identification of the features of *jus cogens*. In *Prosecutor v. Jelisic*, a trial chamber of the

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<sup>23</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23.

<sup>24</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 32, para. 64.

<sup>25</sup> *Ibid.*, p. 87, separate opinion of Judge *ad hoc* Dugard, para. 4.

<sup>26</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 111, para. 161.

<sup>27</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015 (I), p. 47, para. 87.

<sup>28</sup> *Ibid.*

International Criminal Tribunal for the former Yugoslavia held that, in the *Reservations to the Convention on the Crime of Genocide* Advisory Opinion, the International Court of Justice went beyond the identification of the prohibition of genocide as a customary norm and placed it “on the level of *jus cogens* because of its extreme gravity”<sup>29</sup>.

64. The values stressed in the 1951 Advisory Opinion in the *Reservations to the Convention on the Crime of Genocide* and confirmed 55 years later in *Armed Activities on the Territory of the Congo* (2006), and again 54 and 64 years later in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2007, 2015) cases, concern the inherent dignity of the human person and thus, fundamental human rights; it is in that context that we find references to “purely humanitarian and civilizing purpose” and “the most elementary principles of morality”. The 1951 Advisory Opinion therefore, although not containing any express reference to *jus cogens*, provides clear signposts and indicia for the identification of norms that are *jus cogens*.

65. In *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, the Court observed that “[t]he question whether a norm is a part of the *jus cogens* relates to the legal character of the norm”<sup>30</sup>. It decided not to determine whether norms of international humanitarian law are part of *jus cogens*. In the Court’s view the General Assembly’s request for its advice related to the applicability of principles and rules of humanitarian law in relation to the use of nuclear weapons and not to the legal character of those norms. The Court found that “the fundamental rules [of humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransmissible principles of international customary law”<sup>31</sup>. While scholars have pondered over the meaning of the biblical sounding phrase, “intransmissible principles”, the better view is that the Court was not just addressing rules of customary international law, but peremptory norms of general international law. Here again, the Court, notwithstanding its explanation for not dealing with *jus cogens*, appears to exhibit a reluctance to get to the heart of that concept.

66. In *Questions relating to the Obligation to Prosecute or Extradite*, we find the clearest explanation to date of the Court’s view of the kind of evidence needed to substantiate a finding that a norm of general international law has become a peremptory norm within the meaning of Article 53 of the VCLT. Paragraph 99 of the Court’s Judgment is set out below:

“In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been

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<sup>29</sup> ICTY, IT-95-10-T, 14 December 1999, p. 18, para. 60.

<sup>30</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 258, para. 83.

<sup>31</sup> *Ibid.*, p. 257, para. 79.

introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.”<sup>32</sup>

Article 53 of the Vienna Convention provides that *jus cogens* is a norm of general international law that is peremptory. In principle this means that any of the three sources of law set out in Article 38 (1) (a), (b) and (c) of the Court’s Statute can give rise to a peremptory norm of general international law. However, peremptory norms of general international law most usually derive from rules of customary international law. Treaties, of course, will not — in and of themselves — give rise to peremptory norms, but when they contain provisions that reflect rules of customary international law, those provisions may become peremptory norms of general international law. The first sentence of this paragraph addresses the growth (“has become”) of the prohibition of torture, as part of customary international law and thus, general international law, into a peremptory norm (*jus cogens*).

67. The Court cites several instruments of universal application as evidence of State practice and *opinio juris* sufficient to establish that the prohibition of torture is a peremptory norm of general international law. An examination of the various instruments cited by the Court, which include the Universal Declaration of Human Rights and the ICCPR, shows that the prohibition of torture, which is part of customary international law, has become a peremptory norm. That is so because they all reflect the values that the Court identified in the often cited passage from the 1951 *Reservations* Advisory Opinion (see paragraph 52, above). These are values that protect a wider communitarian interest rather than the interest of individual States. The instruments are also very widely accepted by States, thereby signifying acceptance and recognition of the non-derogability of the norm prohibiting torture.

68. In paragraph 99 the Court also identifies the inclusion of the prohibition of torture in the domestic laws of many States and the regular denunciation of acts of torture in national and international fora as material with an evidentiary value in determining the *jus cogens* character of the prohibition of torture.

69. The first sentence in paragraph 99 refers to the prohibition of torture as part of customary international law and also as a peremptory norm. The next and longer sentence begins with the words, “[t]hat prohibition”, giving rise to some uncertainty as to whether the various evidentiary material that follows relates to the prohibition of torture as part of customary international law or as a norm of *jus cogens*. The Court had already noted in paragraph 97 that the parties in the case had agreed that acts of torture are regarded by customary international law as international crimes, independently of the Torture Convention. It is therefore reasonable to conclude that the prohibition that is referred to in the longer sentence relates to the prohibition of torture as a peremptory norm. Of course, it is possible that it could relate to the prohibition of torture both as a part of customary international law and as a peremptory norm. The first view is to be preferred, and would seem to be a necessary one for the approach taken in this Opinion, since the *jus cogens* requirement of recognition and acceptance by the international community of States as a whole of the non-derogability of the norm does not apply to a norm of customary international law.

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<sup>32</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 457, para. 99.

### **Evidentiary material supporting the *jus cogens* character of the right to self-determination**

70. The separate opinion now turns to an examination of the evidentiary material that substantiates the characterization of the right to self-determination as a norm of *jus cogens*, substantially following the approach in paragraph 99 of the *Obligation to Extradite or Prosecute*.

#### **1. International Instruments of universal application**

71. Below are international instruments referring to the right to self-determination:

- (a) The right to self-determination is a Charter right. Not only is it set out in the Charter, it is reflected in Article 1, paragraph 2, as one of the purposes of the United Nations. The Charter identifies this purpose as “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. The purposes of the Charter have a very special significance in the architecture established by the United Nations after the Second World War for the maintenance of international peace and security. The development of friendly relations among States is an important part of this system. This Opinion has already referred to the Court in *Military and Paramilitary Activities in and against Nicaragua* citing the International Law Commission’s statement in its commentary on Article 50 of its draft Articles on the Law of Treaties that the prohibition of the use of force is a norm of *jus cogens*. This is a strong authority for concluding that a norm that derives from the Charter and which, in particular, reflects a purpose of the United Nations, as does the right of peoples to self-determination in Article 1, paragraph 2, of the Charter, is very likely to warrant characterization as *jus cogens*.
- (b) Unsurprisingly, the 1970 Friendly Relations Declaration includes the principle of equal rights and self-determination of peoples as a principle of international law relating to friendly relations and co-operation among States, and imposes a duty on States to take the necessary action to promote the realization of that principle. In the *Legal Consequences of the Construction of a Wall* Advisory Opinion, the Court referred to this duty. In paragraph 148 of its current Advisory Opinion, the Court also refers to this principle, pointing out that consequent on the Charter making the principle of equal rights and self-determination one of the purposes of the United Nations, it then included provisions to “enable non-self-governing territories ultimately to govern themselves”.
- (c) United Nations Declaration on the Elimination of All Forms of Racial Discrimination — General Assembly resolution 1904 of 20 December 1963 — the fourth preambular paragraph refers to the Declaration on the Granting of Independence to Colonial Peoples and Countries, that is, 1514.
- (d) In 1966 the General Assembly adopted the ICCPR and the ICESCR. Paragraph 1 of Article 1 of both Covenants is identical to paragraph 2 of 1514. In its Advisory Opinion, the Court cited the two Covenants, indicating that paragraph 1 common to both Covenants affirms the right to self-determination. It has already been explained earlier in this separate opinion that the fact that the Advisory Opinion is confined to the right to self-determination in the context of decolonization does not in any way render the two Covenants irrelevant. The basis for the second paragraph in 1514 and Article 1, paragraph 1, of the Covenants is the same: respect for the inherent dignity and worth of the human person. This common basis points to the indivisibility of the rights set out in the two Covenants on the one hand and the rights addressed by the second paragraph of 1514 on the other. The entry into force of the two Covenants after the relevant date of 1968 becomes less important for the following reasons. First, the rights which the two Covenants entrench are based on the fundamental right of all peoples to self-determination as reflected in common Article 1, paragraph 1, of the Covenants and

paragraph 2 of 1514; that right had crystallized as a customary rule before 1968. Second, General Assembly resolution 2200 A which annexed the two Covenants received extremely strong support, having both been adopted unanimously by a body which at that time had 106 Member States.

- (e) General Comment No. 12 of the United Nations Human Rights Committee, established pursuant to the ICCPR, adopted on 13 March 1984 stated that

“the right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States . . . placed this provision as Article 1 apart from and before all of the other rights in the two Covenants.”

There can hardly be any value requiring more protection than that relating to respect for the inherent dignity and worth of the human person. The two Covenants seek to provide that protection. How can a norm that is essential — some say indispensable — for the enjoyment of all the rights in the two Covenants be anything other than a compelling right from which, in the wider public interest of the international community, no derogation is permitted?

- (f) In 1993, the Second World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, paragraph 2 of which provided, *inter alia*, that “the World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realisation of this right”.

- (g) In resolution 61/295 of 13 September 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples which affirmed “the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic social and cultural development”.

- (h) By resolution 2106 (XX), the fourth preambular paragraph of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly on 21 December 1965, affirms the right to self-determination as follows:

“Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end”.

- (i) General Assembly resolution 1803 of 14 December 1962 — the second preambular paragraph refers to the instruction given to the Commission on Permanent Sovereignty over Natural Resources to conduct a survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination.

- (j) The Vienna Convention on Succession of States in respect of Treaties — the sixth preambular paragraph refers to the principles of international law embodied in the Charter such as the principle of equal rights and self-determination of peoples.

- (k) The International Convention on the Suppression and Punishment of the Crime of Apartheid — General Assembly resolution 3068, 30 November 1973 — the third preambular paragraph refers to 1514.

The instruments referred to above that were adopted after 1968 are all confirmatory of the right to self-determination. Following the approach of the Advisory Opinion in paragraph 143, reference may be made to, and reliance placed, on them.

## 2. The views of States

72. States have on many occasions expressed the view that the right to self-determination is a norm of *jus cogens*:

- (a) At the Vienna Conference on the Law of Treaties 1968-1969 various States made that assertion — the Soviet Union and several developing countries. On the occasion of the adoption of the Friendly Relations Declaration many countries also made the same assertion.
- (b) In 1979 there was a very telling statement from the Legal Adviser to the United States State Department contained in a memorandum to the Acting Secretary of State, Warren Christopher. In that memorandum, the United States Legal Adviser expressed the view that the Soviet Union's invasion of Afghanistan was contrary to Article 2, paragraph 4, of the Charter as well as to the principle of self-determination of peoples. Given that Article 2 (4) was to be considered a peremptory norm of international law, he indicated that the 1978 Treaty between the USSR and Afghanistan was null and void by virtue of its conflict with a norm of *jus cogens*. Antonio Cassese describes this statement as "a very skilful and subtle way of elevating self-determination — albeit in an indirect and roundabout way — to the rank of *jus cogens*"<sup>33</sup>.

## 3. Views of international bodies and scholars

73. While it is principally State-oriented action, such as United Nations resolutions and multilateral conventions, that should be relied on to establish the right of self-determination as a norm of *jus cogens* — and this is so because Article 53 describes a peremptory norm of general international law as "one that is accepted and recognized by the international community of *States as a whole*" (my emphasis) — reference may also be made to influential views of certain international bodies and learned scholars:

- (a) Although the work of the International Law Commission on peremptory norms of general international law (*jus cogens*) is not yet concluded, it is noted that the Special Rapporteur has on several occasions in his reports described the right to self-determination as a peremptory norm, for example, paragraphs 92, 97, and 99 of his Third Report.
- (b) In that regard, paragraph 3 of the 1966 International Law Commission's commentary on Article 50 of the VCLT addressed, *inter alia*, the question whether the Commission should provide an illustrative list of norms of *jus cogens*. It was decided not to do so. However paragraph 3 of the Commentary on Article 50 indicated that some members of the Commission expressed the view that if examples were given, treaties violating the principle of self-determination should be included. Similarly, paragraph 5 of the International Law Commission's 2001 Commentary on Article 40 of the draft Articles on Responsibility of States for Internationally Wrongful Acts, identifies the right to self-determination as a peremptory norm that is "clearly accepted and recognised"<sup>34</sup>.

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<sup>33</sup> Antonio Cassese, *Self Determination of Peoples*, Cambridge University Press, 1995 p. 138.

<sup>34</sup> Commentary on the draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, p. 85, para. 5.

(c) Another example is James Crawford's (as he then was) description of 1514 as having "a quasi-constitutional status in international law which is similar to the Universal Declaration on Human Rights and the Charter itself"<sup>35</sup>. To place the right to self-determination in the same company as the Universal Declaration and the Charter is to put one's estimation of the status of the right at the very highest level.

### Article 53 of the VCLT

74. Article 53 of the VCLT states:

"Treaties conflicting with a peremptory norm of  
general international law (*jus cogens*)"

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

75. This Article, which gave rise to so much controversy at the Vienna Conference on the Law of Treaties, is fairly straightforward in its presentation and meaning. There are four points to be made. First, the consequence of a breach of the norm by a treaty is that the treaty is rendered void. This was a seminal development in international law, based on the traditional principle of sovereignty of States, and in particular, in the law of treaties in which the principle of *pacta sunt servanda* is paramount. Ultimately the controversy at the Conference was resolved by the insertion of Article 66 in the Convention giving to a party to a dispute concerning the application of *jus cogens* to a particular treaty the right to bring that dispute to the International Court of Justice. Second, the norm in question must be a norm of general international law and must obviously meet the requirements for that status. As we have seen, it is most usually norms of customary international law that become peremptory norms of general international law. Third, the norm in question must not only be a norm of general international law; it must be a norm that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. This is indeed the most important criterion for the identification of a norm of *jus cogens*. The material set out by the Court in *Obligation to Extradite or Prosecute* at paragraph 99 provides evidence of this acceptance and recognition in relation to the prohibition of torture. What is required is acceptance and recognition by the international community of States *as a whole* — an important consideration, signifying that unanimity among all States is not required. Fourth, the consequence of a norm being a peremptory norm of general international law is that there can be no derogation from it. This consequence goes to the core of a norm of *jus cogens*. It is the distinguishing feature of such a norm.

76. The foregoing analysis shows that there is a close relationship between obligations *erga omnes* and a norm of *jus cogens*. Certainly both norms reflect fundamental values of the international community. While a *jus cogens* norm will always result in an obligation *erga omnes*, an *erga omnes* obligation will not always reflect a norm of *jus cogens*.

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<sup>35</sup> James Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, 1979, p. 604.

77. In light of the analysis of the case law of the Court and Article 53 of the VCLT, it is concluded that the right to self-determination is a norm of *jus cogens* and had that status at the relevant period for the following reasons:

- (a) it is a norm of customary international law that has become a peremptory norm of general international law, which is recognized and accepted by States as a whole even without conventional obligation to do so;
- (b) it is a norm that reflects principles that have a moral and humanitarian underpinning, serving a wider public, communitarian purpose;
- (c) it is a norm that protects one of the most fundamental values of the international community, namely, the obligation to respect the inherent dignity and worth of the human person, which forms the basis of the right of peoples to freely determine their political status on the bases set out in 1514. Indeed, as a right that is seen as essential for the enjoyment of all the rights entrenched in the ICCPR and ICESCR, how could it not be a norm of *jus cogens*?
- (d) it is a norm that is universally applicable in that it applies to all States;
- (e) the evidentiary material set out in paragraphs 71 to 73 above establishes not only the existence of the norm of the right to self-determination as a rule of customary international law, but also as a peremptory norm of general international law; in particular, the instruments referred to show the recognition and acceptance by States of the non-derogability of the norm.

78. A comment is warranted on the Court's case law as a whole.

79. In its case law, the Court's reasoning on *jus cogens* is largely based on the well-known passage of the 1951 *Reservations to the Convention on the Crime of Genocide* Advisory Opinion, (paragraph 52 above) in which the term *jus cogens* does not appear. That, of course does not invalidate reliance on the passage.

80. Scholars have argued that *Barcelona Traction* was an apology for the 1966 Judgment on South West Africa. Given that that case established obligations *erga omnes*— itself a concept closely related to *jus cogens*— there would seem to be a historical, if not jurisprudential, connection between the development of the law on *jus cogens* and the development of the law on decolonization, which was at the heart of the 1966 Judgment in the *South West Africa* cases.

81. There is no need to venture into the stormy seas of the debate concerning the doctrinal basis of *jus cogens*: natural law or consent-based positivism. However, there is an inescapable contrast between the strong natural law tone of the 1951 *Reservations* case— “contrary to moral law” and “the most elementary principles of morality”— and the more positivist, consent and evidence-based approach in *Obligations to Extradite or Prosecute*. The contrast remains striking, notwithstanding the Court's description, 61 years later, of rules of international humanitarian law as “the intransmissible principles of international customary law” in the *Legality of the Threat or Use of Nuclear Weapons*. Twelve years before that decision, a trial chamber of the International Criminal Tribunal for the former Yugoslavia found that “most norms of international humanitarian law in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms or *jus cogens* i.e. of a non-derogable and overriding character”<sup>36</sup>. It may be that

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<sup>36</sup> *Prosecutor v. Kupreskic*, IT-95-16-T, para. 520.

the doctrinal controversy will be settled along the lines of Judge Bedjaoui's declaration in the *Legality of the Threat or Use of Nuclear Weapons* that

"[t]he resolutely positivist, voluntarist approach of an international law still current at the beginning of the century . . . has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community"<sup>37</sup>.

Here the eminent judge seems to be steering a course, avoiding the pitfalls of both natural law and positivism and instead, mooring his approach to an international law reflecting what he calls a "collective juridical conscience".

82. The most striking feature of the Court's case law is the apparent reluctance that it reveals on the part of the Court to engage fully with the subject of *jus cogens*, at times only finding its application in an indirect and oblique manner, and at other times, not pronouncing on the application of the norm. Consequently, the keen observer may conclude that, despite finding the application of *jus cogens* several times in its work, the Court's embrace of the concept is somewhat hesitant.

#### **Application of the norm of *jus cogens* in the law of treaties in the context of these advisory proceedings**

83. Having found that the right to self-determination is a norm of *jus cogens*, the question arises whether there was a treaty between the United Kingdom and the United States that conflicted with it. If that is the case, that treaty would, pursuant to Article 53 of the VCLT, be void.

84. On 30 December 1966, the United Kingdom and the United States adopted an Exchange of Notes constituting an Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory (with Annexes) ("the 1966 Agreement")<sup>38</sup>. Paragraph 2 (a) of the 1966 Agreement provides:

"In the case of the initial United States requirement for the use of a particular island the appropriate governmental authorities shall consult with respect to the time required by the United Kingdom authorities for taking administrative measures that may be necessary to enable any such defence requirement to be met."

85. An Agreed Minute of the same date indicates that "the following agreement and understanding [was] reached:

With reference to paragraph 2 (a) of the Agreement, the administrative measures referred to are those necessary for modifying or terminating any economic activity then being pursued in the islands, resettling any inhabitants, and otherwise facilitating the availability of the islands for defence purposes."

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<sup>37</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 270, declaration of Judge Bedjaoui, para. 13.

<sup>38</sup> Exchange of Notes constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the British Indian Ocean Territory, United Nations, *Treaty Series*, 1967. Vol. 603, p. 274, No. 8737.

86. In addition to the 1966 Agreement imposing an obligation on the United Kingdom to make the island available to the United States for defence purposes, it also dealt with the collateral matter of the administrative measures that the United Kingdom would have to take in relation to the discharge of that obligation. These measures are as much a part of the 1966 Agreement as the United Kingdom's agreement to make the islands available for defence purposes. Significantly the United Kingdom was charged with the responsibility of the resettlement of the inhabitants. Although the Agreed Minute speaks of resettlement, it necessarily implies removal of the inhabitants prior to their resettlement. The Court's Advisory Opinion indicates that all the Chagossians were removed between 1967 and 1973.

87. The objective of the 1966 Agreement to make the islands available to the United States for defence purposes and the obligations incurred by the United Kingdom under the Agreed Minute, including in particular, resettlement of the Chagossians who had been removed, are all in conflict with the right of the peoples of Mauritius including the Chagossians, to self-determination. The Advisory Opinion makes clear that the essence of this right is the obligation to respect the freely and genuinely expressed will of colonial peoples as to their political status and economic, social and cultural development. Nowhere in the proceedings is there any evidence that the peoples of Mauritius, including the Chagossians, were consulted and their freely and genuinely expressed will ascertained as to the establishment of the military base on the islands of the archipelago, and the removal and resettlement of the inhabitants of the islands. Of course, the 1966 Agreement was concluded against the background of the United Kingdom's detachment of the Chagos Archipelago from Mauritius some 13 months before, on 8 November 1965. The Court in its Advisory Opinion has found that this act contravened the right to self-determination. However that finding does not mean that other acts carried out in the decolonization process by the administering Power did not also contravene the *jus cogens* norm of the right to self-determination.

88. The 1966 Agreement therefore conflicts with the right to self-determination of the peoples of Mauritius including the Chagossians, and is void by virtue of Article 53 of the VCLT, since that right is a norm of *jus cogens*. The 1966 Agreement is incapable of producing any legal effects. According to the *Monetary Gold* principle, the Court will not exercise jurisdiction where the legal interests of a third State would form "the very subject matter" of the claim<sup>39</sup>. In my view, that principle would not prevent the Court making a finding of voidness of the 1966 Agreement in the circumstances of these proceedings.

#### **Application of the norm of *jus cogens* in the law of State responsibility in the context of these advisory proceedings**

89. In its Advisory Opinion, the Court found that the detachment of the archipelago by the United Kingdom was an unlawful act. The legal consequences of an unlawful act that breaches a peremptory norm are addressed by Articles 40 and 41 of the International Law Commission draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. These Articles, which would appear to reflect general international law, relate to the consequences of serious breaches of an international obligation. Article 41 is devoted to consequences of a serious breach of an obligation arising under a peremptory norm of general international law. "Serious breach" is defined as a "gross or systematic failure by the responsible State to fulfil the obligation". It is beyond question that the United Kingdom's detachment of the archipelago from Mauritius is a gross failure on the part of the United Kingdom. States have an obligation not to "recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation". The Commentary to the Draft Articles makes clear that

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<sup>39</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19.

this duty applies to all States, including the responsible State. In the *Legal Consequences of the Construction of a Wall*, the Court found that all States had a similar obligation in respect of the breach of the right to self-determination, which it confirmed as a right establishing obligations *erga omnes*.

### PART III: THE QUESTION OF MAURITIUS’ “CONSENT” TO DETACHMENT

90. The principal findings of the Court in relation to this question are set out in paragraph 172 of the Advisory Opinion. First, it is stated that at the time of the “consent” to the detachment, Mauritius “was, as a colony, under the authority of the United Kingdom”. The Court then cites a passage from a report from the Committee of Twenty-Four to the effect that by the Constitution of Mauritius, it was the United Kingdom and its representatives and not the people of Mauritius that had real power. Second, it was the view of the Court that one could not speak of an international agreement when one “party” to it “was under the authority of the latter”. Third, the Court concludes that, having reviewed the circumstances in which the Council of Ministers agreed in principle, the detachment was not based on the “free and genuine expression of the will of the people concerned”.

91. In my view, the circumstances in which Mauritius is said to have “consented” to the detachment may be seen as forming part of a single transaction commencing with the meetings between the Mauritian Premier and the United Kingdom’s Prime Minister on 23 September 1965, and ending with the Council of Ministers confirming “agreement” with the detachment on 5 November 1965. The Advisory Opinion does not sufficiently identify the particular circumstances which demonstrate that the detachment was not based on the free and genuine expression of the will of the people of Mauritius, including the Chagossians. The separate opinion will now examine these particular circumstances.

92. The Advisory Opinion referred to the meeting on 23 September 1965 between the Premier of Mauritius and the British Prime Minister, and to the following brief that the Prime Minister’s Private Secretary sent to him in advance of the meeting:

“Sir Seewoosagur Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago . . . The key sentence in the brief is the last sentence of it on page three.”<sup>40</sup>

The key last sentence read: “The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach the Chagos by Order in Council, *without* Mauritius consent but this would be a grave step.” (Emphasis in original.)

93. During the meeting at 10 a.m. on 23 September 1965, the British Prime Minister made it abundantly clear to Sir Seewoosagur that he could return to Mauritius “either with Independence or without it” and that “the best solution of all might be Independence and detachment by agreement”<sup>41</sup>. Sir Seewoosagur was between the proverbial rock and a hard place. He “agreed” to

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<sup>40</sup> United Kingdom Colonial Office, *Note for the Prime Minister’s Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius*, PREM 13/3320 (22 Sept. 1965), p. 1.

<sup>41</sup> United Kingdom Foreign Office, Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 a.m. on Thursday, September 23, 1965, FO 371/184528 (23 Sept. 1965), p. 3.

the excision in order to obtain independence. The attempt by the United Kingdom to depict Mauritius as misrepresenting what actually happened during the meeting is not convincing; nor is the attempt to downplay the significance of the meeting with the submission that “Mauritius focuses on a short internal minute prepared for the Prime Minister ahead of the meeting, and also on a small part of the United Kingdom’s record of the meeting”. September 23, 1965 was a dark day in British diplomacy; on that day British colonial relations reached a nadir. The intent to bully, frighten and coerce the Mauritian Premier was all too obvious. If one needs an explanation of what was meant in paragraph 1 of 1514 by alien subjugation, domination and exploitation, one need look no further than the United Kingdom’s treatment of the Mauritian Premier. The intent was to use power to frighten the Premier into submission. It is wholly unreasonable to seek to explain the conduct of the United Kingdom on the basis that it was involved in a negotiation and was simply employing ordinary negotiation strategies. After all, this was a relationship between the Premier of a colony and its administering Power. Years later, speaking about the so-called consent to the detachment of the Chagos Archipelago Sir Seewoosagur is reported to have told the Mauritian Parliament, “we had no choice”<sup>42</sup>. It is also reported that Sir Seewoosagur told a news organization, the Christian Science Monitor that: “There was a nook around my neck. I could not say no. I had to say yes, otherwise the [noose] could have tightened.”<sup>43</sup> It is little wonder then that, in 1982, the Mauritian Legislative Assembly’s Select Committee on the Excision of the Archipelago concluded that the attitude of the United Kingdom in that meeting could “not fall outside the most elementary definition of blackmailing”<sup>44</sup>.

94. The Premier of Mauritius was appointed by the Governor under a constitutional provision<sup>45</sup> that directed him to appoint as the Premier the person in the Legislative Assembly who appeared to him to command the support of the majority of the members of that Assembly. The people of Mauritius gained adult suffrage in 1957. The Assembly consisted of 40 elected and 15 nominated members. It is possible that the Premier as well as any decision that he made could be seen as reflecting the will of the peoples of Mauritius, provided he was himself free and independent in making decisions affecting his people. But the circumstances in which the Premier gave his “consent” to the detachment of the Chagos Archipelago during his meeting with the British Prime Minister were wholly antithetical and repugnant to the free expression of his own will. The general atmosphere was one of intimidation and coercion. Therefore any “consent” to the detachment given by the Premier in those circumstances would not accord with what was required by the customary and peremptory norm of the right to self-determination. That norm, as we have seen, required the free and genuine expression of the will of the peoples as to their political future. This subversion of Sir Seewoosagur’s personal will meant that his decision could not reflect the collective will of the people of Mauritius including the Chagossians.

95. The United Kingdom argued that the Mauritian Council of Ministers consented to the detachment on 23 September and on 5 November 1965. However, the Council of Ministers that gave its consent could not, by virtue of the manner in which it was constituted, be seen as reflecting the free and genuine expression of the will of the people. It simply was not sufficiently independent of the Governor to be capable of reflecting in its decision-making the will of the peoples of Mauritius including the Chagossians. The Council consisted of 10 to 13 members, the Chief Secretary and the Premier. The members of the Council were appointed by the Governor, after

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<sup>42</sup> Mauritius Legislative Assembly, *Speech from the Throne —Address in Reply: Statement by the Prime Minister of Mauritius*, 11 Apr. 1979, p. 456.

<sup>43</sup> See reference to that statement in Mauritius Legislative Assembly, *Reply to PQ No. B/1141* (25 Nov. 1980), p. 4223.

<sup>44</sup> Mauritius Legislative Assembly, Report of the Select Committee on the Excision of the Chagos Archipelago, No. 2 of 1983, June 1983, para. 52 E.

<sup>45</sup> Mauritius (Constitution) Order 1964, 26 February 1964, Article 60 (1).

consultation with the Premier. They were persons who were either elected or nominated members of the Legislative Assembly, which consisted of 40 elected members and up to 15 members nominated by the Governor<sup>46</sup>. The nominated members of the Legislative Assembly held office at the pleasure of the Governor<sup>47</sup>. The Governor presided over the meetings of the Council and determined whether a meeting could take place at all. Questions regarding membership of the nominated members of the Council were determined by the Governor acting in his discretion<sup>48</sup>. Moreover, although under Section 59 of the Constitution, the Governor was obliged to consult with the Council of Ministers on policy matters, he was not obliged to do so in any situation where, in his judgment, “Her Majesty’s service would sustain material prejudice if the Council was consulted thereon”<sup>49</sup>. The important point about this Council is that every single member (even those elected) ultimately owed his appointment to the Governor. There could be no Council without the Governor. It is entirely possible that, showing scant regard for democratic governance, the Council of Ministers could have been constituted by the Governor with 13 persons nominated by him and holding office at his pleasure. The lack of real power by the representatives of Mauritius has been highlighted by the Court in its reference to the Committee of Twenty Four’s Report that in Mauritius power was effectively in the hands of the United Kingdom and its representatives, and not the representatives of Mauritius.

96. Although the Governor’s appointment of members of the Council of Ministers was done after consultation with the Premier, he had no obligation to give effect to any recommendation that might have been made by the Premier. In those circumstances a decision of that Council “consenting” to the detachment could never be taken as reflecting the free and genuine expression of the will of the people. Structured as it was, it is not unlikely that the Council would reflect the will of the Governor rather than the will of the people. The Governor’s allegiance was not to the people of Mauritius including the Chagossians but to Her Majesty. That is why the Mauritius (Constitution) Order provided that the Governor was not obliged to consult the Council in any situation where, in his view, such consultation would prejudice Her Majesty’s service. On that basis therefore the “consent” of the Council of Ministers to the detachment amounts to nothing because it was not representative of the will of the peoples of Mauritius including the Chagossians.

97. No doubt it was the presence of undemocratic features in colonial governance of the kind described above that prompted the General Assembly to emphasize that the will of the people was to be ascertained through “plebiscites or other recognized democratic means, preferably under the auspices of the United Nations”<sup>50</sup>. Principle IX of resolution 1541 (XV) of 15 December 1960 reiterates that integration should be based on the result of the “freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage”.

98. The United Kingdom also argued that the “consent” of Mauritius to the detachment was given in the general election that was held in 1967. The United Kingdom maintained that the political party which supported the detachment won the majority in those elections and therefore this meant there was no negative public reaction to the detachment. The reality, however, is that by the time of the elections in 1967 the detachment was a fait accompli in that it had already been carried out and the United Kingdom had already entered into an agreement with the United States

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<sup>46</sup> Mauritius (Constitution) Order, Art. 27 (1). It also included the Speaker and the Chief Secretary *ex officio*.

<sup>47</sup> Mauritius (Constitution) Order, Art. 32 (1).

<sup>48</sup> Mauritius (Constitution) Order, Art. 34 (1).

<sup>49</sup> Mauritius (Constitution) Order, 2. 59 (2).

<sup>50</sup> United Nations General Assembly, res. 637 A (VII).

of America for the archipelago to be used for defence purposes for 50 years. In the election the people were not given the option of retaining the archipelago as part of Mauritius with independence. That election therefore cannot be seen as a reflection of the will of the peoples of Mauritius, including the Chagossians, as to the detachment.

99. The story of the Chagossians as told in these proceedings is in three parts — the detachment of the archipelago in 1965, the Agreement to allow the United States to install a military base on the islands and the removal of the Chagossians from the islands. Both in its several parts and as a whole, this is a story of alien subjugation, domination and exploitation, condemned by 1514, and which in every respect breached the *jus cogens* right of the people of Mauritius, including the Chagossians, to self-determination and independence.

100. This analysis substantiates the conclusion of the Court that the detachment was not based on the free and genuine expression of the will of the people concerned.

#### **PART IV: THE PLIGHT OF THE CHAGOSSIANS**

101. The Court's Advisory Opinion devotes a section to what is described as "the situation of the Chagossians". Given the circumstances in which they find themselves some five and a half decades after the detachment of the archipelago, it might be more appropriate to speak of "the plight of the Chagossians".

102. The Chagossians are a people uprooted from their homeland and taken against their will to other places, an act strikingly redolent of the abduction of millions from Africa four centuries ago, their transportation to other countries and enslavement to work on plantations. The majority of Chagossians were forcibly removed. Others who had travelled outside the archipelago for various purposes were prevented from returning. Mr. Louis Olivier Bancoult, was born on Peros Banhos in 1964. His family and himself had travelled to Mauritius for medical treatment. They were prevented from returning to their home. Mr. Bancoult would have left the archipelago when he was about one year old. He is the founder and Chairperson of the Chagos Refugee Group and has been involved in a representative capacity either directly or indirectly in all of the litigation that has taken place since the Chagossians' removal from the archipelago. He has challenged the action of the United Kingdom Government in its courts on several occasions over the last twenty years, the last case being Bancoult No. 5, a decision of the United Kingdom's Divisional Court on 8 February 2019. Mr. Bancoult, who deserves a prestigious international award for the courage and tenacity he has shown on behalf of his people, has not succeeded in any of his actions. Today, as the Court has said in its Advisory Opinion, he and the other Chagossians have not been able to return to their home as a result of United Kingdom laws and decisions of its courts.

103. A number of Chagossians attended the advisory proceedings in the Great Hall of Justice. Ms Marie Liseby Elysé was one. She made a statement for presentation to the Court. Since she would have only been able to address the Court in Kreol and is unable to read a written statement, her statement was presented in the form of a video recording. An English translation of

her speech was submitted to the Court. Ms Elysé presents a human face in this distressing saga, an aspect of which — the administration of the archipelago by the United Kingdom — the Court has found must now be brought to an end.

104. Below is the transcript of the statement by Ms Elysé – 14 August 2018:

“My name is Liseby Elysé. I was born on 24 July 1953 in Peros Banhos. My father was born in Six Iles. My mother was born in Peros Banhos. My grandparents also were born there. I form part of the Mauritius delegation. I am telling how I have suffered since I have been uprooted from my paradise island. I am happy that the International Court is listening to us today. And I am confident that I will return to the island where I was born.

In Chagos everyone had a job, his family and his culture. But all that we ate was fresh food.

Ships which came from Mauritius brought all our goods. We received our groceries. We received all that we needed. We did not lack anything. In Chagos everyone lived a happy life.

But one day the administrator told us that we had to leave our island, leave our houses and go away. All persons were unhappy. They were angry that we were told to go away. But we had no choice. They did not give us any reason. Up to now we have not been told why we had to leave.

But afterwards ships which used to bring food stopped coming. We had nothing to eat. No medicine. Nothing at all. We suffered a lot. But then one day, a ship called Nordvaer came. The administrator told us we had to board the ship, leaving everything, leaving all our personal belongings behind except a few clothes and go. People were very angry about that and when this was done, it was done in the dark. We boarded the ship in the dark so that we could not see our island. And when we boarded the ship, conditions in the hull of the ship were bad. We were like animals and slaves in that ship. People were dying of sadness in that ship.

And as for me I was 4 months pregnant at that time. The ship took 4 days to reach Mauritius. After our arrival, my child was born and died. Why did my child die? For me, it was because I was traumatized on that ship, I was very worried, I was upset. This is why when my child was born, he died. I maintain we must not lose hope. We must think one day will come when we will return on the land where we were born. My heart is suffering, and my heart still belongs to the island where I was born.

But nobody would like to be uprooted from the island where he was born, to be uprooted like animals.

And it's heart breaking. And I maintain justice must be done. And I must return to the island where I was born.

Don't you feel that it is heart breaking when someone is uprooted from his island like an animal and he does not know where he is being brought?

And I am very sad. I still don't know how I left my Chagos. They expelled us by force. And I am very sad. My tears keep rolling every day. I keep thinking I must return to my island. I maintain I must return to the island where I was born and I must

die there and where my grandparents have been buried. In the place where I took birth, and in my native island.

I certify that this is an accurate translation from Kreol into English.

Anirood Pursunon  
Deputy Permanent Secretary  
Prime Minister's Office  
17 August 2018"

105. Ms Elysé's statement paints a picture of a simple, happy and almost idyllic life on the archipelago. It was her "paradise lost" that Mr. Bancoult, just a year old when he left, has spent the last two decades of his life trying to "regain".

106. Ms Elysé said that the conditions in the hull of the ship that transported the Chagossians from the archipelago were "bad", and that they were "like animals and slaves in that ship". The irony of this statement should not be lost on the international community, since some two centuries before her ancestors had been brought to the island and enslaved to work on coconut plantations; they were freed in the 1830s, but in the hull of the ship she experienced another enslavement.

107. The right to return to one's country is a basic human right protected by Article 12 of the ICCPR. It is the humanity of the Chagossians that has been violated. The 1951 *Reservations to the Convention on the Crime of Genocide* Advisory Opinion speaks about that humanity when it refers to conduct "contrary to moral law" and a purpose that "endorses the most elementary principles of morality". The Court in the well-known passage of which these phrases are a part, identifies the very essence of a norm of *jus cogens* and an obligation *erga omnes*: principles that protect the fundamental values of the international community.

108. In *Secretary of State for the Foreign and Commonwealth Affairs v. the Queen* (on application of Bancoult) 2007 EWCA Civ. 498, Judge Sedley spoke persuasively of the right to return to one's home when he said in the Court of Appeal judgment:

"The point is that the two Orders in Council negate one of the most fundamental liberties known to human beings, the freedom to return to one's own homeland, however poor and barren the conditions of life, and contingent though return may be on the property rights of others; and that they do this for reasons unconnected with the well-being of the people affected."

This judgment of the Court of Appeal that was in favour of Mr. Bancoult's position was overturned by the House of Lords.

109. The story of the Chagossians is a human tragedy that has no place in the twenty-first century. It is a story that would appear to bely the greatest advance in international law since 1945: as a response to the atrocities of the Second World War, the development of a body of law based on respect for the inherent dignity and worth of the human person. The United Kingdom itself was a significant actor in that development, which must now be made by all those concerned to work to the advantage of the Chagossians.

110. The Court has rightly taken note of the apology given by the United Kingdom for the treatment of the Chagossians.

111. The General Assembly identified the question of the resettlement of the Chagossians as an issue on which it wished to be advised by the Court. The Court, noting that this question relates to fundamental rights of the individual, has remitted it to the General Assembly, stressing that it should be taken into account during the completion of the decolonization of Mauritius.

*(Signed)* Patrick ROBINSON.

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