

## SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

### *Table of Contents*

	<i>Paragraphs</i>
I. <i>Prolegomena</i> .....	1
II. The Long-Standing United Nations Acknowledgment of, and Commitment to, the Fundamental Right to Self-Determination of Peoples. ....	6
1. U.N. General Assembly Resolutions along the Fifties.....	9
2. U.N. General Assembly Resolution 1514 (XV) of 1960 - Declaration on the Granting of Independence to Colonial Countries and Peoples. ....	13
3. Successive U.N. General Assembly Resolutions (1961-1966) in Support of the Declaration on the Granting of Independence to Colonial Countries and Peoples.....	18
4. U.N. General Assembly Resolution 2066(XX) of 1965 on the “Question of Mauritius”.....	21
5. U.N. General Assembly Resolutions (1966-1967) in Support of the Right of Peoples to Self-Determination.....	23
6. U.N. General Assembly Resolution 2621(XXV) of 1970 on the Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.....	25
7. U.N. General Assembly Resolution 2625(XXV) 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. ....	27
III. Eradication of Colonialism: Projection in Time of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and of Successive U.N. General Assembly Resolutions.....	29
IV. The International Law of Decolonization as a Manifestation of the Humanization of Contemporary International Law. ....	38
V. The Right to Self-Determination in the Two U.N. Covenants on Human Rights of 1966.....	56
1. Article 1 of the two U.N. Covenants on Human Rights of 1966. ....	56
2. Human Rights Committee, General Comment n. 12 (of 1984) on Article 1 of the Covenant(s) (Right to Self-Determination of Peoples).....	60
3. Human Rights Committee, Observations on Reports by States Parties to the Covenant on Civil and Political Rights, Focusing on Chagos Islanders. ....	63
4. Human Rights Committee: Additional Considerations.....	65
VI. The Acknowledgment of the Right to Self-Determination in the Case-Law of the International Court of Justice.....	69
VII. The Acknowledgement of the Right to Self-Determination by the II U.N. World Conference on Human Rights (Vienna, 1993).....	77
VIII. A Question from the Bench to All Delegations of Participants in the Oral Advisory Proceedings.....	87
IX. The Answers from Delegations of Participants in the Oral Advisory Proceedings. ....	88
1. Answers from Delegations.....	88
2. Comments on the Answers.....	105

3. General Assessment.....	112
X. The Fundamental Right to Self-Determination in the Domain of <i>Jus Cogens</i> .....	120
1. Early Acknowledgement of <i>Jus Cogens</i> .....	120
2. Reassertions of <i>Jus Cogens</i> in the Present Advisory Proceedings.....	129
XI. Criticism of the Insufficiencies in the ICJ’s Case-Law Relating to <i>Jus Cogens</i> .....	151
XII. <i>Opinio Juris Communis</i> and <i>Jus Cogens</i> : Conscience above the “Will”.....	170
1. <i>Jus Cogens</i> : The Existence of <i>Opinio Juris Communis</i> .....	171
2. <i>Recta Ratio</i> : <i>Jus Cogens</i> and the Primacy of Conscience above the “Will”.....	175
XIII. Rights of Peoples, Beyond the Strict Inter-State Outlook.....	202
XIV. Conditions of Living: The Longstanding Tragedy of Imposed Human Suffering.....	219
XV. <i>Opinio Juris Communis</i> in U.N. General Assembly Resolutions.....	232
XVI. The Duty to Provide Reparations for Breaches of the Right of Peoples to Self-Determination.....	242
1. Temporal Perspective.....	242
2. Reassertions of the Duty to Provide Reparations in the Present Advisory Proceedings.....	245
3. The Indissoluble Whole of Breaches of the Right and Duty of Prompt Reparations.....	257
XVII. The Vindication of the Rights of Peoples, with Reparations, and the Mission of International Tribunals.....	264
XVIII. The Vindication of the Rights of Individuals and of Peoples and the Important Role of General Principles of Law in the Realization of Justice.....	288
XIX. Epilogue: A Recapitulation.....	306

## I. PROLEGOMENA.

1. I vote in support of the adoption today, 25 February 2019, of the present Advisory Opinion of the International Court of Justice (ICJ), on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, for concurring with the conclusions that the Court has reached, set forth in the *dispositif*. As I have come to such conclusions on the basis of a reasoning at times clearly distinct from that of the Court, and as there are some points which, in my understanding, either have not been sufficiently dealt with by the ICJ, or deserve more attention, - and even relevant points which have not been considered at all by the Court, - I thus feel obliged, in the present Separate Opinion, to dwell upon them and to lay on the records the foundations of my own personal position thereon.

2. To that end, I shall begin by addressing the long-standing United Nations acknowledgment of, and commitment to, the fundamental right to self-determination of peoples, from 1950 onwards, as reflected in successive resolutions of the General Assembly. Following this, I shall examine the eradication of colonialism, with the projection in time of the 1960 U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, and of successive U.N. General Assembly resolutions. In logical sequence, I shall then dwell upon the formation of the international law of decolonization as a manifestation of the humanization of contemporary international law.

3. Next, I shall focus attention on the right to self-determination in the two U.N. Covenants on Human Rights of 1966, and on the contribution of the Human Rights Committee on the matter, followed then by the examination of the acknowledgment of that right in the case-law of the ICJ, as well as at the II U.N. World Conference on Human Rights (Vienna, 1993). I shall then turn attention to the question I put to all participating Delegations in the ICJ's oral advisory proceedings, and to their written answers, and comments thereon, and proceed to my own assessment of them.

4. I shall in sequence dwell upon the fundamental right to self-determination in the domain of *jus cogens*, from the early acknowledgment of this latter to reassertions of *jus cogens* in the present advisory proceedings. Following this, I shall proceed to my criticism of the insufficiencies in the ICJ's case-law relating to *jus cogens*. Accordingly, I shall then dedicate my following reflections to *jus cogens* and the existence of *opinio juris communis*, to the *recta ratio* in respect of *jus cogens* and the primacy of conscience above the "will", as well as to the rights of peoples beyond the strict inter-State outlook. This will bring me to consideration of conditions of living and the longstanding tragedy of imposed human suffering.

5. In sequence, after examining *opinio juris communis* in U.N. General Assembly resolutions, I shall dwell upon the duty to provide reparations for breaches of the right of peoples to self-determination, reasserted by participating Delegations in the present ICJ's advisory proceedings. After singling out the indissoluble whole of breach and the duty of prompt reparation, I shall then examine the vindication of the rights of peoples, with reparations, in relation to the mission of international tribunals. This will lead me to address the vindication of the rights of individuals and of peoples and the important role of general principles of law in the realization of justice. Last but not least, I shall, in an epilogue, proceed to a recapitulation of the points sustained in my present Separate Opinion.

## **II. THE LONG-STANDING UNITED NATIONS ACKNOWLEDGMENT OF, AND COMMITMENT TO, THE FUNDAMENTAL RIGHT TO SELF-DETERMINATION OF PEOPLES.**

6. The present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, requested to the ICJ by the U.N. General Assembly, can in my view be properly considered in the framework of the longstanding endeavours of the General Assembly itself in full support of the right of peoples and nations to self-determination. There have been moments of historical importance for the transformation and evolution of contemporary international law, the new *jus gentium* of our times, reflected, e.g., in its landmark 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, followed, one decade later, by its *célèbre* 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

7. There have been, along the years, several other resolutions of the General Assembly to be kept in mind to the same effect, as I shall survey in the present Separate Opinion. The two questions put to the ICJ by the General Assembly are clearly formulated in the following terms:

“Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?”

What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

8. Those two questions lodged with the ICJ in the present request by the U.N. General Assembly for an Advisory Opinion are to be examined in the aforementioned framework of United Nations action. In this respect, may I initially point out that the fundamental right to self-determination has a long history, preceding the *célèbre* 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, going back to the earlier years of the U.N. General Assembly.

### **1. U.N. General Assembly Resolutions along the Fifties.**

9. Thus, already in its resolution 421(V) of 04.12.1950, the General Assembly called upon the U.N. Economic and Social Council (ECOSOC) and its then Commission of Human Rights to study the "ways and means to ensure the right of peoples and nations to self-determination", in connection with the preparatory work of the Draft U.N. Covenant(s) on Human Rights (measures of implementation) (para. D-6). This provision was recalled in subsequent resolutions.

10. In this respect, General Assembly resolution 545(VI) of 05.02.1952, after referring to it, at first underlined the importance of ensuring that fundamental human right, as its violation had "resulted in bloodshed and war in the past and is considered a continuous threat to peace" (preamble). In the operative part of this resolution of February 1952, the General Assembly stated that it

*"Decides to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations"* (para. 1).

11. Some months later, the General Assembly, in its resolution 637(VII) of 16.12.1952, asserted (part A) that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights" (preamble); hence the importance to take "practical steps" to secure its realization (para. 3), with special attention (part B) to the exercise of the right to self-determination exercised by peoples of non-self-governing Territories (para. 1). Resolution 637(VII) of 1952 stressed (part C) the importance of securing "international respect for the right of peoples to self-determination" (preamble and paras. 1-2).

12. In sequence, General Assembly resolution 738(VIII) of 28.11.1953, referring to previous resolutions, reiterated "the importance of the observance of, and respect for, the right to self-determination in the promotion of world peace and of friendly relations between peoples and nations" (preamble). The General Assembly insisted on this point in its following resolution 833(IX) of 04.12.1954 (para. 1(c)), as well as in its resolution 1188(XII) of 11.12.1957 (preamble, and para. 1); in this latter, it further warned that "disregard for the right to self-determination not only undermines the basis of friendly relations among nations" as defined in the U.N. Charter, but also "creates conditions which may prevent further realization of the right itself", in a situation which "is contrary to the purposes and principles of the United Nations" (preamble).

Thus, already in the fifties (1950 onwards), the U.N. General Assembly, in the aforementioned resolutions, expressed its firm commitment to the fundamental *right* of self-determination of peoples.

## **2. U.N. General Assembly Resolution 1514 (XV) of 1960 - Declaration on the Granting of Independence to Colonial Countries and Peoples.**

13. By the end of the fifties, the time was ripe for another important - and historical - step. In effect, in its resolution 1514(XV) of 14.12.1960, containing the “*Declaration on the Granting of Independence to Colonial Countries and Peoples*”, the General Assembly at first stressed, in its preamble, the need to secure universal respect for “fundamental human rights” and for the “self-determination of all peoples”; in sequence, it called for “the end of colonialism in all its manifestations”, and to “all practices of segregation and discrimination associated therewith”; it then asserted that “all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory”. To this end, it then declared that:

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

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.

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

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.

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.

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.

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”.

14. General Assembly resolution 1514(XV), of 14.12.1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, much contributed to the consolidation of the right to self-determination of peoples. In acknowledging that “the subjection of peoples to alien subjugation, domination and exploitation” is a “denial of fundamental human rights”, contrary to the U.N. Charter (para. 1), the General Assembly notably declared that all peoples “have the right to self-determination” (para. 2).

15. General Assembly resolution 1514(XV) of 1960 defined the right to self-determination as encompassing the right to “freely determine their political status and freely pursue their economic, social and cultural development” (para. 2). It further stated that “[a]ny 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” (para. 6).

16. The landmark Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) came to strengthen the international status of non-self-governing territories and of territories under trusteeship (para. 5), and to affirm in a categorical way the right of self-determination of peoples. As I pointed out some years ago, the 1960 Declaration thus went beyond the strictly inter-State dimension, turning attention to peoples and the safeguard of their rights<sup>1</sup>. The corresponding obligations came to be seen as opposable *erga omnes*, both *vis-à-vis* the State administering the territory at issue as well as *vis-à-vis* all the other States, i.e., obligations due to the international community as a whole.

17. The right to self-determination of peoples (living in non-self-governing territories or in other circumstances) became solidly grounded in the contemporary law of nations. The Law of the United Nations cared to reject the old objections of the wrongly assumed lack of political preparedness or economic inviability of those territories (para. 3). The aforementioned Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) added that the submission of peoples to foreign domination constituted “a denial of fundamental human rights” contrary to the U.N. Charter (para. 1).

### **3. Successive U.N. General Assembly Resolutions (1961-1966) in Support of the Declaration on the Granting of Independence to Colonial Countries and Peoples.**

18. After the adoption of its resolution 1514(XV) of 1960 containing the landmark Declaration and already along the first half of the 1960s, the General Assembly monitored, by means of the adoption of successive resolutions, the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, reiterating each time the importance of that Declaration and of the principles encompassed therein (General Assembly resolutions 1654(XVI), of 27.11.1961; 1810(XVII), of 17.12.1962; 1956(XVIII), of 11.12.1963; 2105(XX), of 20.12.1965; 2189(XXI), of 13.12.1966), for the exercise of the peoples’ right to self-determination.

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<sup>1</sup> A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 730-731 and 734-739; and cf. A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo* [1981], 2<sup>nd</sup>. rev. ed., Brasília, FUNAG, 2017, pp. 157-161.

19. Already in 1961, General Assembly resolution 1654(XVI) established the Special Committee on the Situation regarding the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the Special Committee on Decolonization or C-24), with the mission of monitoring the implementation of the 1960 Declaration. To this effect, the Special Committee was to make suggestions and recommendations on the progress and extent of the implementation of the 1960 Declaration, and to report its findings to the General Assembly, - as it has kept on doing along the years<sup>2</sup>.

20. General Assembly resolution 1654(XVI) of 1961 called upon the States concerned “to take action without further delay” (para. 2) in order to apply promptly the 1960 Declaration contained in the previous G.A. resolution 1514(XV) of 1960. This latter, it may be recalled, called upon all States to observe “faithfully” the provisions and principles contained in itself (para. 7). Thus, the *law-making* character of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples was duly reckoned shortly after its adoption, at the beginning of the sixties. And it was enhanced by successive General Assembly resolutions along the first half of that decade<sup>3</sup>, and from then onwards.

#### **4. U.N. General Assembly Resolution 2066(XX) of 1965 on the “Question of Mauritius”.**

21. At the time the United Kingdom was planning the separation of the Chagos Archipelago from Mauritius, before the independence of the latter, the General Assembly adopted its resolution 2066(XX), of 16.12.1965, on the “*Question of Mauritius*”. It warned that “any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples]”, contained in its earlier resolution 1514(XV) of 1960, and in particular of paragraph 6 thereof (cf. *supra*).

22. In this new resolution 2066(XX) of 1965, the General Assembly also invited the United Kingdom “to take effective measures with a view to the immediate and full implementation of resolution 1514(XV)”; moreover, after recalling its previous resolution 1514(XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly reaffirmed the “inalienable right” of the people of Mauritius to independence in accordance with that resolution (point 2), and invited the United Kingdom to comply with it (point 3) and “to take no action which would dismember the Territory of Mauritius and violate its territorial integrity” (point 4).

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<sup>2</sup> By means of still annually reviewing the list of Territories to which the 1960 Declaration is applicable, and making recommendations as to its implementation, - an issue which remains still central to the mission of the United Nations.

<sup>3</sup> Cf., to this effect, for a study of that time, S.A. Bleicher, “The Legal Significance of Re-Citation of General Assembly Resolutions”, 63 *American Journal of International Law* (1969) pp. 444-478. - For an account of the debates during the drafting of the resolution 1514(XV) of 1960 as an interpretation of the U.N. Charter disclosing *opinio juris* and contributing to the progressive development of international law, cf. O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, Nijhoff, 1966, pp. 163-185 and 243-245.

### **5. U.N. General Assembly Resolutions (1966-1967) in Support of the Right of Peoples to Self-Determination.**

23. Shortly after the detachment of the Chagos Archipelago from Mauritius took place, the U.N. General Assembly adopted several resolutions, notably resolutions 2232(XXI), of 20.12.1966, and 2357(XXII) of 19.12.1967, concerning the reports of the Special Committee on Decolonization. In both resolutions the General Assembly, after referring in their preambles to its aforementioned resolutions, to be implemented by the administering Powers, reaffirmed the “inalienable right” of peoples (of the territories at issue, including Mauritius), to self-determination.

24. General Assembly resolutions 2232(XXI) of 1966, 2357(XXII) of 1967, then reiterated that any attempt aimed at the “partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories” is “incompatible” with the principles and purposes of the United Nations Charter and of its own resolution 1514(XV) of 14.12.1960 (paras. 2 and 4).

### **6. U.N. General Assembly Resolution 2621(XXV) of 1970 on the Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.**

25. On the occasion of the tenth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly adopted resolution 2621(XXV), of 12.10.1970, on the Programme of Action for its full implementation. In its operative part, the continuation of colonialism was typified as a *crime*. Already in paragraph 1, the General Assembly

“*Declares* the further continuation of colonialism in all its forms and manifestations a crime which constitutes a violation of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law”.

26. In adopting the Programme of Action, it called upon U.N. member States to render “all necessary moral and material assistance” to peoples of colonial Territories “in their struggle to attain freedom and independence” (para. 3(2)) and to achieve “the speedy elimination of colonialism” (para. 3(3)(b)(iii)). The General Assembly further called upon compliance with all its relevant resolutions on the question of decolonization, so as to reach “the final liquidation of colonialism” (para. 9(a)).

### **7. U.N. General Assembly Resolution 2625(XXV) 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.**

27. Days later, the next important step in the relevant work of the General Assembly in the present domain was taken, with the adoption of its well-known resolution 2625(XXV), of 24.10.1970, containing the “*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*”, -

recognized by the ICJ itself as reflecting customary international law<sup>4</sup>. In this resolution, the General Assembly reiterated the principle that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations” (preamble).

28. This resolution containing the aforementioned Declaration on Principles of International Law then reiterated the duty of every State to promote the realization of the principle of equal rights and self-determination of peoples, notably in order to “bring a speedy end to colonialism” (para. 5(2)(b)). It further also recalled that “[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country” (para. 5(8)).

### **III. ERADICATION OF COLONIALISM: PROJECTION IN TIME OF THE 1960 DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES AND OF SUCCESSIVE U.N. GENERAL ASSEMBLY RESOLUTIONS.**

29. The ICJ itself addressed General Assembly resolution 2625(XXV) of 1970 containing the Declaration on Principles of International Law in the case *Nicaragua versus United States* (merits, Judgment of 27.06.1986): after referring to the “character of *jus cogens*” of the prohibition of the use of force in Article 2(4) of the United Nations Charter, it stated that the adoption by member States of the aforementioned 1970 Declaration afforded “an indication of their *opinio juris* as to customary international law” on the matter (para. 191).

30. For its part, the U.N. General Assembly, in other successive resolutions, has recognized the eradication of colonialism as one of the priorities of the United Nations. It has therein, accordingly, pursuant to its earlier resolutions on decolonization, again called for the attainment of the full exercise of the peoples’ right to self-determination. The General Assembly devoted its resolutions 43/47 of 22.11.1988, 55/146 of 08.12.2000, and 65/119 of 10.12.2010, to three succeeding international decades (periods 1990-2000, 2001-2010, and 2011-2020) for the eradication of colonialism. Furthermore, it subsequently reaffirmed (in 2015-2017) the incompatibility of colonialism, in any form, with the United Nations Charter, the Universal Declaration of Human Rights, and the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>5</sup>.

31. In this respect, on the occasion of the 50<sup>th</sup>. anniversary of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the U.N. General Assembly adopted its resolution 65/118, of 10.12.2010, whereby it again reiterated the “inalienable right of all peoples of the non-self-governing Territories to self-determination” (para. 1), after expressing its deep concern as to the fact that “colonialism has not yet been totally eradicated” (preamble). It then declared that

“the continuation of colonialism in all its forms and manifestations is incompatible with the Charter of the United Nations, the [1960] Declaration and the principles of international law” (para. 2).

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<sup>4</sup> ICJ, case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua versus United States of America*, merits, Judgment of 27.06.1986), paras. 191-193 (in respect of the principle of the prohibition of the use of force in customary international law).

<sup>5</sup> Cf., e.g., General Assembly resolutions 70/231, of 23.12.2015; 71/122, of 06.12.2016; and 72/111, of 07.12.2017.

32. General Assembly resolution 65/118, of 2010, requested the administering Powers to preserve the “cultural identity” and national unity of the peoples concerned, so as to foster their “unfettered exercise” of their right to self-determination and independence (para. 8). It then urged member States “to ensure the full and speedy implementation of the [1960] Declaration and other relevant resolutions of the United Nations” (para. 10). At last, it requested the Special Committee on Decolonization to identify “the most suitable ways” for the speedy and total application of the 1960 Declaration, and to propose measures for “the complete implementation of the [1960] Declaration in the remaining non-self-governing Territories” (para. 12).

33. Half a decade later, the U.N. General Assembly adopted its resolution 70/231, of 23.12.2015, wherein it began again by calling for the prompt “eradication of colonialism”, which continued to be one of the priorities of the United Nations (preamble), reiterating that the persistence of colonialism was

“incompatible with the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Universal Declaration of Human Rights” (para. 2).

34. It urged a speedy end to colonialism, so as to enable peoples to exercise their right to self-determination, including independence (paras. 3-4 and 8(a)(c)). This should be done, - it added, - in accordance with the relevant General Assembly resolutions on decolonization, focusing attention on the implementation by member States of General Assembly resolution 1514(XV) of 1960 and other relevant and successive General Assembly resolutions on the matter (para. 8(b)(c)).

35. In the following year, the U.N. General Assembly adopted its resolution 71/122, of 06.12.2016, warning first that the prompt eradication of colonialism has not yet been attained, and has remained “one of its priorities” (preamble). It then reiterated the same considerations found in the previous resolution 70/231, of 2015 (paras. 2-3). Moreover, it urged further advance in the “decolonization agenda” (para. 17), as well as the provision of “moral and material assistance, as needed, to the peoples of the non-self-governing Territories” (para. 15).

36. Once again, in the following year, in its resolution 72/111, of 07.12.2017, the U.N. General Assembly, reiterated these points (paras. 2-3, 18 and 16), and added its significant call upon the administering Powers concerned

“to terminate military activities and eliminate military bases in the non-self-governing Territories under their administration in compliance with the relevant resolutions of the General Assembly” (para. 14).

37. It can thus be seen that, as from General Assembly resolution 1514(XV) of 1960, a new epoch in the progressive development of contemporary international law had started, with the condemnation of colonialism as a denial and breach of fundamental human rights, contrary to the United Nations Charter itself. General Assembly resolution 1514(XV) of 1960 provided the legal framework for such development. The right to self-determination emerged as a true human right in

itself, a right of peoples, as promptly captured by expert writing since the adoption of General Assembly resolutions in the early sixties<sup>6</sup>.

#### IV. THE INTERNATIONAL LAW OF DECOLONIZATION AS A MANIFESTATION OF THE HUMANIZATION OF CONTEMPORARY INTERNATIONAL LAW.

38. Growing attention and care came to be devoted to the rights of peoples, and in particular to the right to self-determination as a right inherent to all peoples, as a *fundamental* human right (cf. part V, *infra*). There was accordingly a decisive move towards the *universalization* of the United Nations, with the gradual and considerable increase of its membership<sup>7</sup>, and greater attention to a matter of concern to the whole international community.

39. This move was fully in accordance with the United Nations Charter itself, which, may I here recall, as from its preamble presents the determination of “we, the peoples of the United Nations”, to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”, and in the “equal rights” of “nations large and small” (2<sup>nd</sup>. para.). Attention was focused on peoples - as shown in several of its provisions - and on the safeguard of values common to humankind.

40. According to its provisions, the realization of human rights without distinctions (Articles 1(3) and 13(1)(b)) was to be undertaken. There were express references to equal rights and self-determination of peoples (Articles 1(2) and 55), and to State duties towards peoples ensuing therefrom (“sacred trust”, Article 73). Respect was due to peoples, their rights and cultures. There was thus a new vision advanced by the United Nations Charter, so as “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind” (preamble, 1<sup>st</sup>. para.).

41. In addition, the references to the *principles* and the *purposes* of the United Nations were to be kept in mind, as they imposed upon members of the United Nations a “legal obligation” to act in accordance with them. It became their “legal duty to respect” fundamental human rights. Such provisions were adopted, after prolonged consideration before and during the 1945 San Francisco Conference,

“as part of the philosophy of the new international system and as a most compelling lesson of the experience of the inadequacies and dangers of the old”<sup>8</sup>.

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<sup>6</sup> Cf. A. Rigo Sureda, *The Evolution of the Right to Self-Determination - A Study of United Nations Practice*, Leiden, Sijthoff, 1973, pp. 221-222, 263-264 and 353; J.A. Carrillo Salcedo, *El Derecho Internacional en Perspectiva Histórica*, Madrid, Tecnos, 1991, pp. 101-102; J.A. de Obieta Chalbaut, *El Derecho Humano de la Autodeterminación de los Pueblos*, Madrid, Tecnos, 1993 (reimpr.), pp. 88, 91-92, 232 and 238.

<sup>7</sup> Cf., to this effect, J.A. Carrillo Salcedo, *El Derecho Internacional en Perspectiva Histórica*, *op. cit. supra* n. (6), p. 104; A. Truyol y Serra, *Histoire du droit international public*, Paris, Éd. Economica, 1995, pp. 156-157.

<sup>8</sup> H. Lauterpacht, *International Law and Human Rights*, London, Stevens & Sons Ltd., 1950, p. 147.

42. The humanist outlook of the law of nations was rescued. *Civitas maxima gentium* resurged in a new context, namely, that of the emergence, in the mid-XXth. century, of an “international law of decolonization”, moving towards a “universal common good”, keeping in mind the juridical equality of all States (including those that emerged from decolonization)<sup>9</sup>. The United Nations, much attentive to peoples, with its universalist outlook, much contributed to foster this humanist perspective proper of the classical conceptions of the *totus orbis*, or of the *civitas maxima gentium*.

43. May I here recall that, in his book of remembrances, René Cassin pondered that the United Nations Charter itself could be seen as emanating from “human conscience” against the atrocities of the II world war in disregard for the principle of humanity<sup>10</sup>. Already in its earlier years, - he added, - the United Nations, starting with the General Assembly, counted on the significant role, - from the 1955 Conference of Bandung onwards (*infra*), - of new States emerged from decolonization, including in the adoption of the two U.N. Covenants on Human Rights of 1966<sup>11</sup>, which provided in common Article 1 for the right to self-determination (cf. part V, *infra*). The importance of universality for the United Nations was rendered clear.

44. This new era in the progressive development of international law, of the acknowledgment of the right of peoples and nations to self-determination, was due to the awakening of the universal juridical conscience to the needs and aspirations of humankind as a whole, faithful to the perennial legacy of the jusnaturalist thinking of the “founding fathers” of the law of nations. In my own conception, this evolution is another significant manifestation of the historical process of *humanization* of contemporary international law<sup>12</sup>.

45. In effect, by the mid-1950s, the right of peoples to self-determination was already being firmly adjudicated at multilateral level. Thus, the 1955 Asian-African Conference of Bandung, held on 18-24.04.1955, with the participation of 29 countries, condemned colonialism and discrimination as a denial of fundamental rights in the sphere of education and culture, and declared its full support for fundamental human rights enshrined into the United Nations Charter and the Universal Declaration on Human Rights, encompassing the right of peoples to self-determination - expressed in U.N. resolutions - as “a prerequisite of the full enjoyment of all fundamental human rights”<sup>13</sup>.

46. The 1955 Asian-African Conference of Bandung condemned “colonialism in all its manifestations” as “an evil which should speedily be brought to an end”, for being “a denial of fundamental human rights” in breach of the United Nations Charter and “an impediment to the promotion of world peace”<sup>14</sup>. Moreover, the 1955 Bandung Conference sustained universal

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<sup>9</sup> Cf. A. Truyol y Serra, *La Sociedad Internacional* [1974], 2<sup>nd</sup>. ed. (reimpr.), Madrid, Alianza Edit., 1998, pp. 83, 85, 97-98 and 110-112, and cf. pp. 88, 167 and 169.

<sup>10</sup> R. Cassin, *La pensée et l'action*, [Paris,] Ed. F. Lalou, 1972, p. 115.

<sup>11</sup> *Ibid.*, pp. 130 and 172.

<sup>12</sup> Cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>nd</sup>. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 1-726.

<sup>13</sup> “Final Communiqué of the Asian-African Conference” (Bandung, 18-24.04.1955), reproduced in: 11 *Interventions - International Journal of Postcolonial Studies* (2009) n. 1, pp. 97 n. 2, and 98 n. 1.

<sup>14</sup> *Ibid.*, p. 99 n. 1.

membership of the United Nations<sup>15</sup>. The 1955 Conference, at last, called for respect for fundamental human rights, for the principles and purposes of the United Nations, and for justice and international obligations<sup>16</sup>; it further called for complete disarmament, including the prohibition and elimination of nuclear weapons<sup>17</sup>.

47. The 1955 Bandung Conference was promptly followed by other Conferences of the kind (such as those of Cairo, in December 1957-January 1958; of Accra, in April 1958; and of Addis Ababa, in June 1960), giving continuity to their aims. The Asian-African countries came then to count on the support of Latin American and Arab countries as well, fostering the process of decolonization<sup>18</sup>. The principles initially adopted at the 1955 Conference of Bandung were to become the most immediate antecedent, as well as goals, of the Non-Aligned Movement, founded, six years later, in a Conference held in Belgrade, in the first week of September 1961.

48. Latin American contribution to it benefited from its already firmly-grounded doctrine of international law<sup>19</sup>. In effect, also in respect of the work of the aforementioned Special Committee on Decolonization (*supra*), as from its beginning, - and even before it, - delegates of Latin American and Caribbean countries marked their presence and gave their contribution to the U.N. plenary debates of the General Assembly (1960-1961 onwards) in support of decolonization and the right of self-determination of peoples<sup>20</sup>.

49. The same occurred in even earlier debates of the IV Committee of the General Assembly (1949 onwards), as to the prospects of non-self-governing Territories and the U.N. trusteeship

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<sup>15</sup> *Ibid.*, p. 96 n. 11, and p. 100 n. 1.

<sup>16</sup> *Ibid.*, p. 102 ns. 1 and 10.

<sup>17</sup> *Ibid.*, p. 101.

<sup>18</sup> Cf., e.g., Various Authors, *Bandung, Global History, and International Law - Critical Past and Pending Futures* (eds. L. Eslava, M. Fakhri and V. Nesiha), Cambridge, Cambridge University Press, 2017, pp. 13-14, 20-21 and 243; R. Burke, *Decolonization and the Evolution of International Human Rights*, Philadelphia, University of Pennsylvania Press, 2010, pp. 8, 38 and 53-54; S.L.B. Jensen, *The Making of International Human Rights - The 1960s, Decolonization and the Reconstruction of Global Values*, Cambridge, Cambridge University Press, 2016, pp. 43, 51-56, 60, 62 and 64-65; among others.

<sup>19</sup> For a recent study of it, cf. A.A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des Cours de l'Académie de Droit International de La Haye* (2014) pp. 19-92.

<sup>20</sup> Cf., e.g., in the official records (*procès-verbaux*) of the plenary meetings of the General Assembly, the interventions of the delegates of Argentina (927th. meeting, of 29.11.1960, pp. 1005-1008; and 1174th. meeting, of 23.11.1962, pp. 810-811; and, later on, 1631st. meeting, of 14.12.1967, pp. 8-10); of Colombia (929th. and 1054th. meetings, of 30.11.1960 and 14.11.1961, pp. 1039-1041 and 633-638, respectively; and 1175th. meeting, of 26.11.1962, pp. 841-844); of Guatemala (1057th. meeting, of 17.11.1961, pp. 692-694); of Mexico (1058th. meeting, of 20.11.1961, pp. 701-703; and 1066th. meeting, of 27.11.1961, pp. 861-862; and 1270th. meeting, of 03.12.1963, pp. 10-12); of Venezuela (1059th. meeting, of 21.11.1961, pp. 745-746; and 1180th. meeting, of 29.11.1962, pp. 923-925); of Cuba (1060th. meeting, of 21.11.1961, pp. 755-757; of Chile (1631st. meeting, of 14.12.1967, pp. 12-13); of Brazil (1173rd. meeting, of 21.11.1962, pp. 801-804); of Costa Rica (1176th. meeting, of 26.11.1962, pp. 845-847); of Uruguay (1176th. meeting, of 26.11.1962, pp. 847-850); of Haiti (1192nd. meeting, of 14.12.1962, pp. 1110-1113); of Peru (1192nd. meeting, of 14.12.1962, pp. 1115-1116). - And cf. also, earlier on, in the official records of plenary meetings of the General Assembly, the interventions of the delegates of Guatemala (64th. meeting, of 14.12.1946, pp. 1360-1361); of Cuba (64th. meeting, of 14.12.1946, pp. 1363-1368); of the Dominican Republic (262nd. meeting, of 01.12.1949, pp. 449-450).

system, with the contribution likewise of delegates of Latin American and Caribbean countries<sup>21</sup>. The new world-wide movement of non-aligned countries, conformed in 1961, brought a change of paradigm for the United Nations<sup>22</sup>, in pursuance of its universalist outlook.

50. The *corpus juris gentium* was thereby enriched, with the vindication of the right of peoples to self-determination. In this connection, General Assembly resolution 1514(XV) of 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as General Assembly resolution 2625(XXV) of 1970, containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (cf. *supra*), came to be regarded as “authentic interpretations” of the U.N. Charter<sup>23</sup>, rendering the “postulate of self-determination” of peoples a precept “directly binding on States”<sup>24</sup>, and evidencing such enrichment of the *corpus juris gentium*.

51. The international law of decolonization was conformed with the support of international organizations, in the line of the aforementioned contribution of the United Nations. Thus, in the African continent, for example, the African Union (AU) - preceded chronologically by the Organization of African Unity (OAU) - has endeavoured, along the years, to secure the achievement of the right to self-determination of peoples, including in respect of the Archipelago of Chagos.

52. The former OAU as well as its successor, the AU, have both categorically condemned the military basis established in the island Diego Garcia (in Chagos). Thus, in its resolution AHG/Res. 99(XVII) of 04.07.1980, the OAU stated that Diego Garcia “has always been an integral part of Mauritius” (para. 3), and “was not ceded to Britain for military purposes” (para. 4). Thus, - it added, - “the militarization of Diego Garcia is a threat to Africa, and to the

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<sup>21</sup> Cf., e.g., in the official records (*procès-verbaux*) of the meetings of IV Committee of the General Assembly, the interventions, *inter alia*, of the delegates of the Dominican Republic (109th. meeting, of 27.10.1949, pp. 101-102; and 125th. meeting, of 16.11.1949, pp. 189-189); of Brazil (113th. meeting, of 02.11.1949, pp. 121-123; and 331st. meeting, of 12.10.1953, p. 97); of Guatemala (114th. meeting, of 03.11.1949, pp. 125-126; and 125th. meeting, of 16.11.1949, pp. 184-185 and 187-188); of Cuba (115th. meeting, of 03.11.1949, pp. 130-132; and 124th. meeting, of 14.11.1949, pp. 182-183; and 125th. meeting, of 16.11.1949, p. 187); of Venezuela (124th. meeting, of 14.11.1949, pp. 179-180); of Uruguay (125th. meeting, of 16.11.1949, p. 187); of Mexico (125th. meeting, of 16.11.1949, p. 188); of Panama (1039th. meeting, of 07.11.1960, pp. 236-237); of Haiti (1040th. meeting, of 08.11.1960, pp. 241-242). - The support of Latin American and Caribbean countries was promptly acknowledged by Asian and African, as well as Arab delegations within the United Nations. And, in its turn, the Organization of American States (OAS), since its creation in 1948 by the Charter of Bogotá, was attentive to what was occurring at the United Nations in support of the right of peoples to self-determination; the Inter-American Juridical Committee (IAJurCom) itself studied (in 1992) the inter-relationship, in historical perspective, between self-determination and the protection of human rights; cf. Comité Jurídico Interamericano, *La Democracia en los Trabajos del Comité Jurídico Interamericano (1946-2010)*, Washington D.C., OAS General Secretariat, 2011, pp. 85-91. In effect, early in its existence the IAJurCom was already seen as expressing the “continental juridical conscience” (much more *Latin American* than *inter-American*), attentive to principles, e.g., of non-intervention (and non-use of force) and of juridical equality of nationals and aliens, and seeking to contribute to the progressive development of international law; A.A. Cançado Trindade, “The Inter-American Juridical Committee: An Overview”, 38 *The World Today* – Chatham House/London (1982) n.11, pp. 438-439 and 442.

<sup>22</sup> For an account of the Non-Aligned Movement, cf., *inter alia*, e.g., P. Willetts, *The Non-Aligned Movement - The Origins of a Third World Alliance*, London/N.Y., Frances Pinter/Nichols Publ., 1978, pp. 1-239.

<sup>23</sup> J.A. Carrillo Salcedo, *El Derecho Internacional en un Mundo en Cambio*, Madrid, Tecnos, 1984, p. 198. - On the enrichment of the *corpus juris gentium*, cf. J.A. de Obieta Chalbaut, *El Derecho Humano de la Autodeterminación de los Pueblos*, *op. cit. supra* n. (6), pp. 106-107, and cf. pp. 52, 83, 85, 95-96 and 175. As to the acknowledged universality of self-determination, and its impact on the contemporary law of nations, cf. J. Summers, *Peoples and International Law - How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Leiden, Nijhoff, 2007, pp. 163-164, 244-245 and 258-259.

<sup>24</sup> A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal*, Cambridge, Cambridge University Press, 1998 [reprint], p. 43.

Indian Ocean as a zone of peace” (para. 5). This being so, it demanded that “Diego Garcia be unconditionally returned to Mauritius and that its peaceful character be maintained” (para. 6).

53. Subsequently, the AU, in its decision CM/Dec. 26(LXXIV) of 08.07.2001, reiterated its

“unflinching support to the Government of Mauritius in its endeavours and efforts to restore its sovereignty over the Chagos Archipelago, which forms an integral part of the territory of Mauritius, and calls upon the United Kingdom to put an end to its continued unlawful occupation of the Chagos Archipelago and to return it to Mauritius thereby completing the process of decolonization” (para. 1).

The AU then called upon “the international community to support the legitimate claim of Mauritius”, so as “to secure the return of the Chagos Archipelago to its jurisdiction” (para. 3).

54. More recently, the AU, in its resolution 1(XXV), of 15.06.2015, began by reasserting, in its preamble, that the “Chagos Archipelago, including Diego Garcia, forms an integral part of the territory” of Mauritius (para. 2); it then deplored

“the continued unlawful occupation by the United Kingdom of the Chagos Archipelago, thereby denying the Republic of Mauritius the exercise of its sovereignty over the Archipelago and making the decolonization of Africa incomplete” (para. 3).

55. After recalling its own previous resolutions and declarations (in the period 2011-2013) on distinct legal matters<sup>25</sup> (para. 4), it supported, still in its preamble, the endeavours of Mauritius to exercise effectively “its sovereignty over the Chagos Archipelago, including Diego Garcia, in keeping with the principles of international law” (para. 8). Then, in its operative part, AU resolution 1(XXV), of 15.06.2015, it reiterated its support to Mauritius “in its legitimate pursuit to effectively exercise its sovereignty over the Chagos Archipelago, including Diego Garcia” (para. 3), as well as its full support to “the early and unconditional return of the Chagos Archipelago, including Diego Garcia, to the effective control” of Mauritius (para. 6). To this effect, it renewed its

“call on the United Kingdom to expeditiously end its unlawful occupation of the Chagos Archipelago with a view to enabling the Republic of Mauritius to effectively exercise its sovereignty over the Archipelago” (para. 4).

## **V. THE RIGHT TO SELF-DETERMINATION IN THE TWO U.N. COVENANTS ON HUMAN RIGHTS OF 1966.**

### **1. Article 1 of the two U.N. Covenants on Human Rights of 1966.**

56. Within the realm of the United Nations, besides the aforementioned U.N. General Assembly resolutions, another significant initiative was the insertion, with historical influence, of the right of all peoples to self-determination, in the two U.N. Covenants on Human Rights of 1966 (Civil and Political Rights; and Economic, Social and Cultural Rights, respectively). That right could thus be vindicated by individuals and groups of individuals.

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<sup>25</sup> Namely: AU, resolution 1(XVI) of January 2011; declaration of February 2013; declaration of May 2013 of the Assembly of the African Union held in Addis Ababa, Ethiopia; and solemn declaration on the 50th anniversary of the OAU/AU also of May 2013.

57. The right to self-determination, under Article 1 of the two U.N. Covenants, is formulated in the same terms, namely:

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

2. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”.

58. Such formulation, applying equally to civil and political rights, as well as to economic, social and cultural rights, thus enhances the indivisibility of all human rights. Such indivisibility was advanced by the two U.N. Covenants two years before the holding of the U.N. I World Conference on Human Rights (Tehran, 1968), which much contributed to it. The formulation of the *célèbre* common Article 1 of the two U.N. Covenants thus acknowledges, at their beginning, that the right to self-determination is furthermore essential to the enjoyment of other human rights.

59. Thus, by the mid-sixties, the fundamental right to self-determination was consolidated in the *corpus juris gentium*, and its importance was universally acknowledged, in a historical process which was much fostered by the landmark General Assembly resolution 1514(XV) of 1960. Such acknowledgment was reflected, e.g., in the work of the U.N. Human Rights Committee, and in the case-law of the ICJ, to which I turn now.

## **2. Human Rights Committee, General Comment n. 12 (of 1984) on Article 1 of the Covenant(s) (Right to Self-Determination of Peoples).**

60. The U.N. Human Rights Committee (HRC) devoted its General Comment n. 12, adopted on 13.03.1984, to Article 1 of the two U.N. Covenants on Human Rights, on the Right to Self-Determination of Peoples. The HRC began its Comment stating that, in accordance with the purposes and principles of the United Nations Charter, Article 1 of the Covenant on Civil and Political Rights (and also of the Covenant on Economic, Social and Cultural Rights)

“recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization 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” (para. 1).

61. The General Comment proceeded that Article 1 of the two Covenants “enshrines an inalienable right of all peoples” and “imposes on all States parties corresponding obligations” (para. 2), of importance ultimately to the whole “international community” (para. 5). General Comment n. 12 added that the obligations on States parties were “not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination” (para. 6).

62. It followed that all States parties to the two Covenants should take “positive action” to facilitate the realization of “the right of peoples to self-determination”, consistent with their obligations under the United Nations Charter and under international law (para. 6). The HRC, in its Comment, then related Article 1 of the two Covenants in particular to the U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, contained in General Assembly resolution 2625(XXV) of 24.10.1970 (para. 7).

### **3. Human Rights Committee, Observations on Reports by States Parties to the Covenant on Civil and Political Rights, Focusing on Chagos Islanders.**

63. The HRC further addressed the matter in its concluding observations in its consideration of reports submitted by States Parties to the Covenant on Civil and Political Rights (under its Article 40)<sup>26</sup>. It did so in respect of United Kingdom reports, focusing *inter alia* on the Chagos islanders. Thus, in its concluding observations of 06.12.2001, the HRC stated that the United Kingdom should render “practicable” the right of Chagossians “to return to their territory”; furthermore, - it added, - it “should consider compensation for denial of this right over an extended period”<sup>27</sup>.

64. Subsequently, as the problem persisted, the HRC, in its concluding observations of 30.07.2008, regretted that, “despite its previous recommendation”, the United Kingdom has not included the “British Indian Ocean Territory” (BIOT) in its periodic report, claiming that, “owing to an absence of population, the Covenant does not apply to this territory”; the HRC firmly reiterated that the United Kingdom

“should ensure that the Chagos islanders can exercise their right to return to their territory and should indicate what measures have been taken in this regard. It should consider compensation for denial of this right over an extended period. It should also include the Territory in its next periodic report”<sup>28</sup>.

### **4. Human Rights Committee: Additional Considerations.**

65. The HRC thus asserted the right to reparations (a relevant point I shall dwell upon later in the present Separate Opinion - cf. parts XVI-XVII, *infra*) to the Chagos Islanders, victimized for a prolonged period of time by the United Kingdom. In the present Advisory Opinion, the ICJ has taken into account (paras. 123 and 126) the HRC’s Observations of 2001 and 2008 on United Kingdom reports (*supra*); yet, instead of expanding on their contents and implications, the ICJ rather related them to facts at domestic law level in the United Kingdom (paras. 121-127).

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<sup>26</sup> On this faculty of the HRC, cf., eg., T. Opsahl, *Law and Equality - Selected Articles on Human Rights*, Oslo, Ad Notam Gyldendal, 1996, pp. 465-569.

<sup>27</sup> U.N., doc. CCPR/CO/73/UK, of 06.12.2001, p. 9, para. 38.

<sup>28</sup> U.N., doc. CCPR/C/GBR/CO/6, of 30.07.2008, p. 6, para. 22.

66. The contribution of the HRC to the handling of the matter at issue is to be properly assessed keeping in mind its work as a whole, comprising its Views on communications, its Observations on reports by States Parties to the Covenant on Civil and Political Rights, as well as its General Comments<sup>29</sup>. The aforementioned General Comment n. 12, of 1984, is not the only relevant one; in my perception, there are points made by the HRC in other General Comments that are to be taken into account here as well.

67. Thus, for example, the *principle of humanity* was stressed by the HRC in its General Comments n. 9, of 1982 (para. 3), and n. 21, of 1992 (para. 4); and the *continuity* of obligations under the Covenant was underlined by the HRC in its General Comment n. 26, of 1997 (paras. 3-5)<sup>30</sup>. Of particular importance is its General Comment n. 31, of 29.03.2004, in which, after warning as to the vulnerability of certain groups of persons (such as children - para. 15), the HRC asserted the duty of reparation by States Parties to the individual victimized, whose rights under the Covenant were breached, also in a continuing way (paras. 15 and 19).

68. In the same General Comment n. 31, of 2004, the HRC insisted that “[c]essation of an ongoing violation is an essential element of the right to an effective remedy” (para. 15). It then added that Article 2(3) of the Covenant requires that

“States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3), is not discharged. In addition to the explicit reparation required by Articles 9(5), and 14(6), the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations” (para. 16).

## **VI. THE ACKNOWLEDGMENT OF THE RIGHT TO SELF-DETERMINATION IN THE CASE-LAW OF THE INTERNATIONAL COURT OF JUSTICE.**

69. The foundations of the consolidation of the right to self-determination came to be found not only at normative and doctrinal levels, as they encompassed international case-law as well. Thus, the ICJ, from 1971 onwards, gradually moved from the *principle* to the *right* of self-determination, that it clearly acknowledged and upheld, having thus much contributed to the recognition of its importance.

70. In its Advisory Opinion on *Namibia* (of 21.06.1971), the ICJ recognized that “the subsequent development of international law in regard to non-self-governing territories”, as enshrined in the U.N. Charter, “made the principle of self-determination applicable to all of them”. It further stated that another “important stage in this development” was the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples (in General Assembly resolution 1514(XV) of 14.12.1960), embracing all peoples and territories which had not yet attained independence (para. 52).

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<sup>29</sup> Cf. A.A. Cançado Trindade, “Address to the U.N. Human Rights Committee on the Occasion of the Commemoration of Its 100<sup>th</sup> Session”, 29 *Netherlands Quarterly of Human Rights* (2011) pp. 131-137.

<sup>30</sup> *Ibid.*, pp. 133-135.

71. There was thus an expansion of the *corpus juris gentium* in the present domain. Moreover, in the same Advisory Opinion, the ICJ observed that it had to “take into consideration the changes which have occurred in the supervening half-century”, and its interpretation could not “remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law”, and it added that

“an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned” (para. 53).

72. Four years later, in its Advisory Opinion on *Western Sahara* (16.10.1975), the ICJ reiterated its statement regarding the development of the right to self-determination of peoples and the importance of the U.N. Charter and the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and added that the provisions of this Declaration emphasized that

“the application of the right to self-determination requires a free and genuine expression of the will of the peoples concerned” (paras. 54-56).

73. Two decades later, in its Judgment on the *East Timor* case (1995), the ICJ recognized the *erga omnes* nature of “the right of peoples to self-determination”, as evolved from the U.N. Charter and its practice, in line with “one of the essential principles of contemporary international law” (para. 29). In the following decade, in its Advisory Opinion on the *Construction of a Wall* (2004), the ICJ had the occasion to reiterate that the developments of international law made the principle of self-determination applicable to all non-self-governing territories and that this right was “today a right *erga omnes*” (para. 88).

74. In this same Advisory Opinion, the ICJ further recalled the terms of General Assembly resolution 2625(XXV) of 1970, according to which

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle (...)” (para. 156).

75. Subsequently, in its Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), the ICJ stated that

“During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation” (para. 79)<sup>31</sup>.

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<sup>31</sup> The ICJ also recalled the importance of the principle of territorial integrity in the international legal order and the fact that it is enshrined in the U.N. Charter, in particular in Article 2(4) (para. 80). Yet, the Court decided not to address “the extent of the right of self-determination and the existence of any right of ‘remedial secession’” as it considered it beyond the scope of the question asked to it by the General Assembly (para. 83).

76. In my Separate Opinion appended to the ICJ's aforementioned Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), I addressed the people-centered outlook in contemporary international law (paras. 169-172), and its concern with the conditions of living of people (paras. 65-66). This was a manifestation of the overcoming of the inter-State paradigm in international law (paras. 182-188). And I added that

“Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State. This distortion led States to regard themselves as final repositories of human freedom, and to treat individuals as means rather than as ends in themselves, with all the disastrous consequences which ensued therefrom. The expansion of international legal personality entailed the expansion of international accountability” (para. 239).

#### **VII. THE ACKNOWLEDGEMENT OF THE RIGHT TO SELF-DETERMINATION BY THE II U.N. WORLD CONFERENCE ON HUMAN RIGHTS (VIENNA, 1993).**

77. Furthermore, in my same Separate Opinion appended to the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), I moreover recalled that, at the outcome of the historical II World Conference on Human Rights (in the Drafting Committee of which I worked, and of which I keep vivid memories)<sup>32</sup>, the final document it adopted, the 1993 Vienna Declaration and Programme of Action, reasserted the right of all peoples to self-determination. Then, taking into account “the particular situation of peoples under colonial or other forms of alien domination or foreign occupation”, it further stated (para. 2) *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 realization of this right.

In accordance with the [1970] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing *the whole people belonging to the territory without distinction of any kind*” [emphasis added]<sup>33</sup>.

78. I then added, in my same Separate Opinion in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), that the final document of that memorable United Nations World Conference of 1993 “went further than the 1970 Declaration of Principles, in proscribing discrimination ‘*of any kind*’”, thus enlarging in scope the “entitlement to self-determination” (para. 181). This wider framework should not pass unnoticed. I then added that

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<sup>32</sup> For my detailed historical account of the 1993 II World Conference on Human Rights, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2<sup>nd</sup> ed., Porto Alegre/Brazil, S.A. Fabris Ed., 2003, chapters I-VII, pp. 33-338; and, as to the preceding I World Conference on Human Rights, held in Teheran in 1968, in whose legacy stands the firm assertion of the indivisibility of all human rights, cf. *ibid.*, pp. 77-80 and 83-84.

<sup>33</sup> *Cit. in* para. 180 of my aforementioned Separate Opinion.

“If the legacy of the II World Conference on Human Rights (1993) convened by the United Nations is to be summed up, it surely lies in the recognition of *the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere and at any time*<sup>34</sup>, with special attention to those in situation of greater vulnerability and standing thus in greater need of protection. Further than that, this is the common denominator of the recent U.N. cycle of World Conferences along the nineties, which sought to conform the U.N. agenda for the dawn of the XXIst century” (para. 185).

79. By the turn of the century, the U.N. *Millenium Declaration*, contained in General Assembly resolution 55/2, of 08.09.2000, asserted “the right to self-determination of peoples which remain under colonial domination and foreign occupation” (para. 4.), as well as its commitment “to making the right to development a reality for everyone and to freeing the entire human race from want” (para. 11). The 2000 Declaration was particularly attentive to protecting the vulnerable ones (paras. 2, 17 and 26).

80. Half a decade later, the *World Summit Outcome*, contained in General Assembly resolution 60/1, of 16.09.2005, reasserted the right to self-determination of peoples (para. 5) and the need of respect for it (para. 77), again drawing particular attention to vulnerable people (paras. 55(c)(d) and 143). It recalled that “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing” (para. 121). And it affirmed that “all States should act in accordance with the [1970] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations” (para. 73).

81. One and a half decades after the II U.N. World Conference of Human Rights (1993), the U.N. Declaration on the Rights of Indigenous Peoples, enshrined into General Assembly resolution 61/295, of 13.09.2007, acknowledged that the U.N. Charter, the two U.N. Covenants on Human Rights, and the Vienna Declaration and Programme of Action (adopted at the II World Conference on Human Rights) 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” (16<sup>th</sup>. preambular para.).

82. It added that “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law” (17<sup>th</sup>. preambular para.). In its operative part, the 2007 Declaration the indigenous peoples’ right to self-determination (Article 3) and its autonomous exercise (Article 4). In case of its breach, the Declaration stressed that indigenous peoples have the right to effective remedies and redress<sup>35</sup>.

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<sup>34</sup> A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2<sup>nd</sup>. ed., vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 241-242; *ibid.*, 1st. ed., vol. II, 1999, pp. 263-276; *ibid.*, 2<sup>nd</sup>. ed., vol. III, 2003, pp. 509-510.

<sup>35</sup> Articles 20(2), 28(1)(2), 32(3) and 40.

83. Twenty-five years have gone by since the adoption of the 1993 Vienna Declaration and Programme of Action, - the same period between the I and II World Conferences on Human Rights (Tehran, 1968, and Vienna, 1993). Yet, regrettably there has been no initiative so far to convene a III World Conference of the kind, despite the world, currently torn by extreme violence, standing in great need of it. Lessons from the past are simply not learned. Despite this apparent indifference, the Declaration and Programme of Action of the II World Conference at least should not be forgotten.

84. As already pointed out, that final document confirmed the consolidation and enlarged scope of the right to self-determination, and, moreover, it underlined the importance of the right to development as a “universal and inalienable” human right to be “implemented and realized”, taking “the human person as the central subject of development” (paras. 10 and 72). The Vienna Declaration and Programme of Action was very attentive to persons belonging to *vulnerable* groups (para. 24), with a time dimension so as to meet the “needs of present and future generations” (para. 11).

85. Half a decade ago, when the II World Conference on Human Rights completed two decades, I proceeded to a reassessment of it<sup>36</sup>, the advances achieved and new challenges arisen. I pondered therein that the protection of the human being in any circumstances, against all manifestations of arbitrary power, corresponds to the new *ethos* of our times, reflected in the new *jus gentium* of our times, wherein the human persons and peoples occupy a central position. The *corpus juris* of the International Law of Human Rights came to be interpreted and applied bearing always in mind the pressing needs of protection of the victims (in particular those in situations of vulnerability or even defencelessness), fostering the historical process of *humanization* of international law (cf. *supra*).

86. Such *corpus juris* is a true *law of protection* (*droit de protection*) of the rights of human beings and peoples, and not of States, - a development which could hardly have been anticipated some decades ago. To this effect, it has developed its own canons, such as those of the realization of superior common values, of the human persons and peoples as subjects of rights (*titulaires de droits*) inherent to them, of the objective character of the obligations of protection, and of the collective guarantee of the safeguard of the rights to be protected. Hence the utmost importance of the right of access to justice *lato sensu*, with the new primacy of the *raison d’humanité* over the old *raison d’État*, in the framework of the new *jus gentium* of our times.

#### VIII. A QUESTION FROM THE BENCH TO ALL DELEGATIONS OF PARTICIPANTS IN THE ORAL ADVISORY PROCEEDINGS.

87. In the course of the oral proceedings on the present matter before the ICJ of the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, I have deemed it fit, in the Court’s public sitting of 05.09.2018, to put the following question to all Delegations of participants therein:

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<sup>36</sup> Cf. A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-356, esp. pp. 13-107; A.A. Cançado Trindade, “The International Law of Human Rights Two Decades After the II World Conference on Human Rights in Vienna in 1993”, in *The Realisation of Human Rights: When Theory Meets Practice - Studies in Honour of L. Zwaak* (eds. Y. Haeck *et alii*), Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 15-39.

“Ma question est adressée à toutes les délégations des participants dans cette procédure consultative orale.

Comme il est rappelé dans le paragraphe (a) de la requête de l'Assemblée générale des Nations Unies pour un avis consultatif de la Cour internationale de Justice (A/RES/71/292 du 22 juin 2017), l'Assemblée générale fait référence aux obligations inscrites dans ses résolutions successives pertinentes, à savoir: les résolutions de l'Assemblée générale 1514 (XV) du 14 décembre 1960, 2066 (XX) du 16 décembre 1965, 2232 (XXI) du 20 décembre 1966, et 2357 (XXII) du 19 décembre 1967.

Au cours de la présente procédure consultative orale, plusieurs délégations de participants ont souvent fait référence à ces résolutions.

À votre avis, quelles sont les conséquences juridiques découlant de la formation du droit international coutumier, notamment la présence significative de l'*opinio juris communis*, pour assurer le respect des obligations énoncées dans ces résolutions de l'Assemblée générale?

Je passe à l'autre langue de la Cour.

My question is addressed to all delegations of participants in these oral advisory proceedings.

As recalled in paragraph (a) of the U.N. General Assembly's Request for an advisory opinion of the International Court of Justice, General Assembly resolution 71/292 of 22 June 2017, the General Assembly refers to obligations enshrined into successive pertinent resolutions of its own, as from 1960, namely: General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966, and 2357 (XXII) of 19 December 1967.

In the course of the present oral advisory proceedings, references were often made to such resolutions by several delegations of Participants.

In your understanding, what are the legal consequences ensuing from the formation of customary international law with the significant presence of *opinio juris communis* for ensuring compliance with the obligations stated in those General Assembly resolutions?"<sup>37</sup>.

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<sup>37</sup> ICJ, doc. CR 2018/25, of 05.09.2018, p. 58, para. 26.

## IX. THE ANSWERS FROM DELEGATIONS OF PARTICIPANTS IN THE ORAL ADVISORY PROCEEDINGS.

### 1. Answers from Delegations.

88. The Delegations of participants which provided their written answers to my question<sup>38</sup> were those of the African Union, Argentina, Botswana, Guatemala, Mauritius, Nicaragua, the United Kingdom, the United States of America, and Vanuatu. The great majority of several Delegations of participants - all from Africa, Asia and Latin America - stressed the *opinio juris communis* as to the considerable importance of the fundamental right to self-determination (as from General Assembly resolution 1514(XV) of 1960) to the progressive development of (conventional and customary) international law, as well as to its universalization and humanization. Only a tiny minority of Delegations of participants (notably the United Kingdom and the United States) sought in vain to cast doubt upon such evolution, and to question that *opinio juris communis*. May I next survey their written answers to my question.

89. To start with, *Mauritius* considered that the obligations contained in the General Assembly resolutions constitute customary international law, “with the significant presence of *opinio juris communis*, as at 1960, and thus at 1965”. In particular, Mauritius noted that General Assembly resolution 1514(XV) of 1960 “crystallised the customary international law on decolonization, sets forth obligations for ‘all States’, including members of the United Nations and administering powers”. In particular, Mauritius stated that the language of the aforementioned resolution is drafted in mandatory terms, and that the “obligations are recognized to reflect obligations under customary law, and to have a peremptory and *erga omnes* character”. These obligations, - it recalled, - are further affirmed in the subsequent General Assembly resolutions.

90. According to Mauritius, the legal consequences ensuing from the breaches of the obligations set forth in the General Assembly resolutions are as follows: a) the obligation on the part of the United Kingdom to cease immediately its internationally wrongful conduct (that is, its unlawful colonial administration of the Chagos Archipelago), and to return the territory to Mauritius; b) the obligation of the United Kingdom to cease to impair or interfere with Mauritius’ exercise of its sovereignty over the Chagos Archipelago, including the resettlement of people of Chagossian origin; and c) the obligation of all other States not to recognize the legitimacy of the existing colonial administration, either directly or indirectly, and not to aid or assist the United Kingdom in its internationally wrongful conduct.

91. The *African Union* reiterated the position it took in its oral statement, namely: after surveying the evolution of the principle of self-determination from 1945 until the adoption of General Assembly resolution 1514 (XV) of 1960, it contended that a right to self-determination came to exist under general international law, at the time of the adoption of that ground-breaking resolution. In its understanding, General Assembly resolution 1514(XV) of 1960 crystallised customary international law on decolonization and self-determination.

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<sup>38</sup> ICJ, *Written Replies to the Question Put by Judge Cañado Trindade*, in docs. CHAG 2018/129 (of Mauritius), of 10.09.2018, pp. 1-5; 2018/130 (of Guatemala), of 10.09.2018, pp. 1-2; 2018/132 (of Argentina), pp. 1-5; 2018/127 (of Nicaragua), of 10.09.2018, pp. 1-3; 2018/126 (of Botswana and Vanuatu), of 10.09.2018, pp. 1-4; 2018/131 (of the United States), of 10.09.2018, pp. 1-3; 2018/128 (of the United Kingdom), of 10.09.2018, pp. 1-5.

92. The following resolutions adopted by the General Assembly, - the African Union continued, - came to confirm the *opinio juris communis* of States. General Assembly resolution 2066(XX) of 1965, in particular, was indicative and confirmative of the prescriptions enshrined in General Assembly resolution 1514(XV) of 1960, and stressed that any attempt aimed at the partial disruption of the territorial unit of Mauritius would be contrary to international law.

93. The African Union identified four legal consequences ensuing from the formation of customary international law, namely: a) the administering Power is obligated to cease its unlawful conduct and any action or omission contrary to the principle of self-determination and the territorial integrity of Mauritius; b) all States must refrain from recognizing the illegal administration of the Chagos Archipelago and any other omission pertaining to such unlawful administration; and c) all international organisations must ensure that their members act in compliance with the customary prescriptions of the aforementioned resolutions, aimed at putting an end to colonialism and, by the same token, ensuring promotion of peaceful regional integration. It then pointed out that the United Nations is, thus, also under an obligation under international law to advance further its mandate on decolonization in compliance with the resolutions of the General Assembly.

94. In their joint answer, *Botswana* and *Vanuatu* noted that the General Assembly resolutions demonstrate that the right to self-determination and the corresponding obligation to respect it, were already part of customary international law during the period of adoption of the General Assembly resolutions between 1960 and 1967. They contended that the customary law status of the contents of those General Assembly resolutions places the following obligations on the administering power: a) to take immediately steps to transfer all powers (without conditions) to the peoples of the territories which have not yet gained independence, in order to enable them to enjoy complete independence and freedom; and b) to take no action which would dismember the administered territory and to violate its territorial integrity. Furthermore, - they added, - all States are under the obligations: a) not to recognize an illegal situation resulting from a violation of the right to self-determination; b) not to render aid or assistance in maintaining the situation created by such a violation; and c) to see that impediments to the exercise of the right to self-determination are brought to an end.

95. *Argentina*, for its part, held the position that the obligations set forth in General Assembly resolutions 1514(XV) of 1960, 2066(XX) of 1965, 2232(XXI) of 1966, and 2357(XXII) of 1967 constitute an expression of *opinio juris communis*, and are interpretations of the obligations stemming from both conventional and customary international law. *Argentina* substantiated its position by identifying the legal obligations stemming from each General Assembly resolution. As to the legal consequences arising from a breach of the General Assembly resolutions, it noted that the consequences ensued from: a) customary international law on State responsibility, b) the obligation to settle international disputes peacefully, c) the United Nations practice in the field of decolonization; and d) the obligations incumbent upon the United Nations itself.

96. Under the law of State responsibility, - *Argentina* continued, - the legal obligations incumbent upon the administering powers were: a) to cease all illegal conduct and restore the territorial integrity of the peoples concerned; b) to allow the peoples entitled to self-determination to exercise their rights; and c) to make appropriate reparation for their illegal conduct. All States are under an obligation not to recognize any aid or assistance that would lead to maintain the colonial situation.

97. The obligation to settle international disputes peacefully, - it went on, - required the administering power to negotiate with the subject concerned (in this case, Mauritius) the completion of decolonization without conditions. Argentina stressed that the duty to “bring a speedy end to colonialism” (as established in the General Assembly resolutions) reinforces the obligation to settle disputes peacefully. Argentina then addressed the contents of the obligations concerning decolonization.

98. In its understanding, the powers of the United Nations in the domain of decolonization encompass obligations as follows: a) not to take unilateral measures that may affect the process of decolonization; b) to respect the competences of the United Nations pertaining to decolonization; and c) to ensure that its conduct is in line with resolutions adopted by the General Assembly (and its Decolonization Committee) regarding the way of putting an end to the colonial situation, without conditions and without delay. At last, Argentina stated that the United Nations itself is to consider what further action is required to bring to an end illegal situations resulting from breaches of the distinct duties enshrined into the general obligation of putting an end, unconditionally and without delay, to colonialism in all its forms and manifestations.

99. *Guatemala*, for its part, noted that, at the time of their adoption, those General Assembly resolutions constituted a “statement of what was happening in practice through the self-determination-driven process of decolonization the world witnessed from the 1950s and onwards”. *Guatemala* thus regarded General Assembly resolution 1514(XV) of 1960 as a “codification resolution”, and the other General Assembly resolutions (2066(XX), 2232(XXI), and 2357(XXII)) as sufficiently clear as to the obligations of States in respect of decolonization and as to any “contraventions” of, and “level of compliance with”, obligations related to decolonization.

100. For its part, *Nicaragua*, likewise referring to those resolutions of the General Assembly, contended that the principles enshrined therein are of customary international law. It noted, in particular, that the right to self-determination is a peremptory norm of international law from which no derogation is permitted. In its understanding, General Assembly resolutions reflect the *opinio juris* of States, as well as “the *opinio juris* and practice of the Organization in charge of decolonization”.

101. The *United Kingdom* maintained that General Assembly resolutions are generally “not binding under international law and only recommendatory in nature”, and added that the negotiating records and explanations of the votes at the adoption of General Assembly resolution 1514(XV) of 1960 disclosed “divided views” as to the content of the resolution. The *United Kingdom*’s own concerns as expressed during those negotiations, and the abstention of the colonial powers at the time of the adoption of that resolution showed that, while General Assembly resolution 1514(XV) of 1960 “marked an important ‘stage’ in the development of the international law on self-determination”, it “did not reflect States’ acceptance of a customary obligation at that time”.

102. The *United Kingdom* further noted that General Assembly resolution 2066(XX) of 1965 used non-binding language, did not condemn it, nor did it state that the *United Kingdom* acted in breach of international law. In its view, the two General Assembly resolutions 2232(XXI) of 1966, and 2357(XXII) of 1967, were “omnibus resolutions” that expressed “deep concern”, but did not create any binding legal obligations for U.N. member States. It then added those General Assembly resolutions reflected the development of customary international law, but were not reflective of the customary international law of the time.

103. Furthermore, the United Kingdom observed that, even if the General Assembly resolutions did reflect obligations under customary international law between 1960-1967, there would be no legal consequences to this, as Mauritius consented to the detachment of the Chagos Archipelago. Finally, if the General Assembly resolutions were, in fact, binding, any legal consequence ensuing therefrom would, in its view, have to be based on the 1965 Agreement as interpreted by the Arbitral Tribunal in its Award of 18.03.2015<sup>39</sup>.

104. For its part, the *United States* argued that it is up to the ICJ to reach a determination as to whether the General Assembly resolutions reflected international legal obligations. It added that, in its view, there was no *opinio juris* at the time of the adoption of General Assembly resolution 1514(XV) of 1960, nor until the end of the 1960s, there being thus no legal obligations arising from the General Assembly resolutions. In the perception of the United States, there was not extensive or virtually uniform State practice during the relevant period.

## 2. Comments on the Answers.

105. Subsequently to the written answers to my question (*supra*), Mauritius, the African Union, and the United States provided written comments on the answers presented to the Court<sup>40</sup>. In its comments, *Mauritius* recalled that the obligations set forth in General Assembly resolutions 1514(XV) of 1960, 2066(XX) of 1965, 2232(XXI) of 1966, and 2357(XXII) of 1967 constituted customary international law. Mauritius commented that the responses of the United Kingdom and the United States simply repeated their arguments that General Assembly resolutions did not reflect customary international law at the time the Chagos Archipelago was detached from Mauritius, and were therefore not legally binding on the administering power and other States, and could not give rise to legal consequences. Mauritius further noted that neither the administering power nor the United States made any effort to respond to the submissions made by the participating Delegations of various States and the African Union<sup>41</sup>.

106. Moreover, Mauritius asserted that General Assembly resolution 1514(XV) of 1960 reflected a rule of customary international law in 1960, governing the process of decolonization under any circumstances, and conferring upon the peoples of colonial territories the right to self-determination, including the associated right of territorial integrity. It went on to observe that the United States and the United Kingdom, at the time of the adoption of General Assembly resolution 1514(XV) of 1960, and subsequently, made statements recognizing the existence of the right to self-determination. In 2009, e.g., the United Kingdom declared to the ICJ (as part of its submissions in the advisory proceedings on the *Declaration of Independence of Kosovo*), that “[t]he principle of self-determination was articulated as a right of all colonial countries and peoples by General Assembly resolution 1514(XV)”<sup>42</sup>.

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<sup>39</sup> Cf. Permanent Court of Arbitration (PCA), *The Chagos Marine Protected Area Arbitration (Mauritius versus United Kingdom, Award of 2015)*, The Hague, PCA Award Series, 2017, pp. 1-311.

<sup>40</sup> Cf. ICJ, *Written Comments on the Replies of the Participants to the Oral Proceedings to the Question Put by Judge Cançado Trindade*, doc. CHAG 2018/149, of 14.09.2018, pp. 1-13.

<sup>41</sup> Cf. *ibid.*, p. 3.

<sup>42</sup> Reference to the ICJ, *Written Statement of the United Kingdom*, of 17.04.2009, para. 5.21, *cit. in ibid.*, pp. 4-5.

107. Mauritius then observed that the legal obligations set out in General Assembly resolution 1514(XV) of 1960 are addressed to “all States”, and were reaffirmed in subsequent resolutions, which generally condemned the dismemberment of non-self-governing territories (including Mauritius) as contraventions of those resolutions, making it clear that compliance with those General Assembly resolutions is obligatory as a matter of international law. Mauritius stressed that the United Kingdom’s breach of the obligations set out in General Assembly resolution 1514(XV) of 1960 generates legal consequences for the United Kingdom, and for all States<sup>43</sup>; such consequences have been set out in written and oral submissions, and in Mauritius’ response to my question put to the participating Delegations in the ICJ public sitting of 05.09.2018 (*supra*).

108. For its part, the *African Union* reasserted its position that there already existed, under general international law, a right to self-determination, at the time of the adoption of the General Assembly resolution 1514(XV) of 1960, which “crystallized the customary international law” thereon<sup>44</sup>. The *opinio juris communis* was then confirmed by General Assembly resolutions 2066(XX) of 1965, 2232(XXI) of 1966, and 2357(XXII) of 1967, among others; and General Assembly resolution 2066(XX) of 1965, - it added, - recalled that “any attempt aiming at partial disruption of the territorial unit of Mauritius would be contrary to international law”<sup>45</sup>.

109. The African Union then expressed its view that “the Administering Power is under an obligation to cease its unlawful conduct and any act or omission contrary to the principle of self-determination and territorial integrity of Mauritius”<sup>46</sup>. The African Union concluded that the obligation to ensure compliance with customary international law on the right to self-determination is incumbent on all States, as well as all international organizations, such as the United Nations and the African Union, so as to put an end to the “illegal administration of the Chagos Archipelago” and to colonialism<sup>47</sup>.

110. Last but not least, in sharp contrast, the *United States* commented that, in its view, evidence had not been provided on the existence of a rule of customary international law: there was no uniform State practice, and, despite many expressions of support for decolonization, (including by the United States and other administering powers), there was uniform *opinio juris* at the time when General Assembly resolution 1514(XV) of 1960 was adopted. It added that the alleged lack of *opinio juris* as to the key elements of self-determination persisted through the negotiation of the Declaration on Principles of International Law contained in General Assembly resolution 2625(XXV) of 1970, there having occurred abstentions reflecting, in its view, a lack of consensus among all States<sup>48</sup>.

111. The United States then expressed its view that General Assembly resolutions are not themselves legally binding (subject to limited exceptions not applicable here), even if they use a mandatory language. This being so, - it added, - General Assembly resolutions did not reflect

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<sup>43</sup> Cf. *ibid.*, pp. 5-6.

<sup>44</sup> Cf. *ibid.*, p. 8.

<sup>45</sup> Cf. *ibid.*, p. 8.

<sup>46</sup> Cf. *ibid.*, p. 9.

<sup>47</sup> Cf. *ibid.*, p. 9.

<sup>48</sup> Cf. *ibid.*, pp. 11-12.

customary international law that would have prohibited the establishment of the British Indian Ocean Territory (BIOT), and, - it added, - in its view there were no legal consequences arising therefrom, and there was thus no need to address the legal consequences of any violations of legal obligations<sup>49</sup>.

### 3. General Assessment.

112. The views expressed by the participating Delegations, in their answers (and comments thereon) to the question I put to them in the public sitting of the ICJ of 05.09.2018, are, in my perception, necessary and of the utmost importance for the understanding of the matter and the appropriate elaboration of the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. As the ICJ has not dwelt upon them to this effect, I feel obliged to do so and to assess them in the present Separate Opinion.

113. The ICJ has preferred to consider, in the present Advisory Opinion (paras. 48, 50, and 67), the award rendered on 19.03.2015 by an Arbitral Tribunal in the case of the *Chagos Marine Protected Area (Mauritius versus United Kingdom)*<sup>50</sup>, - invoked by the United Kingdom in its answers to my question (cf. *supra*), - in my view of far less relevance to this Advisory Opinion than the U.N. General Assembly resolutions on the fundamental right of peoples to self-determination, which deserved far greater attention on the part of the ICJ. This being so, one needs to keep in mind that the case before the Arbitral Tribunal concerned the United Kingdom's unilateral establishment of a marine protected area (MPA) around the Chagos Islands, an issue - I deem it appropriate to add - that was properly considered by Judges J. Kateka and R. Wolfrum in their Joint Dissenting and Concurring Opinion annexed to the Tribunal's Award<sup>51</sup>.

114. To the two Judges, a "central question" that should have been considered by the Arbitral Tribunal on the merits, was the separation of the Chagos Archipelago from Mauritius, determining whether it was "contrary to the legal principles of decolonization as referred to in U.N. General Assembly resolution 1514 and/or contrary to the principle of self-determination" (para. 70, and cf. para. 67), as developed between 1945 and 1965, a period when more than fifty states had gained their independence in the process of decolonization (para. 71).

115. After recalling that General Assembly resolution 1514(XV) of 1960 "clearly stated" that the detachment of a part of a colony (in the *cas d'espèce*, the Chagos Archipelago) was "contrary to international law" (para. 72), Judges J. Kateka and R. Wolfrum concluded that the United Kingdom, by establishing the MPA in breach of its prior commitments *vis-à-vis* Mauritius, thus violated UNCLOS, rendering the MPA "legally invalid" (paras. 86 and 89). The two Judges further noted the "disturbing similarities between the establishment of the BIOT in 1965 and the proclamation of the MPA in 2010", disclosing "a complete disregard" for the rights of Mauritius and its territorial integrity, in putting - as a colonial power - the "British and American defence interests" above "Mauritius' rights, such as the total ban on fishing in the MPA" (para. 91).

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<sup>49</sup> Cf. *ibid.*, pp. 12-13.

<sup>50</sup> The Arbitral Tribunal [PCA] was constituted pursuant to Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). For the text of its Award of 19.03.2015, and the Joint Dissenting and Concurring Opinion of Judges J. Kateka and R. Wolfrum, cf.: Permanent Court of Arbitration (Award Series), *The Chagos Marine Protected Area Arbitration (Mauritius versus United Kingdom)*, The Hague, PCA, 2015, pp. 24-311.

<sup>51</sup> They disagreed with the Tribunal's finding on Mauritius' first two submissions, and agreed with the Tribunal's findings on its third and fourth submissions, albeit with certain deviances from the majority's reasoning.

116. Of far greater importance to the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, is the finding that, in the great majority of the answers (and comments thereon) provided by the participating Delegations in response to my question, - as seen in the survey above, - the view which has prevailed was clearly in strong support to the fundamental right to self-determination. This latter was acknowledged as also part of general or customary international law (on State responsibility).

117. Those participating Delegations which, in addition to their answers, have presented also comments on them, have elaborated further on their respective prevailing positions (*supra*), in full support of fundamental right to self-determination. Moreover, there was the view which has likewise prevailed in the positions taken by the Delegations of participants, in both the written and oral phases of the present advisory proceedings, on a point of great significance, namely, the fundamental right of peoples and nations to self-determination as belonging to the domain of *jus cogens*.

118. According to such prevailing view, moreover, that fundamental right is enshrined in a peremptory norm (cf., on *jus cogens*, parts X, XI and XII, *infra*); the relevant General Assembly resolutions in support of it disclose an *opinio juris communis*, with *erga omnes* duties (of compliance with the fundamental right of self-determination). In my understanding, there is no reason nor justification for the ICJ, in its present Advisory Opinion, not having expressly held that the fundamental right of peoples to self-determination belongs to the realm of *jus cogens*.

119. This is a point which has been made by several participating Delegations throughout the present advisory proceedings, and has not been taken into account by the ICJ in its own reasoning. It is a matter which deserves careful consideration, to which I shall next turn attention. It could never have been left out of the reasoning of the present Advisory Opinion of the ICJ; there is no justification for not having addressed it. The fundamental right of peoples to self-determination indeed belongs to the realm of *jus cogens*, and entails obligations *erga omnes*, with all legal consequences ensuing therefrom.

## **X. THE FUNDAMENTAL RIGHT TO SELF-DETERMINATION IN THE DOMAIN OF *JUS COGENS*.**

### **1. Early Acknowledgement of *Jus Cogens*.**

120. The evolution that I have examined in the previous parts of the present Separate Opinion appended to this ICJ's Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* shows that respect for the right to self-determination of peoples has crystallized as an imperative for the United Nations, in conformity with contemporary international law. The consolidation of peremptory norms of *jus cogens*, with the corresponding obligations *erga omnes* of protection, is bound to pave the way for the creation of a true international *ordre public* based upon the respect and observance of human rights.

121. In my earlier Separate Opinion appended to the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), after dwelling upon the humanitarian tragedy of the local population, I devoted one part (XIV) of it to the path towards "a comprehensive conception of the incidence of *jus cogens*" (paras. 212-217). In the present advisory proceedings before the ICJ on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, we are once again before a humanitarian tragedy, this time a long-standing one, of the Chagossians forcefully displaced from their homeland and abandoned to try to survive in intergenerational poverty, with all its consequences.

122. This being so, in my present Separate Opinion, I once again devote this part (X) of it to *jus cogens*, as encompassing here the fundamental right to self-determination. In historical perspective, it should not pass unnoticed that the right to self-determination, as formulated in Article 1 of the two U.N. Covenants on Human Rights of 1966 (part III, *supra*), came promptly - in the same year of their adoption<sup>52</sup> - to be regarded as “a peremptory norm of international law”<sup>53</sup>, belonging to the domain of *jus cogens*.

123. Further to the jurisprudential construction thereon (cf. *infra*), the International Law Commission (ILC) has also given its contribution on the matter. In this respect, along the six years before the adoption of the 1969 Vienna Convention on the Law of Treaties, the conceptualization of *jus cogens* was carefully examined and upheld by the members of the ILC within the framework of the law of treaties<sup>54</sup>. On several occasions, as from the early sixties, *jus cogens* was directly attached to the right to self-determination.

124. For example, in the ILC debates of 1963, it was contended, e.g., that a treaty “imposed on a former colony which had since become an independent State would certainly be void for illegality”, because it would breach the *jus cogens* norm of self-determination<sup>55</sup>. In the ILC work of 1966 on *jus cogens*, some of its members stressed the importance of the principles of the juridical equality of States and of the self-determination of peoples in relation to “treaties violating human rights”<sup>56</sup>; *jus cogens* has its effect upon treaties incompatible with it<sup>57</sup>. And in the ILC work of 1968 on *jus cogens*, some of its members reiterated that the right of peoples to self-determination “should be respected”<sup>58</sup>.

125. The fact remains that, even well before that, already in its earlier years, - shortly after its creation, - the United Nations had already engaged itself into the attainment of self-determination of peoples; it soon provided evidence of the peremptory character of the right to self-determination<sup>59</sup>, in the already examined successive resolutions of the General Assembly (cf. parts II and III, *supra*), as well as in international Conferences. Thus, already one and a half decades before the II U.N. World Conference on Human Rights of 1993 (cf. part VI, *supra*), the U.N. World Conference to Combat Racism and Racial Discrimination of 1978 drew attention to “the principles of non-discrimination and self-determination as imperative norms of international law”<sup>60</sup>.

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<sup>52</sup> Cf. I. Brownlie, *Principles of Public International Law*, 1st. ed., Oxford, Clarendon Press, 1966, pp. 417-418; a breach of *jus cogens* would amount to a *delicta juris gentium* (*ibid.*, pp. 415-416).

<sup>53</sup> A. Rigo Sureda, *The Evolution of the Right to Self-Determination - A Study of United Nations Practice*, *op. cit. supra* n. (6), p. 353.

<sup>54</sup> Cf. U.N., *Yearbook of the ILC* (1963) vol. I, pp. 59-79, 155, 192, 252-257 and 294; U.N., *Yearbook of the ILC* (1964) vol. II, pp. 185-186 and 191; U.N., *Yearbook of the ILC* (1966) vol. II, pp. 217, 239-240, 247-249, 261-267, 327 and 341; U.N., *Yearbook of the ILC* (1967) vol. II, pp. 378, 390 and 394-395; U.N., *Yearbook of the ILC* (1968) vol. II, pp. 220 and 231-232.

<sup>55</sup> U.N., *Yearbook of the ILC* (1963) vol. I, p. 155, para. 56; and cf. p. 257, para. 37.

<sup>56</sup> U.N., *Yearbook of the ILC* (1966) vol. II, p. 248, n. 3.

<sup>57</sup> *Ibid.*, p. 327, and cf. also p. 341.

<sup>58</sup> U.N., *Yearbook of the ILC* (1968) vol. II, p. 220.

<sup>59</sup> L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki, Lakimiesliiton Kustannus, 1988, pp. 191, 357-358, 304, 381-382 and 717.

<sup>60</sup> U.N. General Assembly resolution 33/99, of 16.12.1978, part III, para. 9.

126. By that time, in a study prepared in 1979-1980 by the Special *Rapporteur* of the old U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (H. Gros Espiell), titled “*The Right to Self-Determination - Implementation of United Nations Resolutions*”, he singled out, from the start, “the exceptional importance” of “self-determination of peoples in the modern world”, which has led to its acknowledgment as a *jus cogens* norm<sup>61</sup>. He recalled, to this effect, the relevant parts of the work of the ILC which led to the drafting of the 1969 Vienna Convention of the Law of Treaties<sup>62</sup>.

127. He then pointed out that *jus cogens* found its place in Articles 53 and 64 of that 1969 Vienna Convention; no examples of it were expressly mentioned therein, so as to leave the issue of the content of *jus cogens* open to evolution. Thus, - Gros Espiell added, “[t]oday no one can challenge the fact that, in the light of contemporary international realities”, self-determination necessarily has “the character of *jus cogens*”<sup>63</sup>. Furthermore, in the view of the Special *Rapporteur*, the fundamental principles of the United Nations Charter embodied in the General Assembly resolution 2625(XXV) of 1970, including the one of self-determination of peoples, are manifestations “in contemporary international law” of *jus cogens*<sup>64</sup>.

128. Most of the international legal theory, - he went on, - supports the view that the right to self-determination has the character of *jus cogens*, as “a condition or prerequisite for the exercise and effective realization of human rights”<sup>65</sup>. Special *Rapporteur* H. Gros Espiell then concluded that the existence of *jus cogens* is *per se* based on natural law, and the right of peoples to self-determination is nowadays one of the manifestations of *jus cogens*<sup>66</sup>.

## **2. Reassertions of *Jus Cogens* in the Present Advisory Proceedings.**

129. In this respect, in the course of the present advisory proceedings on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, this issue has been brought to the ICJ’s attention in several written and oral submissions of the participating Delegations, in support of *jus cogens* (namely, those of African Union<sup>67</sup>, Argentina<sup>68</sup>, Belize<sup>69</sup>,

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<sup>61</sup> H. Gros Espiell (Special *Rapporteur* of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *The Right to Self-Determination - Implementation of United Nations Resolutions*, U.N. doc. E/CN.4/Sub.2/405/Rev.1(1980), N.Y., U.N., 1980, p. 11, para. 70.

<sup>62</sup> *Ibid.*, p. 11, para. 71.

<sup>63</sup> *Ibid.*, pp. 11-12, paras. 73-74.

<sup>64</sup> *Ibid.*, p. 12, para. 75.

<sup>65</sup> *Ibid.*, p. 12, para. 78.

<sup>66</sup> *Ibid.*, p. 13, paras. 84-85.

<sup>67</sup> *Written Statement*, paras. 67-128; *Comments*, paras. 164-179; *Oral Pleadings*, ICJ doc. CR 2018/27, pp. 24-26, paras. 7-15.

<sup>68</sup> *Written Statement*, para. 48; *Comments*, paras. 19-30 and 50-54; *Oral Pleadings*, ICJ doc. CR 2018/22, pp. 44-46, paras. 21-28.

<sup>69</sup> *Written Statement*, paras. 1.4, 2.1-2.22 and 3.1-3.13; *Oral Pleadings*, ICJ doc. CR 2018/23, pp. 9-18, paras. 7-48.

Brazil<sup>70</sup>, Chile<sup>71</sup>, Cuba<sup>72</sup>, Cyprus<sup>73</sup>, Djibouti<sup>74</sup>, Kenya<sup>75</sup>, Mauritius<sup>76</sup>, Namibia<sup>77</sup>, Nigeria<sup>78</sup>, The Netherlands<sup>79</sup>; Nicaragua<sup>80</sup>; Serbia<sup>81</sup>; Seychelles<sup>82</sup>; South Africa<sup>83</sup>; and Zambia<sup>84</sup>), or else singling out its effects *erga omnes* (namely, those of China<sup>85</sup>; Guatemala<sup>86</sup>; India<sup>87</sup>; Botswana<sup>88</sup>; and Vanuatu<sup>89</sup>). May I proceed to a review of their arguments presented to the Court, as to the support to the *jus cogens* nature of the fundamental right to self-determination, and the *erga omnes* obligations ensuing therefrom.

130. In its *Written Statement*, Mauritius sustained that it is well-established that the fundamental right to self-determination falls within the category of peremptory norms; in its understanding, this discards the argument of the United Kingdom, as the nature of the right at issue is such that no State could claim to be a so-called “persistent objector” to it, in clear disregard for a commitment to the international rule of law<sup>90</sup>. Furthermore, in its written answer to the question I put to the participating Delegations (parts VIII-IX, *supra*), Mauritius recalled the mandatory terms of the General Assembly resolutions on the matter, acknowledging the peremptory nature of the fundamental right at issue, with the ensuing obligations under customary law endowed with an *erga omnes* character<sup>91</sup>.

131. For its part, the *African Union* likewise stated that it is undisputed that the right of peoples to self-determination is regarded as *jus cogens*. It added that the *erga omnes* character of the obligations ensuing therefrom “entails a corresponding duty on the part of all States and international organisations to enforce” the fundamental right to self-determination<sup>92</sup>. The relevance of this right in the domain of *jus cogens* was likewise pointed out in the *Written Statements* and oral pleadings of Latin American States.

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<sup>70</sup> *Written Statement*, paras. 15-19 and 28(b); *Oral Pleadings*, ICJ doc. CR 2018/23, pp. 42-45, paras 10-19.

<sup>71</sup> *Written Statement*, paras. 6-7.

<sup>72</sup> *Written Statement*, p. 1.

<sup>73</sup> *Comments*, paras. 1(c), 10-14 and 17-19; *Oral Pleadings*, ICJ doc. CR 2018/23, pp. 47-48, paras 9-10).

<sup>74</sup> *Written Statement*, paras. 3, 22 and 27-33.

<sup>75</sup> *Oral Pleadings*, ICJ doc. CR 2018/25, p. 25, para. 11; pp. 26-30, paras. 17-34; p. 32, para. 43; and p. 33, para. 46.

<sup>76</sup> *Written Statement*, paras. 1.3-1.5, 1.41 (ii), 5.31, 6.3-6.61 and 6.109; *Comments*, paras. 3.7-3.41 and 3.67; *Oral Pleadings*, ICJ doc. CR 2018/20, pp. 45-47, paras. 5-12, and p. 82, para. 27.

<sup>77</sup> *Written Statement*, p. 3.

<sup>78</sup> *Oral Pleadings*, ICJ doc. CR 2018/25, p. 53, para. 11.

<sup>79</sup> *Written Statement*, paras. 2.1-4.5.

<sup>80</sup> *Statement*, paras. 6-9; *Comments*, paras. 4-9; *Oral Pleadings*, ICJ doc. CR 2018/25, pp. 42-44, paras. 38-47.

<sup>81</sup> *Written Statement*, paras. 29-31; *Oral Pleadings*, ICJ doc. CR 2018/26, pp. 12-13, paras. 33-40.

<sup>82</sup> *Comments*, para. 9.

<sup>83</sup> *Written Statement*, paras. 6, 18 and 60-64; *Oral Pleadings*, ICJ doc. CR 2018/22, pp. 14-18, paras. 23-39.

<sup>84</sup> *Oral Pleadings*, ICJ doc. CR 2018/27, pp. 10-12, paras. 4 and 7-12.

<sup>85</sup> *Written Statement*, paras. 5-13.

<sup>86</sup> *Comments*, para. 9; *Oral Pleadings*, ICJ, doc. CR 2018/24, pp. 34-35, paras. 23-27.

<sup>87</sup> *Written Statement*, paras. 28-35.

<sup>88</sup> *Oral Pleadings*, ICJ, doc. CR 2018/23, pp. 31-34, paras. 3-21.

<sup>89</sup> *Oral Pleadings*, ICJ, doc. CR 2018/26, pp. 39-40, para. 16.

<sup>90</sup> ICJ, *Written Statement* of Mauritius, p. 92, para. 3.44.

<sup>91</sup> ICJ, doc. CHAG 2018/129 (Mauritius), of 10.09.2018, para. 3.

<sup>92</sup> ICJ, *Written Statement* of the African Union, para. 69.

132. Thus, *Nicaragua* sustained, in its oral pleadings, that the obligation *erga omnes* to respect the right of self-determination is so compelling that no derogation from it is permitted. It added that the right at issue is so fundamental that it cannot be curtailed by any sort of “agreement”, nor can it at all be “put aside by a colonial Power”<sup>93</sup>. Moreover, in its written answer to the question I put to the participating Delegations (parts VIII-IX, *supra*), Nicaragua stressed the relevance of General Assembly resolution 1514(XV) of 1960 for the consolidation of the right to self-determination in accordance with the U.N. Charter and the related respect for the territorial integrity of colonial territories, forming part also of customary international law. The right to self-determination, - it reiterated, - is “a peremptory norm from which no derogation is permitted”<sup>94</sup>.

133. In its *Written Statement*, *Cuba* expressed its concern for the violation of *jus cogens* in respect of the territorial integrity of Mauritius, “its right to exercise sovereignty over the Chagos Archipelago”, as well as “the right to return to the Archipelago of the Mauritian citizens forcibly displaced by the United Kingdom”<sup>95</sup>. For its part, *Argentina* underlined the *erga omnes* obligations related to “the right of peoples to self-determination”<sup>96</sup>. The same point (effects *erga omnes*) was also made by *China*<sup>97</sup>, *Guatemala*<sup>98</sup>, *India*<sup>99</sup>, *Botswana*<sup>100</sup>, and *Vanuatu*<sup>101</sup>.

134. In its *Written Statement*, *Brazil* drew attention to the importance of compliance with *erga omnes* obligations in the context of decolonization, to as to secure the right of peoples to self-determination; such obligations are “owed to all, and to the international community as a whole”<sup>102</sup>. It added that the right to self-determination has been recognized in successive U.N. resolutions, in multilateral declarations, and in the ICJ’s own decisions, making it clear that the General Assembly’s request for the present Advisory Opinion “transcends the realm of any bilateral relationship”, as it deals with matters “directly of concern to the United Nations” as a whole<sup>103</sup>.

135. In its *Written Statement*, *Belize* sustained that the right to self-determination under customary international law is reflected in the U.N. Charter, in resolutions of the U.N. General Assembly, in State practice, and in the jurisprudence of the ICJ. It is a peremptory norm of international law, a right with *erga omnes* effects, from which no derogation is permitted. Belize recalled that self-determination as a legal right began to be articulated in the fifties, being subsequently reaffirmed in numerous concordant General Assembly resolutions; it reflected customary international law in 1965, when the United Kingdom separated the Chagos Archipelago from Mauritius<sup>104</sup>.

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<sup>93</sup> Cf. *Oral Pleadings* by Nicaragua, in ICJ, doc. CR 2018/25, of 05.09.2018), p. 44, para 47.

<sup>94</sup> ICJ, doc. CHAG 2018/127, of 10.09.2018, p. 1.

<sup>95</sup> ICJ, *Written Statement* of Cuba, pp. 1-2.

<sup>96</sup> ICJ, *Written Statement* of Argentina, para. 49.

<sup>97</sup> ICJ, *Written Statement* of China, paras. 5-13.

<sup>98</sup> ICJ, *Comments* of Guatemala, para. 9; *Oral Pleadings* by Guatemala, in ICJ, doc. CR 2018/24, pp. 34-35, paras. 23-27.

<sup>99</sup> ICJ, *Written Statement* of India, paras. 28-35.

<sup>100</sup> *Oral Pleadings* by Botswana, in ICJ, doc. CR 2018/23, pp. 31-34, paras. 3-21.

<sup>101</sup> *Oral Pleadings* by Vanuatu, in ICJ, doc. CR 2018/26, p. 20, para.10.

<sup>102</sup> ICJ, *Written Statement* of Brazil, p. 5, para. 12.

<sup>103</sup> *Ibid.*, p. 5, para. 12.

<sup>104</sup> ICJ, *Written Statement* of Belize, p. 5, paras. 2.1-2.2.

136. It added that great importance was promptly attributed to General Assembly resolution 1514(XV) of 1960, and in the early sixties the right to self-determination was already acknowledged as a peremptory norm of international law. In this respect, Belize then recalled that, in their debates of 1963, certain members of the U.N. International Law Commission (ILC) referred to the right to self-determination as a settled norm of *jus cogens*<sup>105</sup>.

137. In its oral pleadings, *Cyprus* rebutted the argument of an alleged bilateral dispute between Mauritius and the United Kingdom, sustaining that matters pertaining to self-determination in general, and the lawful completion of a process of decolonization in particular, can never be properly characterized as purely bilateral matters between a former colonial Power and a former colony. This is confirmed, - it added, - by “the *jus cogens* character of the right to self-determination”, and by “the *erga omnes* character of the obligations it generates”; the relevant obligations are owed to the international community as a whole, and all States have a legal interest in their proper implementation<sup>106</sup>.

138. According to *Cyprus*, the *jus cogens* character of the right to self-determination and the *erga omnes* character of the obligations it generates stress two points, namely: first, precisely because the duty not to participate in colonialism is a duty owed to the international community as a whole, consent by one or more States to the perpetuation of colonialism by another State cannot absolve the latter State of the aforementioned duty; and secondly, precisely because colonialism constitutes an infringement of the right to self-determination, which is “a *jus cogens* norm, all States are under a positive duty *not* to recognize as lawful any situation perpetuating colonialism”<sup>107</sup>.

139. In its oral pleadings, *Zambia* likewise discarded the argument of the United Kingdom that there was here an alleged bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over territory, thus rendering it to decide it without the U.K.’s consent. The wording of the first question put to the ICJ by the General Assembly, quite distinctly, was about the international law obligations regarding decolonization. *Zambia* sustained that this is a matter squarely within the competence of the General Assembly and thus not at all simply bilateral: in particular, this matter is about the implementation of the right to self-determination, which the ICJ itself has held that it gives rise to obligations *erga omnes*<sup>108</sup>.

140. In expressing its particular attention to the matter before the ICJ, *Djibouti*, in its *Written Statement*, sustained that the right to self-determination is an *erga omnes* norm of concern to the international community as a whole<sup>109</sup>. Such right of peoples to self-determination “has an *erga omnes* character”, as acknowledged by the ICJ itself (e.g., in the *East Timor* case (1995), and, accordingly, it cannot “be regarded as only a bilateral matter”: it is indeed a concern of the international community as a whole, expressing one of the “essential principles of contemporary international law”<sup>110</sup>.

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<sup>105</sup> Belize further referred to the first edition of I. Brownlie’s *Principles of Public International Law* (1966), which stated that “certain portions of *jus cogens* are the subject of general agreement, including (...) self-determination”; cf. *ibid.*, p. 11, para. 2.15.

<sup>106</sup> *Oral Pleadings* of *Cyprus*, in: ICJ, doc. CR 2018/23, of 04.09.2018, pp. 49-50, para. 4.

<sup>107</sup> *Ibid.*, p. 53, para. 9.

<sup>108</sup> *Oral Pleadings* of *Zambia*, in: ICJ, doc. CR 2018/27, of 06.09.2018, pp. 9-10, para. 4.

<sup>109</sup> ICJ, *Written Statement* of *Djibouti*, p. 5, para. 3.

<sup>110</sup> *Ibid.*, pp. 11-12, para. 22.

141. Djibouti added that this was further acknowledged by the ICJ in its Advisory Opinion on the *Construction of a Wall* (2004), where it upheld (in para. 159) the “exercise by the Palestinian people of its right to self-determination”. In sum, this right to self-determination “gives rise to an obligation to the international community as a whole to permit and respect its exercise”, it being thus incumbent on all States and international organizations to act in accordance with that obligation<sup>111</sup>.

142. In the understanding of *Kenya*, the right of peoples to self-determination rests in the domain of *jus cogens*, and entails a corresponding duty *erga omnes*, on the part of all States to the international community as a whole, to enforce this right. This discards the allegation that one would be here concerned with a bilateral dispute. The failure to respect the right to self-determination is the failure to respect an obligation owed to the international community as a whole<sup>112</sup>.

143. For their part, *Namibia* and *Seychelles*, even without expressly mentioning *jus cogens* or *erga omnes* effects, as to the right of self-determination, submitted, in their *Written Statement*<sup>113</sup> and *Written Comments*<sup>114</sup>, respectively, that, at the relevant time of the mid-1960s, - the time of the excision of the Chagos Archipelago, - “the right to self-determination was firmly established”. And *Chile* sustained, in its *Written Statement*, the “normative” character of the right of peoples to self-determination “firmly established” since the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 1960, followed by the subsequent codification of the right to self-determination in the two U.N. Covenants on Human Rights of 1966, demonstrating how well-established that right had become<sup>115</sup>.

144. In its *Written Statement*, *The Netherlands* submitted that the obligation to respect and promote the right of peoples to self-determination in a colonial context, as well as the obligation to refrain from any forcible action which would deprive such peoples of this right, is an obligation arising under a peremptory norm of international law<sup>116</sup>. It added that the fundamental character of the right of self-determination has been stressed in the process of decolonization, and explicitly acknowledged by States as a peremptory norm of international law<sup>117</sup>.

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<sup>111</sup> *Ibid.*, p. 23, paras. 52-53.

<sup>112</sup> *Oral Pleadings of Kenya*, in: ICJ, doc. CR 2018/25, p. 25, para. 11.

<sup>113</sup> ICJ, *Written Statement of Namibia*, p. 3.

<sup>114</sup> ICJ, *Written Comments of Seychelles*, para. 9.

<sup>115</sup> ICJ, *Written Statement of Chile*, paras. 6-7.

<sup>116</sup> The Netherlands recalled that, during the discussions preceding the adoption of General Assembly resolution 2625 of 1970, States have characterized the right to self-determination as “fundamental” and “binding on all States” (doc. A/AC.125/SR.41 - Poland), “one of the fundamental norms of contemporary international law” (doc. A/AC.125/SR.40 - Yugoslavia), “one of the most important principles” embodied in the U.N. Charter” (doc. A/AC.125/SR.69 - Japan), “a universally recognized principle of contemporary international law” (doc. A/AC.125/SR.70 - Cameroon), and “indispensable for the existence of community of nations” (doc. A/AC.125/SR.68 - United States).

<sup>117</sup> Namely: Spain, *Western Sahara* case, *ICJ Pleadings*, vol. I, pp. 206-208; Algeria, *Western Sahara* case, *ICJ Pleadings*, vol. IV, pp. 497-500; Morocco, *Western Sahara* case, *ICJ Pleadings*, vol. V, 179-80; Guinea-Bissau, case concerning the *Arbitral Award of 31.07.1989* [cf.]. Cf. ICJ, *Written Statement of The Netherlands*, pp. 8-9, paras. 3.9 [cf.].

145. In its oral pleadings before the ICJ, *Nigeria* held that self-determination has assumed the status of *erga omnes*. The exercise of the right of self-determination by the Chagossians should, in its understanding, be done in the context of exercising the right in the form of internal self-determination within the sovereignty of Mauritius and clearly not in the form of exercise of external self-determination that would result in disintegration of the territorial integrity and sovereignty of Mauritius<sup>118</sup>.

146. For its part, *Serbia* recalled that “rules and principles of decolonization” are well established in the Law of the United Nations, as from the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514(XV) of 14.12.1960. Serbia strongly urged full implementation of the peremptory norm of international law that any attempt aimed at the “partial or total disruption” of the “territorial integrity of a country” is incompatible with the purposes and principles of the U.N. Charter<sup>119</sup>.

147. In its oral pleadings, *South Africa*, attentive to the case-law of the ICJ, stressed the most fundamental character of the right to self-determination, belonging to *jus cogens*, and entailing obligations *erga omnes*<sup>120</sup>, thus prohibiting any violation of that right; it added that there is thus need to uphold the rule of law and to strengthen a rule-based international legal order<sup>121</sup>. South Africa then recalled the United Kingdom’s actions *vis-à-vis* Seychelles, and *vis-à-vis* Mauritius and the Chagossians.

148. It pointed out that, at the time when the British Indian Ocean Territory (BIOT) was created, the islands of Aldabra, Desroches and Farquhar were similarly separated from Seychelles and colonized as part of the BIOT; those islands were, however, rightfully returned to Seychelles upon its independence in 1976. This stands in sharp contrast with what happened in the case of Mauritius and the Chagossians, with the U.K.’s allegation of the strategic location and the defence value of the Chagos Archipelago<sup>122</sup>.

149. In South Africa’s understanding, this has amounted to “the continued unlawful and incomplete decolonization process of Mauritius and the violation of the *jus cogens* right to self-determination as well as the ongoing human rights violations”<sup>123</sup>. It concluded that the “*jus cogens* right to self-determination”, and the territorial integrity of a nation, “cannot be disregarded for the sole purpose of protecting the defence interests and military ambitions of another”<sup>124</sup>.

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<sup>118</sup> Oral Pleadings of Nigeria, ICJ doc. CR 2018/25, p. 53, para. 11.

<sup>119</sup> ICJ, *Written Statement of Serbia*, paras. 29-39.

<sup>120</sup> *Oral Pleadings of South Africa*, in: ICJ, doc. CR 2018/22, of 04.09.2018, pp. 14-15, para. 25.

<sup>121</sup> *Ibid.*, p. 15, para. 27.

<sup>122</sup> *Ibid.*, p. 16, paras. 31-32.

<sup>123</sup> *Ibid.*, p. 16, para. 32.

<sup>124</sup> *Ibid.*, p. 16, para. 32.

150. In South Africa's view, the "violation of human rights in relation to the failure to complete the decolonization process of Mauritius" in of "a continuing nature", and it is essential to enable the United Nations "to protect peoples left vulnerable by colonialism"<sup>125</sup>. At last, in its understanding, the Chagos Archipelago should be promptly returned to Mauritius<sup>126</sup>. In my perception, all the above reassertions of *jus cogens* in the course of the present advisory proceedings are significant, though the Court unfortunately has not addressed this important point in the present Advisory Opinion (cf. *infra*).

## XI. CRITICISM OF THE INSUFFICIENCIES IN THE ICJ'S CASE-LAW RELATING TO *JUS COGENS*.

151. As just seen, there has been special attention devoted, in the course of the present advisory proceedings, by participating Delegations, to *jus cogens* with its incidence on the fundamental right to self-determination (cf. part X, *supra*). Furthermore, I have already pointed out that the United Nations Charter, from the start, made express references to equal rights and self-determination of peoples (Articles 1(2) and 55) (part IV, *supra*), and that the United Nations became promptly committed to, and engaged in, the realization of the fundamental right to self-determination of peoples (part II, *supra*).

152. The evolution of the matter under the United Nations Charter led to the acknowledgment of the *jus cogens* character of that right: soon it became "overwhelmingly characterized as forming part of the peremptory norms of international law", thus generating "effects *erga omnes*"<sup>127</sup>. Bearing this in mind, may I now proceed to a review of the presence of *jus cogens* in the case-law of the ICJ. In effect, there have been occasions when the ICJ expressly acknowledged, in rather brief terms, the concept of *jus cogens* (encompassing norms endowed with a peremptory character), as raised in the course of proceedings, but without providing explanations or elaborating on it.

153. One can find, e.g., brief references to *jus cogens* in its Judgments in the cases of *North Sea Continental Shelf* (of 20.02.1969, para. 72), *Nicaragua versus United States* (of 27.06.1986, para. 190), *Arrest Warrant* (of 14.02.2002, paras. 56 and 58), *Jurisdictional Immunities of the State* (of 03.02.2012, paras. 92-93 and 95-97), as well as in its Advisory Opinions of *Threat or Use of Nuclear Weapons* (of 08.07.1996, para. 83), and of *Kosovo* (of 22.07.2010, para. 81). The ICJ went further than that, in the case of the *Obligation to Prosecute or Extradite*, in stating, in its Judgment (of 20.07.2012), that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)" (para. 99).

154. In the case concerning *Armed Activities on the Territory of the Congo* (New Application, 2002) (D.R. Congo versus Rwanda, jurisdiction and admissibility, Judgment of 03.02.2006), the ICJ, in addressing the relationship between peremptory norms (of *jus cogens*) and the establishment of its own jurisdiction, observed that the fact that a dispute relates to compliance with a norm having the character of *jus cogens*, "which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties" (para. 64).

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<sup>125</sup> *Ibid.*, p. 17, para. 38.

<sup>126</sup> *Ibid.*, p. 18, para. 39.

<sup>127</sup> K. Doehring, "Self-Determination as *Jus Cogens*", in [Various Authors,] *The Charter of the United Nations - A Commentary* (eds. B. Simma et alii), Oxford, Oxford University Press, 1994, pp. 70-71.

155. The ICJ reiterated its position in its subsequent Judgments in the two cases of the *Application of the Convention against Genocide* (in relation to Bosnia, of 26.02.2007, para. 161; and in relation to Croatia, of 03.02.2015, para. 87). In my own understanding, the determination of *jus cogens* has ineluctable *legal consequences*, largely overlooked<sup>128</sup> by the ICJ in its case-law to date. In my understanding, the ICJ cannot at all keep on overlooking the legal consequences of *jus cogens*, obsessed with the consent of individual States to the exercise of its own jurisdiction (cf. part XVIII, *infra*, paras. 298-301).

156. In effect, I have been devoting special attention to the incidence of *jus cogens* with its legal consequences, e.g., in my lengthy Dissenting Opinion (paras. 318-320 and 536) in the case of the *Application of the Convention against Genocide* (Croatia versus Serbia, Judgment of 03.02.2015)<sup>129</sup>, wherein I warned that the 1948 Convention against Genocide is oriented to protection to groups of human beings in situation of vulnerability, and not to States, and ought to be thus interpreted and applied bearing in mind the pressing needs of protection of members of those groups, and not to susceptibilities of States (paras. 517-524 and 542)<sup>130</sup>.

157. Other examples may be referred to, e.g., my extensive three Dissenting Opinions in the three Judgments of the ICJ (of 05.10.2016) dismissing the cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands versus United Kingdom, India and Pakistan), wherein I sustained that the absolute prohibitions of *jus cogens* have come nowadays to encompass the threat or use of nuclear weapons, “for all the human suffering they entail: in the case of their use, a suffering without limits in space or in time, and extending to succeeding generations” (paras. 186-187).

158. *Jus cogens* thus goes beyond the law of treaties, - I added, - “extending itself to the law of the international responsibility of the State, and to the whole *corpus juris* of contemporary International Law, and reaching, ultimately, any juridical act” (para. 188). In this domain, there is, in my understanding need of a people-centred approach, with the *raison d’humanité* prevailing over the *raison d’État*, and attention being kept on “the devastating and catastrophic consequences of the use of nuclear weapons” (para. 321). *Recta ratio* (as cultivated in jusnaturalism), the universal juridical conscience, - I continued, - prevails over the “will” and the strategies of individual States, pointing to

“a universalist conception of the *droit des gens* (the *lex praeceptiva* for the *totus orbis*), applicable to all (States as well as peoples and individuals), given the unity of the human kind. Legal positivism, centred on State power and “will”, has never been able to develop such universalist outlook, so essential and necessary to address issues of concern to humankind as a whole, such as that of the obligation of nuclear disarmament” (para. 224).

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<sup>128</sup> With the exception of the Court’s Judgment in the case of the *Obligation to Prosecute or Extradite* (merits, 2012).

<sup>129</sup> Reproduced in: Judge A.A. Cançado Trindade - *The Construction of a Humanized International Law - A Collection of Individual Opinions*, vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 158 and 231; and in: *Vers un nouveau jus gentium humanisé - Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade*, Paris, L’Harmattan, 2018, pp. 744-745 and 817.

<sup>130</sup> For a study, cf. A.A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza/Brazil, IBDH/IIDH, 2015, pp. 9-265.

159. In the path towards nuclear disarmament, - I proceeded, - “the peoples of the world cannot remain hostage of individual State consent” (para. 321). We are here before the absolute prohibitions of *jus cogens*, “of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering”, fostering the current historical process of humanization of international law (para. 321).

160. The positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, such as nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law. I then concluded that the existence of nuclear weapons is “the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking” (para. 322)<sup>131</sup>.

161. I have considerably examined the matter of *jus cogens*, furthermore, in my Separate Opinion (paras. 212-217) appended to the Advisory Opinion on the *Declaration of Independence of Kosovo* (of 2010); in my two Dissenting Opinions (paras. 124-125 and 140-153; and paras. 117-129, 214-220, 225, 288-299 and 316, respectively) in the case of *Jurisdictional Immunities of the State* (Order of 2010; and Judgment of 2012); in my Dissenting Opinion (paras. 180 and 195) in the case of the *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD - Judgment of 2011); in my Separate Opinion (paras. 44-51, 82-94, 175 and 181) in the case of the *Obligation to Prosecute or Extradite* (Judgment of 2012); in my two Separate Opinions (para. 165; and para. 95) in the case of *A.S. Diallo* (Judgments of 2010 and 2012)<sup>132</sup>.

162. In my two Separate Opinions in this case of *A.S. Diallo*, I addressed, at the merits stage (2010), the relationship of *jus cogens* with consular assistance and human rights (para. 165), and, at the reparations stage (2012), the relationship of *jus cogens* with the realization of justice itself (para. 95). It is not my intention to reiterate here, in the present Separate Opinion in the ICJ’s Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, all that I have developed on the matter in my previous Individual Opinions in the case-law of the ICJ. I deem it sufficient to refer to them herein. Along one decade here in the ICJ, I have been dedicating considerable attention to the importance and the expansion of the material content of *jus cogens* in the contemporary law of nations, as recorded in my aforementioned successive Individual Opinions.

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<sup>131</sup> And cf. also paras. 168, 189 and 223-225. The numbering of these paragraphs is the one found in my Dissenting Opinion in the case of *Marshall Islands versus United Kingdom*; the same paragraphs are found, with a distinct numbering, in my two other Dissenting Opinions in the cases of *Marshall Islands versus India*, and *Marshall Islands versus Pakistan*. My three Dissenting Opinions are reproduced in: *Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions*, vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 364-489, 236-363, and 490-612, respectively; and in: *Vers un nouveau jus gentium humanisé - Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade*, Paris, L’Harmattan, 2018, pp. 906-1030.

<sup>132</sup> Reproduced in: *Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions*, vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 1121-1123; pp. 1253 and 1258-1259; pp. 1347-1348 and 1354-1361; pp. 1446-1448, 1483-1485, 1487, 1513-1517 and 1522; pp. 1542-1546, 1556-1562, 1597 and 1599; pp. 1710 and 1783, respectively; and in: *Vers un nouveau jus gentium humanisé - Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade*, Paris, L’Harmattan, 2018, pp. 393-394; pp. 279-280 and 286-292; pp. 500-505, 536-538, 540, 566-570 and 574; pp. 128-129 and 134 (...); and p. 613, respectively.

163. This being so, I feel obliged to express here my criticism that the case-law of the ICJ relating to the matter has appeared reluctant and far too slow; the ICJ could and should have developed much further its considerations as to the legal consequences of a breach of *jus cogens*, in particular when faced, - as it is now in the present Advisory Opinion, and in successive cases in recent years, - with situations of grave violations of the rights of the human person and of peoples.

164. This is an issue of the utmost importance, which has been brought to the attention of the Court already for a long time. For example, in the early seventies, in the course of the advisory proceedings of the ICJ in respect of *Namibia* (1970-1971), *jus cogens* was duly addressed by a couple of participating Delegations. On the occasion, while Hungary drew attention to the rights related to obligations *erga omnes*<sup>133</sup>, Pakistan referred to General Assembly resolution 2145(XXI) of 1966 as “the expression of the world community in respect of the most fundamental of all rights of a people, that is, the right of self-determination”, generally recognized as one of *jus cogens*, evidenced by its incorporation in Article 1(1) of the two U.N. Covenants on Human Rights<sup>134</sup>.

165. Subsequently, in the advisory proceedings of the ICJ in relation to *Western Sahara* (1975), likewise, Spain referred to the right of peoples to self-determination as a norm of *jus cogens*, in the sense of a peremptory norm of general international law recognized by the international community of States as a whole; Spain further characterized General Assembly resolution 1514(XV) of 1960 as the “Grande Charte de décolonisation”<sup>135</sup>.

166. For its part, Algeria also asserted the character of *jus cogens* of the right of peoples to self-determination; it added that *jus cogens* has become a “norme originaire” of contemporary international law, “d’où découle la construction de tout l’édifice de la communauté internationale de notre temps”, and that on the basis of the right of peoples to self-determination the international community “s’est en effet considérablement élargie et enrichie”<sup>136</sup>. Dwelling further upon that, Algeria stressed that it is the right to self-determination, “dénominateur commun englobant de ce fait la décolonisation, qui constitue la norme supérieure relevant du *jus cogens*”<sup>137</sup>.

167. As it can be seen, this issue has been brought to the ICJ’s attention for a long time, almost half a century, and the Court could and should have developed much further its jurisprudential construction thereon. Moreover, breaches of *jus cogens* have been detected in expert writing in distinct contexts, for example, the acknowledgment that grave violations of the right to self-determination “amount to an international crime”<sup>138</sup>.

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<sup>133</sup> ICJ, *Written Statement* of Hungary, of 16.11.1970, in: ICJ, *Pleadings, Oral Arguments, Documents* - Advisory Opinion on *Namibia*, vol. I, pp. 359-360.

<sup>134</sup> ICJ, *Written Statement* of Pakistan, of 15.02.1971, in: ICJ, *Pleadings, Oral Arguments, Documents* - Advisory Opinion on *Namibia*, vol. II, pp. 141-142; Pakistan further referred to G.A. resolution 2625(XXV) of 1970, containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the U.N. Charter.

<sup>135</sup> ICJ, *Oral Statement* of Spain, of 26.03.1975, in: ICJ, *Pleadings, Oral Arguments, Documents* - Advisory Opinion on *Western Sahara*, vol. I, pp. 206-207.

<sup>136</sup> ICJ, *Oral Statement* of Algeria, of 15.07.1975, in: ICJ, *Pleadings, Oral Arguments, Documents* - Advisory Opinion on *Western Sahara*, vol. IV, p. 493.

<sup>137</sup> ICJ, *Oral Statement* of Algeria, of 29.07.1975, in: ICJ, *Pleadings, Oral Arguments, Documents* - Advisory Opinion on *Western Sahara*, vol. V, p. 320, and cf. p. 319.

<sup>138</sup> A. Cassese, “Remarks on the Present Legal Regulation of Crimes of States”, in: *International Crimes of States* (eds. J.H.H. Weiler, A. Cassese, and M. Spinedi), Berlin, W. de Gruyter, 1989, p. 203, and cf. pp. 201-202; *apartheid*, for example, “has been treated as a crime of State” (*ibid.*, p. 202).

168. As to the present Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, I find it most regrettable that the ICJ has not even mentioned the very important issue of the *jus cogens* character of the fundamental right to self-determination and its legal consequences, extensively dealt with by participating Delegations, in several of their written and oral submissions (in support of *jus cogens*) in the course of the present advisory proceedings, as I have already pointed out (cf. part X, *supra*).

169. The Court, for reasons which escape my comprehension, in face of such an important matter as that of the present request by the General Assembly of its Advisory Opinion, has avoided even mentioning *jus cogens*, limiting itself to refer *in passim* (in paragraph 180) to “respect for the right to self-determination” as “an obligation *erga omnes*”. This does not make much sense to me, as it is utterly incomplete. It appears as if the Court remains (in 2019) haunted by the *Barcelona Traction* ghost of 1970 (beholding only obligations *erga omnes*, without *jus cogens*), as well by the *East Timor* injustice (to its people) of 1995, resulting from its strictly inter-State outlook.

## **XII. OPINIO JURIS COMMUNIS AND JUS COGENS: CONSCIENCE ABOVE THE “WILL”.**

170. *Jus cogens* is nowadays definitively related to the realization of justice itself. Other factual contexts can be referred to, as examined, e.g., in my recent studies of international adjudication of cases of massacres<sup>139</sup>. In such a difficult context, I have addressed, e.g., in my Dissenting Opinion in the case of *Jurisdictional Immunities of the State* (ICJ’s Judgment of 2012), the breach of *jus cogens* in connection with the configuration of crimes of State, e.g., in cases of a criminal State policy (paras. 207-213), of large-scale human rights violations (paras. 214-217 and 231), and of impunity (paras. 294 and 305-306)<sup>140</sup>.

### **1. Jus Cogens: The Existence of *Opinio Juris Communis*.**

171. There is an *opinio juris communis* as to the fundamental right to self-determination in the domain of *jus cogens*, on the part of States themselves which have participated in the present advisory proceedings, as I have endeavoured to demonstrate in the present Separate Opinion (part X, *supra*). This being so, it is high time, - the way I perceive it, - with all the more reason, for the ICJ to embark on a more comprehensive jurisprudential construction on *jus cogens*, without shortcomings, encompassing the legal consequences of its breach. In my understanding, the invocation of “consent” of individual States cannot deprive *jus cogens* of all its legal effects, nor of the legal consequences of its breach. This applies in respect of distinct situations, including the right of peoples to self-determination.

172. I have, in my work along many years, been drawing attention to this. Over three decades ago, for example, in my intervention at the United Nations Conference (debates in Vienna of 12.03.1986 on the concept of *jus cogens*) which ended up adopting the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), I deemed it fit to warn as to the manifest incompatibility with the concept of

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<sup>139</sup> Cf., e.g., A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A.A. Cançado Trindade, *La Reponsabilidad del Estado en Casos de Masacres - Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp.1-104.

<sup>140</sup> Reproduced in: Judge A.A. Cançado Trindade - *The Construction of a Humanized International Law - A Collection of Individual Opinions*, vol. II (ICJ), *op. cit. supra* n. (80), pp. 1481-1484, 1489, 1515 and 1519; and in: *Vers un nouveau jus gentium humanisé - Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade*, Paris, L’Harmattan, 2018, pp. 534-536, 536-537, 542, 568 and 572.

*jus cogens* of the voluntarist conception of international law<sup>141</sup>, which appeared incapable to explain even the formation of rules of general international law and the incidence in the process of formation and evolution of contemporary international law of elements independent of the “free will” of the States<sup>142</sup>. With the assertion of *jus cogens* in the two Vienna Conventions on the Law of Treaties (1969 and 1986), the next step consisted in determining its incidence beyond the law of treaties<sup>143</sup>.

173. In the period 1994-2008, as Judge of the IACtHR, I wholly devoted myself to the jurisprudential expansion of the material content of *jus cogens*<sup>144</sup>. By then, the IACtHR, - followed by the ICTFY, - became the contemporary international tribunal which has most contributed for the conceptual evolution of *jus cogens*, in the faithful exercise of its functions of protection of the human person, so much needed in situations of the most complete adversity or vulnerability.

174. As I pointed out one decade ago, the evolution of contemporary international law does not emanate from the inscrutable “will” of the States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of international law (States, international organizations, human beings, peoples, and humankind as a whole)<sup>145</sup>.

## **2. Recta Ratio: Jus Cogens and the Primacy of Conscience above the “Will”.**

175. Above the “will” stands the human conscience, the universal juridical conscience. The fact that, despite all the sufferings of past generations, there persist in our days new forms of sufferings imposed upon human beings, - illustrated by new situations of chronic and growing poverty, forced displacement, uprootedness, social exclusion or marginalization (as exemplified, *inter alii*, by the forcefully displaced Chagossians - cf. *infra*), - does not mean that Law does not exist to prevent or avoid them (and to provide redress): it rather means that Law keeps on being flagrantly violated, to the detriment of millions of human beings<sup>146</sup> around the world.

176. The ongoing historical process of *humanization* of international law stands in reaction to such injustice. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the *droit des gens*. In effect, already in the XVIth. century, the “founding fathers” of international law drew attention to the principle of equality and non-discrimination: as from *human equality*, Francisco de Vitoria and

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<sup>141</sup> Cf. U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, vol. I, N.Y., U.N., 1995, pp. 187-188 (intervention by the Deputy Head of the Delegation of Brazil, A.A. Cançado Trindade).

<sup>142</sup> A.A. Cançado Trindade, “The Voluntarist Conception of International Law: A Re-Assessment”, 59 *Revue de droit international de sciences diplomatiques et politiques* - Geneva (1981) pp. 201-240.

<sup>143</sup> A.A. Cançado Trindade, “*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law”, in *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2008*, Washington D.C., OAS General Secretariat, 2009, p. 9.

<sup>144</sup> Cf. *ibid.*, pp. 14-26, and cf. pp. 11-13.

<sup>145</sup> *Ibid.*, p. 6.

<sup>146</sup> *Ibid.*, p. 6.

Bartolomé de Las Casas became pioneers in the struggle against oppression<sup>147</sup>, and their penetrating lessons have, along the centuries, kept on echoing in human conscience up to date.

177. In their vision, compliance with the norms of the emerging law of nations (*droit des gens*) - in its universality - stood above State sovereignty. They kept in mind States, peoples and individuals (to whom the principle of equality was fundamental) as subjects of the *droit des gens*<sup>148</sup>. The vision of the human person as subject of international law projected itself along the following centuries<sup>149</sup>. As I have pointed out in a recent assessment of the legacy of the lessons of F. Vitoria,

“The *droit des gens* thus applies to all persons, whether they have consented with it or not; it stands *above* the will. There is an obligation of *reparation* of its violations, establish by it to fulfil a necessity of the international community itself, with the same principles of justice applying to States as well as to peoples and individuals who conform them”<sup>150</sup>.

178. To F. Vitoria, in the universality of the law of nations, in the line of natural law thinking, human *solidarity* marked presence. In the main work of his legacy, his *Relecciones - De Indis* (1538-1539), F. Vitoria, attentive to the duty of conscience, to the *raison d’humanité* (instead of the *raison d’État*), referred to the common good<sup>151</sup>, and to reparation for damages (*restitutio*)<sup>152</sup>. The renewed *jus gentium* could not derive from the “will” of States, as it was a *lex praeceptiva* (proper of natural law) apprehended a *recta ratio* inherent to humankind. In F. Vitoria’s vision, the *jus gentium* applied to all States, peoples and human beings (even without their consent), and the *societas gentium* was a manifestation of the unity of humankind. The way was thus paved for the apprehension of a true *jus necessarium*, transcending the limitations of the *jus voluntarium*<sup>153</sup>.

179. In the search for the common good and in the line of jusnaturalist thinking, F. Vitoria sustained that the *corpus juris* ensues from the *recta ratio*<sup>154</sup>, and not from the “will” of States. Hence the importance attributed to fundamental general principles of law, and to rights and duties

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<sup>147</sup> As I pointed out, e.g., in my Separate Opinions in the IACtHR in the cases of the “*Street Children*” (*Villagrán Morales and Others*, merits, 1999), and of the *Indigenous Community Sawhoyamaxa* (2006).

<sup>148</sup> Cf. J. Brown-Scott, *The Spanish Origin of International Law - Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 163 and 282-283.

<sup>149</sup> Cf. A.A. Cançado Trindade, *Évolution du droit international au droit des gens - L'accès des individus à la justice internationale: Le regard d'un juge*, Paris, Pédone, 2008, pp. 7-184; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-212.

<sup>150</sup> A.A. Cançado Trindade, “Prefácio: A Visão Universalista e Humanista do Direito das Gentes: Sentido e Atualidade da Obra de Francisco de Vitoria”, in: Francisco de Vitoria, *Relecciones - Sobre os Índios e sobre o Poder Civil*, Brasília, Edit. University of Brasília / FUNAG, 2016, pp. 39-40, and cf. pp. 37 and 43-44.

<sup>151</sup> F. Vitoria, “*Relección Segunda - De los Indios*” [1538-1539], in *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1955, pp. 824-825 and 827.

<sup>152</sup> *Ibid.*, pp. 845 and 854-855.

<sup>153</sup> P. Guggenheim, “Contribution à l’histoire des sources du droit des gens”, 94 *Recueil des Cours de l’Académie de Droit International de La Haye* (1958) pp. 21-23, 25, 140 and 170.

<sup>154</sup> F. de Vitoria, *La Ley (De Lege - Commentarium in Primam Secundae)*, Madrid, Tecnos, 1995, pp. 5, 23 and 77; and cf. J. Moreau-Reibel, “Le droit de société interhumaine et le *jus gentium* - Essai sur les origines et le développement des notions jusqu’à Grotius”, 77 *Recueil des Cours de l’Académie de Droit International de la Haye* (1950) pp. 489-492, 495-496, 503, 514-515, 566, 572 and 582; A.A. Cançado Trindade, *A Recta Ratio nos Fundamentos do Jus Gentium como Direito Internacional da Humanidade*, Rio de Janeiro/Belo Horizonte, Academia Brasileira de Letras Jurídicas/Edit. Del Rey, 2005, pp. 21-61.

of all *inter se*<sup>155</sup>, well above State sovereignty<sup>156</sup>. The support by the “founding fathers” of international law to the aforementioned duty of reparation for damages to those victimized, was related also to their denunciation of the extreme and pitiless violence of colonization.

180. For his part, Bartolomé de Las Casas formulated the most forceful criticism of colonialism, discarding it as entirely illegitimate, and calling for, and insisting upon, the duty of reparation to the indigenous peoples. He was particularly poignant in his denunciations, both in his *Brevísima Relación de la Destrucción de las Indias* (1542), and in the subsequent debates of the “Junta de Valladolid” (1550-1551)<sup>157</sup>, on the serious damages inflicted upon the native populations; to him, the barbarians were not these latter, but the colonizers who caused them such damages<sup>158</sup>.

181. B. de Las Casas denounced the situation of extreme adversity imposed by the colonizers upon the native inhabitants, depriving them of their rights<sup>159</sup>. He added that this was in grave breach of the law of nations (*droit des gens*), emanated from *recta ratio*, in the *ius naturale*, common to all nations<sup>160</sup>. *Jus gentium* was thus called, - he proceeded, - as it was common to, and should be complied with, by all nations, in the search for the common good<sup>161</sup>. *Ius naturale*, - he insisted, - could not at all be ignored, and the human rights of peoples should be respected, avoiding all forms of violence, including forced displacement<sup>162</sup>.

182. F. Vitoria and B. Las Casas, among others (*infra*), advanced the humanist vision of the emerging *droit des gens*, revealing the conscience of the dignity inherent to all human beings (*dignitas hominis*)<sup>163</sup>, and the existence of an international objective justice, faithful to

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<sup>155</sup> J. Brown Scott, *The Spanish Origin of International Law - Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1934, pp. 282-283, 140, 150, 163-165, 170 and 172; J. Brown Scott, *The Spanish Origin of International Law - Lectures on Francisco de Vitoria (1480-1546) and Francisco Suárez (1548-1617)*, Washington D.C., Georgetown University, 1928, pp. 15 and 20-21.

<sup>156</sup> A.M. Palamidessi, *Alle Origini del Diritto Internazionale - Il Contributo di Vitoria e Suárez alla Moderna Dottrina Internazionalistica*, Roma, Aracne Edit., 2010, pp. 52-53, 66-69, 83, 169 and 176.

<sup>157</sup> During those debates, B. de Las Casas criticized the contradictory apology by his opponent (J.G. Sepúlveda) of (religious) colonialism, and, positioning himself against it, advanced the truly and authentic humanist posture of equality and preservation of all cultures (including those of far-away native peoples); cf. A. Bidar, *Histoire de l'humanisme en Occident*, Paris, A. Colin, 2014, pp. 202-203.

<sup>158</sup> Cf. B. de Las Casas, *Brevísima Relación de la Destrucción de las Indias* [1542], Alicante, Publ. Universidad de Alicante, 2009, pp. 91-92 and 116-117; B. de Las Casas, *Brevísima Relación de la Destrucción de las Indias* [1552], Barcelona, Ediciones 29, 2004 [reed.], pp. 14, 17, 23, 27, 31, 45, 50, 72-73, 87 and 89-90; B. de Las Casas, *Brevísima Relación de la Destrucción de las Indias* [1552], Barcelona, Ed. Galaxia Gutenberg / Universidad de Alicante, 2009, pp. 91-92 and 116-117; L. Mora-Rodríguez, *Bartolomé de Las Casas - Conquête, domination, souveraineté*, Paris, PUF, 2012, pp. 19, 25, 114, 149, 156, 160, 228-229, 231-235 and 239-241; B. Lavallé, *Bartolomé de Las Casas - Entre la Espada y la Cruz*, Barcelona, Edit. Ariel, 2009, pp. 63, 65 and 220.

<sup>159</sup> Cf. *Tratados de Fray Bartolomé de las Casas*, vol. II, Mexico, Fondo de Cultura Económica (FCE), 1997 [2nd. reimpr.], pp. 761 and 1047.

<sup>160</sup> Cf. *ibid.*, pp. 1067-1073, 1239 and 1255.

<sup>161</sup> Cf. *ibid.*, pp. 1247, 1249 and 1263.

<sup>162</sup> Cf. *Tratados de Fray Bartolomé de las Casas*, vol. I, Mexico, FCE, 1997 [2nd. reimpr.], pp. 319, 371, 419 and 551.

<sup>163</sup> Cf. A. Pele, *El Discurso de la Dignitas Hominis en el Humanismo del Renacimiento*, Madrid, Univ. Carlos III de Madrid/Edit. Dykinson, 2010, pp. 17, 19-21, 29-30, 37, 41-42, 45, 47, 55, 58, 62-68, 92, 101, 108 and 119.

jusnaturalism<sup>164</sup>. The duty of reparation, emanating from the principle *neminem laedere*, with its profound historical roots, aimed at fulfilling a need of the international community as a whole<sup>165</sup>.

183. Still at the time of F. Vitoria in the XVIth. century, the thinking of his contemporary Domingo de Soto was also related to his own, both pursuing the same ideal; this can be seen in Domingo de Soto's book *De Iustitia et Jure* (1557), showing his reasoning oriented by *recta ratio* and the humanist outlook in search of the common good<sup>166</sup>. In my Declaration appended to the ICJ's Order (of 11.04.2016) in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), in addressing the urgent need of providing collective reparations, I deemed it fit to recall the duty of reparation "firmly-rooted in the history of the law of nations" (paras. 11-12 and 15-16), as from the aforementioned classic works of the XVIth. century, besides those of Juan de la Peña (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); Alberico Gentili (*De Jure Belli*, 1598).

184. They were followed, in the XVIIth. century, - I added, - by the writings of Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, book II, ch. 17); Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis - Libri Duo*, 1672, and *On the Duty of Man and Citizen According to Natural Law*, 1673). Then came, along the XVIIIth. century, - I proceeded, - the writings of Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; *Questiones Juris Publici - Libri Duo*, 1737); Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1764, and *Principes du droit de la nature et des gens*, 1758).

185. I then pondered, in the same Declaration, that "[t]he more we do research on the classics of international law (largely forgotten in our hectic days), the more we find reflections on the victims' right to reparations for injuries" (para. 17), in the writings of the "founding fathers" of the law of nations, in the light of the principle *neminem laedere*. The duty of reparation for injuries was clearly and lucidly seen as

"a response to an *international need*<sup>167</sup>, in conformity with the *recta ratio*, - whether the beneficiaries were (emerging) States, peoples, groups or individuals" (para. 19).

186. Shortly afterwards, to the ICJ's new Order (of 06.12.2016) in the case of *Armed Activities on the Territory of the Congo*, I appended a Separate Opinion wherein I examined in detail the contents of the lessons on the duty of reparation in the writings of F. Vitoria, B. de Las

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<sup>164</sup> C. Barcía Trelles, "Francisco de Vitoria et l'École moderne du Droit international", 17 *Recueil des Cours de l'Académie de Droit International de La Haye* (1927) pp. 143, 196, 198, 200, 212, 228, 231, 248, 256, 279, 292, 315, 328 and 331; and cf. pp. 204-205 and 332.

<sup>165</sup> Cf. Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 73-74, and cf. pp. 169-170.

<sup>166</sup> Cf. J. Brufau Prats, *La Escuela de Salamanca ante el Descubrimiento del Nuevo Mundo*, Salamanca, Edit. San Estéban, 1989, pp. 60-61 and 66-67, and cf. p. 71.

<sup>167</sup> J. Brown Scott, *The Spanish Origin of International Law - Francisco de Vitoria and His Law of Nations*, op. cit. supra n. (104), pp. 140, 150, 163, 165, 172, 210-211 and 282-283; and cf. A.A. Cançado Trindade, "Prefacio", in *Escuela Ibérica de la Paz (1511-1694) - La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R.E. Mandado Gutiérrez), Santander/Spain, Ed. Universidad de Cantabria, 2014, pp. 40-109.

Casas, J. Roa Dávila, A. Gentili, H., F. Suárez, S. Pufendorf, C. Wolff<sup>168</sup> (paras. 11-15). In their humanist outlook, the “founding fathers” of the *droit des gens* envisioned redress for damages as fulfilling an international need in conformity with *recta ratio*. They found inspiration in the much earlier writings of Thomas Aquinas (from the XIIIth. century). I then added that:

“The emerging *jus naturae et gentium* was universalist, directed to all peoples; law and ethics went together, in the search for justice. Reminiscent of Cicero’s ideal of *societas hominum*<sup>169</sup>, the ‘founding fathers’ of international law conceived a ‘universal society of the human kind’ (*commune humani generis societas*) encompassing all the aforementioned subjects of the law of nations (*droit des gens*)” (para. 16).

187. Still at the time of C. Wolff, in the mid-XVIIIth. century, the Vattelian reductionism (in E. de Vattel, *Le Droit des gens ou Principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains*, 1758) was proposed. As time went on, - I proceeded, - such reductionist outlook of the international legal order came to prevail in the XIXth and early XXth centuries, under the unfortunate influence of legal positivism, beholding only absolute State sovereignties and subsuming human beings thereunder (para. 17), and incapable of reaching or even understanding universality.

188. This had the well-known disastrous consequences for human beings and peoples, that marked the tragic and abhorrent history of the XXth. century. Yet, - I added, -

“The legacy of the ‘founding fathers’ of international law has been preserved in the most lucid international legal doctrine, from the XVIth-XVIIth centuries to date. It marks its presence in the universality of the law of nations, in the acknowledgment of the importance of general principles of law, in the relevance attributed to *recta ratio*. It also marks its presence in the acknowledgment of the indissoluble whole conformed by breach and prompt reparation” (para. 18).

189. The truth is that the awareness never vanished that it was important to rescue and preserve the humanist and universalist outlook, so essential in the current process of *humanization*

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<sup>168</sup> F. Vitoria, *Second Relectio - On the Indians [De Indis]* [1538-1539], Oxford/London, Clarendon Press/H. Milford, 1934 (reed.), p. LV; F. Vitoria, *Sobre el Poder Civil [Relectio de Potestate Civili]*, 1528] (ed. J. Cordero Pando), Salamanca, Edit. San Estéban, 2009 [reed.], pp. 22 and 44; B. de Las Casas, *De Regia Potestate o Derecho de Autodeterminación* [1571] (eds. L. Pereña, J.M. Pérez-Prendes, V. Abril and J. Azcárraga), CSIC, Madrid, 1969, p. 72; J. Roa Dávila, *De Regnorum Iusticia o El Control Democrático* [1591] (eds. L. Pereña, J.M. Pérez-Prendes and V. Abril), Madrid, CSIC/Instituto Francisco de Vitoria, 1970, pp. 59 and 63; [Various Authors,] *Alberico Gentili - Giustizia, Guerra, Imperio* (Atti del Convegno di San Ginesio, sett. 2010), Milano, Giuffrè Edit., 2014, pp. 275 and 320, and cf. pp. 299-300 and 327; Hugonis Grotii, *De Iure Belli Ac Pacis* [1625], book II, ch. XVII, The Hague, M. Nijhoff, 1948, pp. 79-82, paras. I and VIII-IX; and cf. H. Grotius, *Le droit de la guerre et de la paix* [1625] (eds. D. Alland and S. Goyard-Fabre), Paris, PUF, 2005 (reed.), pp. 415-416 and 418, paras. I and VIII-IX; Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 73-74, and cf. pp. 169-170; S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673] (eds. J. Tully and M. Silverthorne), Cambridge, Cambridge University Press, 2003 [reprint], pp. 57-58, and cf. pp. 59-60; C. Wolff, *Principes du droit de la nature et des gens* [1758], vol. III, Caen, Ed. Université de Caen, 2011 [reed.], ch. VI, pp. 293-294, 296-297 and 306.

<sup>169</sup> Cf., *inter alii*, e.g., M. Luque Frías, *Vigencia del Pensamiento Ciceroniano en las Relecciones Jurídico-Teológicas del Maestro Francisco de Vitoria*, Granada, Edit. Comares, 2012, pp. 70, 95, 164, 272-273, 275, 278-279, 284, 398-399 and 418-419; A.A. Caçado Trindade and V.F.D. Caçado Trindade, “A Pré-História do Princípio de Humanidade Consagrado no Direito das Gentes: O Legado Perene do Pensamento Estóico”, in *O Princípio de Humanidade e a Salvaguarda da Pessoa Humana* (eds. A.A. Caçado Trindade and C. Barros Leal), Fortaleza/Brazil, IBDH/IIDH, 2016, pp. 49-84.

of international law and of construction of the new *jus gentium* of the XXIst century<sup>170</sup>. The perennial legacy of the “founding fathers” of the law of nations (*droit des gens*) thus remains topical nowadays, and keeps on being cultivated<sup>171</sup>, so as to face new challenges that contemporary international tribunals currently face, “from an essentially humanist approach” (para. 30).

190. In my view, one is to move beyond the unsatisfactory inter-State outlook (like the “founding fathers” of international law did), if one is to foster the progressive development of international law in particular in the domain of collective reparations for damages (para. 31). And I concluded that

“It is in jusnaturalist thinking - as from the XVIth century - that the goal of prompt reparation was properly pursued. Legal positivist thinking - as from the late XIXth century - unduly placed the ‘will’ of States above *recta ratio*. It is in jusnaturalist thinking - revived as it is nowadays<sup>172</sup> - that the notion of *justice* has always occupied a central position, orienting *law* as a whole; *justice*, in sum, is at the beginning of all *law*, being, moreover, its ultimate end” (para. 32).

192. In my perception, in rescuing the universalist vision which marked the origins of the most lucid doctrine of international law, the aforementioned historical process of *humanization* of international law contributes to the construction of the new *jus gentium* of the XXIst century, oriented by the general principles of law<sup>173</sup>. This historical process is enhanced by its own conceptual achievements, such as, to start with, *inter alia*, the acknowledgment of *jus cogens* and the corresponding obligations *erga omnes* of protection, disclosing likewise the universalist outlook of the law of nations<sup>174</sup>.

193. The existence of *peremptory* norms of international law goes ineluctably beyond conventional norms, extending to every and any juridical act<sup>175</sup>. The domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law<sup>176</sup>. One and a half decades ago I sustained, in my Concurring Opinion appended to the IACtHR’s Advisory Opinion n. 18 (of 17.09.2003) on the *Juridical Condition and the Rights of Undocumented Migrants*, my

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<sup>170</sup> A.A. Caçado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, *op. cit. infra* n. (178), pp. 1-726.

<sup>171</sup> On that legacy, cf., recently, A.A. Caçado Trindade, *A Humanização do Direito Internacional*, 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, ch. XXIX (“A Perenidade dos Ensinamentos dos ‘Pais Fundadores’ do Direito Internacional”) [“The Perennity of the Teachings of the ‘Founding Fathers’ of International Law”], 2015, pp. 647-676.

<sup>172</sup> Cf., in the last decades, e.g., *inter alii*, A.A. Caçado Trindade, *O Direito Internacional em um Mundo em Transformação*, *op. cit. supra* n. (1), pp. 1028-1029, 1051-1052 and 1075-1094 (universal values underlying the new *jus gentium*, common to the whole of humankind, to all human beings - *civitas maxima gentium*); J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatán, 1982 [reimpr.], pp. 79-80, and cf. p. 104 (the human person transcending the State, and having a destiny superior to time). Cf. also, e.g., [Various Authors,] *Droit naturel et droits de l’homme - Actes des Journées internationales de la Société d’Histoire du Droit* (Grenoble-Vizille, mai 2009 - ed. M. Mathieu), Grenoble, Presses Universitaires de Grenoble, 2011, pp. 40-43, 52-53, 336-337 and 342.

<sup>173</sup> Cf. A.A. Caçado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2<sup>nd</sup>. rev. ed., *op. cit. supra* n. (1), pp. 121-209 and 447-454.

<sup>174</sup> A.A. Caçado Trindade, *A Humanização do Direito Internacional*, 2nd. rev. ed., *op. cit. supra* n. (171), pp. 6-20, 666-676 and 761-767.

<sup>175</sup> Cf. A.A. Caçado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 415-416.

<sup>176</sup> For the extension of *jus cogens* to all possible juridical acts, cf., e.g., E. Suy, “The Concept of *Jus Cogens* in Public International Law”, in *Papers and Proceedings of the Conference on International Law* (Langonissi, Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp. 17-77.

understanding that *jus cogens* is not a closed juridical category, but rather one in evolution and expansion (paras. 65-73). In sum, *jus cogens* is

“(…) an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation. (…)

The concept of *jus cogens* in fact is not limited to the law of treaties, and is likewise proper to the law of the international responsibility of the States. (...) In my understanding, it is in this central chapter of international law, that of the international responsibility (perhaps more than in the chapter on the law of treaties), that *jus cogens* reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (including beyond the domain of State responsibility) on the very *foundations* of an international law truly universal” (paras. 68-70).

194. For its part, the ICJ needs, in my perception, to put an end to its obsession with State consent (to the point of calling it a “principle”), so as to proceed to its own jurisprudential construction on *jus cogens*. Eight years ago, in my Dissenting Opinion in the case of the *Application of the CERD Convention (Georgia versus Russian Federation, preliminary objections, Judgment of 01.04.2011)*, after a lengthy examination of the problem at issue, I warned:

“In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled, in paragraph 110, as ‘the fundamental principle of consent’. I do not at all subscribe to its view, as, in my understanding, consent is not ‘fundamental’, it is not even a ‘principle’. What is ‘fundamental’, i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of justice. It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*” (para. 211).

195. In my understanding, general principles of law guide all legal norms, standing above the “will” of States. They emanate, like *jus cogens*, from human conscience, rescuing international law from the pitfalls of State voluntarism and unilateralism, incompatible with the foundations of a true international legal order. As I have been pointing out for years, they reflect the idea of an objective justice, and give expression to common superior values, which can fulfil the aspirations of humankind as a whole<sup>177</sup>.

196. Their relevance becomes evident in the construction, in our days, of a new and universal *jus gentium*, the international law for humankind<sup>178</sup>. *Jus cogens*, well above *jus dispositivum*, exists and has expanded to benefit of human beings and peoples, and ultimately of humankind<sup>179</sup>. We can here acknowledge the prevalence of the *jus necessarium* over the *jus*

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<sup>177</sup> Cf. A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2<sup>nd</sup>. rev. ed., *op. cit. supra* n. (1), pp. 447-454.

<sup>178</sup> A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>nd</sup>. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 1-726.

<sup>179</sup> A.A. Cançado Trindade, “*Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law*”, *op. cit. supra* n. (92), pp. 28-29.

*voluntarium*, with *jus cogens* occupying a central position and presenting itself as the juridical expression of the international community as a whole<sup>180</sup>.

197. Even if the large majority of those engaged in the legal profession in our times do not share this outlook, for having accommodated themselves to legal positivism, there are a few jurists conforming the more lucid international legal doctrine who have dedicated themselves to a proper understanding of the very foundations of the law of nations. These minority jurists have duly valued the idea of an *objective* justice, the primacy of *jus cogens* above State consent, the primacy of conscience above the “will”. They have embraced this cause - which is my own - in distinct cultural *milieux*, around the world.

198. To recall but a couple of examples, in the Far East, e.g., the Chinese jurist Li Haopei criticized positivists for having attempted to base international law simply on State consent, which was nothing but a “layer of loose sand”, for, if it were really so, international law would cease to be effective whenever States withdrew their consent. He further criticized the attitude of positivists of intentionally ignoring or belittling the value of general principles of law, and held that peremptory norms of international law have emerged to confer an ethical and universal dimension to international law and to serve the common interests of the international community as a whole and, ultimately, of all humankind<sup>181</sup>.

199. In the Caribbean, e.g., to the Cuban jurist M.A. D’Estéfano Pisani the concept of *jus cogens*, rooted in natural law, reflects the juridical achievements of humankind; moreover, it warns States as to the need to abide by fundamental principles and peremptory norms, which deprive of legitimacy any act or situation (under the law of treaties or customary law) incompatible with them<sup>182</sup>. In my own perception, the views of both of them are correct: law and ethics go together, and it is in the line of jusnaturalism that we can keep on constructing a truly universal international law.

200. As to international case-law, the ICJ has missed a historical and precious occasion to advance its own case-law relating to *jus cogens* in the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Distinctly from the ICJ’s reluctant position, my own endeavours and contribution in support of this jurisprudential construction have been duly recognized in expert writing, for drawing attention to the fact that “*jus cogens* ascribes an ethical content to the new *jus gentium*, the international law for humankind”<sup>183</sup>, and thereby for giving expression to the universalist and humanist paradigm to

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<sup>180</sup> *Ibid.*, pp. 14, 27-28.

<sup>181</sup> Li Haopei, “*Jus Cogens* and International Law”, in *Selected Articles from Chinese Yearbook of International Law*, Beijing/China, Chinese Society of International Law, 1983, pp. 47-48, 57, 59, 61-64 and 74.

<sup>182</sup> M.A. D’Estéfano Pisani, *Derecho de Tratados*, 2<sup>nd</sup>. ed., Havana/Cuba, Edit. Pueblo y Educación, 1986 [reprint], pp. 97 and 165-166.

<sup>183</sup> M. Saul, “Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges”, 5 *Asian Journal of International Law* (2015) pp. 32-33, and cf. p. 38; and, for my conceptualization of the international law for humankind, cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>nd</sup>. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 1-726.

guide the progressive development of international law to the ultimate benefit of the international community as a whole<sup>184</sup>.

201. There is pressing need today for the ICJ to elaborate its reasoning on *jus cogens* (not only obligations *erga omnes*) and its legal consequences, taking into account the progressive development of international law. It cannot keep on referring only to obligations *erga omnes* without focusing and elaborating on *jus cogens* wherefrom they ensue. Furthermore, in my understanding, the situation of the forcefully displaced Chagossians, in inter-generational perspective, is to be kept carefully in mind, in the light of the successive resolutions of the U.N. General Assembly examined in the present Separate Opinion.

### XIII. RIGHTS OF PEOPLES, BEYOND THE STRICT INTER-STATE OUTLOOK.

202. In the course of the present Separate Opinion, I have recalled, from the start (cf. part II, *supra*), that the prompt and long-standing United Nations' acknowledgment of, and commitment to, the fundamental right to self-determination, were undertaken in the framework of the rights of peoples, in the light of the United Nations Charter itself, attentive to them. The United Nations, guided by its own Charter, has, since its earlier years, always supported and promoted the rights of peoples, acting beyond the traditional inter-State outlook.

203. There were historical antecedents to be taken into account, such as the minorities and mandates systems at the time of the League of Nations<sup>185</sup>, later followed by non-self-governing territories and the trusteeship system under the United Nations Charter. I just refer to them briefly here, as this is a point lying beyond the framework and scope of the present Separate Opinion.

204. May I add that, even before the current era of the ICJ, its predecessor, the Permanent Court of International Justice (PCIJ), issued Advisory Opinions on matters concerning "communities" (e.g., its Advisory Opinion on the *Greco-Bulgarian "Communities"*, 1930) as well as "minorities" (e.g., its Advisory Opinions on *Access to German Minority Schools in Upper Silesia*, 1931; on *Treatment of Polish Nationals in Danzig*, 1932; on *Minority Schools in Albania*, 1935)<sup>186</sup>.

205. Looking back in time, we find that the safeguard of the rights of peoples has thus its historical roots, preceding the United Nations. Nowadays, in the current era of the ICJ, a point to be underlined, in my perception, is that, in the course of the present advisory proceedings of the ICJ on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,

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<sup>184</sup> A. von Bogdandy and I. Venzke, *En Nombre de Quién? - Una Teoría de Derecho Público sobre la Actividad Judicial Internacional*, Bogotá, Universidad Externado de Colombia, 2016, pp. 80-81, 98-99 and 207; A. von Bogdandy and I. Venzke, *In Whose Name? - A Public Law Theory of International Adjudication*, Oxford, Oxford University Press, 2016 [reprint], pp. 48-49, 62 and 142.

<sup>185</sup> Cf., *inter alia*, e.g., A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 *Netherlands International Law Review* (1977) pp. 373-392; A.M. de Zayas, "The International Judicial Protection of Peoples and Minorities", in *Peoples and Minorities in International Law* (eds. C. Brölmann, R. Lefeber and M. Zieck), Dordrecht, Nijhoff, 1993, pp. 253-274 and 286-287; A.C. Zoller, "International Representation of Peoples and Minorities", in *ibid.*, pp. 303-307 and 309-310.

<sup>186</sup> Cf. A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", in: *A Century of International Justice and Prospects for the Future / Rétrospective d'un siècle de justice internationale et perspectives d'avenir* (eds. A.A. Cançado Trindade and D. Spielmann), Oisterwijk, Wolf Publs., 2013, pp. 3-6 and 12-13, esp. p. 4; C. Brölmann, "The PCIJ and International Rights of Groups and Individuals", in *Legacies of the Permanent Court of International Justice* (eds. C.J. Tams, M. Fitzmaurice and P. Merkouris), Leiden, Nijhoff, 2013, pp. 123-143.

there have been successive references to, and reliance upon, rights of peoples, in the submissions of participating Delegations.

206. Given the importance of the matter, may I retake it here, for additional considerations. In a key-note address I delivered in a ceremony held at the United Nations in Geneva, on 16.12.2009<sup>187</sup>, on the occasion of the retaking by the United Nations (by an initiative of Cuba) of the right of peoples' to peace, I dwelt upon the matter, singling out, *inter alia*, the references to, and reliance upon, peoples' rights in ICJ proceedings. In the early seventies, e.g., in the first *Nuclear Tests* cases (atmospheric testing, Australia and New Zealand *versus* France, 1973-1974), the right of peoples to live in peace was acknowledged and asserted before the ICJ.

207. The submissions of the parties, in the written and oral phases of the proceedings, were particularly significant, even more than the actual outcome of the cases. In its application instituting proceedings (of 09.05.1973), e.g., Australia contended that it purported to protect its people and the peoples of other nations, and their descendants, from the threat to life, health and well-being arising from potentially harmful radiation generated from radio-active fall-out generated by nuclear explosions<sup>188</sup>. For its part, New Zealand went even further in its own application instituting proceedings (also of 09.05.1973)<sup>189</sup>, making clear that it was pleading on behalf not only of its own people, but also of the peoples of the Cook Islands, Niue and the Tokelau Islands<sup>190</sup>.

208. In its memorial on jurisdiction and admissibility (of 29.10.1973), New Zealand further argued that "the atmospheric testing of nuclear weapons inevitably arouses the keenest sense of alarm and antagonism among the peoples and governments of the region in which the tests are carried out"<sup>191</sup>. Moreover, in its request (of 14.05.1973) for the indication of provisional measures of protection, New Zealand recalled two precedents (in 1954 and 1961) of threats to peoples' right to live in peace<sup>192</sup>. Thus, beyond the strict confines of the strictly inter-State *contentieux* before the ICJ, both New Zealand and Australia rightly looked beyond it, and vindicated rights of peoples to health, to well-being, to be free from anxiety and fear, in sum, to live in peace.

209. Two decades later, the matter was brought to the fore again, in the mid-nineties, in the second *Nuclear Tests* cases (underground testing, New Zealand *versus* France, 1995). Although this time only New Zealand was the applicant State (as from its request of 21.08.1995), five other States lodged with the ICJ applications for permission to intervene<sup>193</sup>: Australia, Solomon Islands, Micronesia, Samoa and Marshall Islands. Australia argued (on 23.08.1995) that the dispute between New Zealand *versus* France raised the issue of the observance of obligations *erga omnes* (paras. 18-20, 24-25 and 33-34).

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<sup>187</sup> A.A. Cançado Trindade, "[Key-Note Address: Some Reflections on the Justiciability of the Peoples' Right to Peace - Summary]", in U.N., *Report of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Workshop on the Right of Peoples to Peace* (2009), doc. A/HRC/14/38. de 17.03.2010, pp. 9-11 (summarized version); A.A. Cançado Trindade, "Some Reflections on the Justiciability of the Peoples' Right to Peace, on the Occasion of the Retaking of the Subject by the United Nations", 11 *Revista do Instituto Brasileiro de Direitos Humanos* (2011) pp. 15-29 (full text).

<sup>188</sup> It further referred to the populations being subjected to mental stress and anxiety generated by fear; ICJ, *Nuclear Tests cases* (Australia *versus* France, vol. I) - *Pleadings, Oral Arguments, Documents*, pp. 11 and 14.

<sup>189</sup> ICJ, *Nuclear Tests cases* (New Zealand *versus* France, vol. II) - *Pleadings, Oral Arguments, Documents*, p. 7.

<sup>190</sup> *Ibid.*, pp. 4 and 8.

<sup>191</sup> *Ibid.*, p. 211.

<sup>192</sup> *Ibid.*, p. 54.

<sup>193</sup> Under the terms of Article 62 of the ICJ Statute.

210. On their part, Solomon Islands, Micronesia, Samoa and Marshall Islands, also underlining the need of fulfilment of obligations *erga omnes* (paras. 20 and 25), contended (on 24.08.1995) that, as member States of the South Pacific Forum, they have consistently opposed activities “related to nuclear weapons and nuclear waste disposal in their Region, for example, by seeking to establish and guarantee the status of the Region as a nuclear-free zone” (para. 5). And they added that

“(…) The cultures, traditions and well-being of the peoples of the South Pacific States would be adversely affected by the resumption of French nuclear testing within the region in a manner incompatible with applicable legal norms” (para. 25).

211. Other pertinent examples of resort to peoples’ rights before the ICJ could here be briefly recalled. In its Judgment of 22.12.1986 in the case of the *Frontier Dispute* (Burkina Faso *versus* Mali), the ICJ Chamber, in drawing the frontier line as requested by the parties (para. 148), took note of their contentions, *inter alia*, concerning the *modus vivendi* of the people living in four villages in the region (farming, land cultivation, pasturage, fisheries)<sup>194</sup>.

212. Shortly afterwards, in the course of the proceedings (of 1988-1990) in the case of *Phosphate Lands in Nauru* (Nauru *versus* Australia), e.g., the ICJ took cognizance of successive contentions invoking peoples’ rights<sup>195</sup> (e.g., over their natural resources<sup>196</sup>), and their *modus vivendi*<sup>197</sup>. Furthermore, earlier on, in its Advisory Opinion of 16.10.1975 on *Western Sahara*, the ICJ itself had utilized the expression “right of peoples” (para. 55), in the framework of the application of the “principle of self-determination” (paras. 55 and 59).

213. Two decades later, in the case concerning *East Timor* (Portugal *versus* Australia, Judgment of 30.06.1995), although the ICJ found that it had no jurisdiction to adjudicate upon the dispute (a decision much discussed in expert writing), yet it acknowledged the rights of peoples to self-determination (para. 29) and to permanent sovereignty over their natural resources (para. 33), and added that “the principle of self-determination of peoples” has been recognized by the U.N. Charter and in its own jurisprudence as “one of the essential principles of contemporary international law” (para. 29).

214. In the *East Timor* case, however, the ICJ did not extract the legal consequences therefrom. Attentive to the inter-State scheme of the *contentieux* before itself, it took into account the alleged interests of a third State (which had not even accepted its own jurisdiction), inconsistently taking them for granted (by means of the application of the so-called *Monetary Gold* “principle”), to the detriment of the people of East Timor. The lesson to be extracted therefrom is, in my understanding, that the outdated strictly inter-State mechanism of the *contentieux* before the ICJ cannot and does not amount to a restriction to the *reasoning* of the Court.

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<sup>194</sup> Paras. 114-116 and 124-125.

<sup>195</sup> ICJ, case concerning *Certain Phosphate Lands in Nauru* (Nauru *versus* Australia, vol. I) - *Pleadings, Oral Arguments, Documents*, pp. 14, 16, 21, 87, 113 and 185.

<sup>196</sup> *Ibid.*, pp. 183 and 196.

<sup>197</sup> *Ibid.*, pp. 113 and 117.

215. When the matter lodged with it concerns the *rights of peoples*, as in the aforementioned examples, the ICJ reasoning is to transcend ineluctably the strictly inter-State outlook. Otherwise justice cannot be done. The nature of the matters lodged with the ICJ is to lead to its proper reasoning. I have had the occasion to dwell upon the issue in my successive Dissenting Opinions in the case of the *Application of the Convention against Genocide* (2015), and in the three cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (2016).

216. Thus, in the case of the *Application of the Convention against Genocide (Croatia versus Serbia, Judgment of 03.02.2015)*, I further warned that

“Contrary to what contemporary disciples of Jean Bodin and Thomas Hobbes may still wish to keep on thinking, the Peace Palace here at The Hague was not built and inaugurated one century ago to remain a sanctuary of State sovereignty. It was meant to become a shrine of international justice, not of State sovereignty. Even if the mechanism of settlement of contentious cases by the PCIJ/ICJ has remained a strictly inter-State one, by force of mental inertia, the nature and subject-matters of certain cases lodged with the Hague Court along the last nine decades have required of it to go beyond the strict inter-State outlook. The artificiality of the exclusively inter-State outlook, resting on a longstanding dogma of the past, has thus been made often manifest, and increasingly so.

More recently, the contentious cases wherein the Court’s concerns have had to go beyond the strict inter-State outlook have further increased in frequency<sup>198</sup>. The same has taken place in the two more recent Advisory Opinions of the Court<sup>199</sup>. Half a decade ago, for example, in my Separate Opinion in the ICJ’s Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), I deemed it fit to warn against the shortcomings of the strict inter-State outlook (para. 191), and stressed the need, in face of a humanitarian crisis in the Balkans, to focus attention on the *people* or *population concerned* (paras. 53, 65-66, 185 and 205-207), in pursuance of a humanist outlook (paras. 75-77 and 190), in the light of the principle of humanity (para. 211).

The present case concerning the *Application of the Convention against Genocide (Croatia versus Serbia)* provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against Genocide, - adopted on the eve of the Universal Declaration of Human Rights, - is not State-centered, but rather *people-centered*. The Convention against Genocide cannot be properly interpreted and applied with a strict State-centered outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the *justiciables*, on the victims, - real and potential victims, - so as to impart justice under the Genocide Convention” (paras. 494-496).

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<sup>198</sup> E.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (2009-2013), pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture; the case of *A.S. Diallo* (2010) on detention and expulsion of a foreigner; the case of the *Jurisdictional Immunities of the State* (2010-2012); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (2011); the case of the *Temple of Preah Vihear* (2011-2013).

<sup>199</sup> On the *Declaration of Independence of Kosovo* (2010), and on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012), respectively.

217. Likewise, in my three recent Dissenting Opinions appended to the three Judgments of the ICJ (of 05.10.2016) in the cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, I deemed it fit to warn, *inter alia*, that the submissions made, and elements put forward by the contending parties in the course of the proceedings before the ICJ, “have gone beyond the inter-State outlook. In my perception, there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples’ and humankind’s quest for survival in our times” (para. 295).

218. The present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, which the ICJ has just adopted today, is yet another occasion marking the presence of the rights of peoples, in particular, the right of peoples to self-determination. This time, distinctly from previous occasions, the ICJ has taken due account of it, even if additional points could have been made, as I have pointed out in the present Separate Opinion. I shall next address another one of these latter.

#### **XIV. CONDITIONS OF LIVING: THE LONGSTANDING TRAGEDY OF IMPOSED HUMAN SUFFERING.**

219. In my own conception, the right to life - of forcefully displaced Chagossians and their descendants - comprises the right to dignified conditions of living. In the course of the present advisory proceedings before the ICJ, the following statement was made, in the public hearing of 03.09.2018, by the representative of the Chagossian community (Ms. M. Liseby Elysé):

“My name is Liseby Elysé. (...) 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. (...) 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. (...) [O]ne 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. (...) 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 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.

(...) [N]obody 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. (...)

(...) 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”<sup>200</sup>.

220. Bearing this testimony in mind, the lessons of F. Vitoria and B. de Las Casas (*supra*), after five centuries, remain topical in our times; they both addressed sources of violence against people, which go much further back in time. There are several illustrations to this effect, many centuries earlier, in the ancient Greek tragedies of Aeschylus, Sophocles and Euripides. To recall but one example, may I refer to the sadness expressed by Euripides’ *Hecuba* (*circa* 423 b.C.):

“Those who have power should not exercise it unjustly  
or suppose in their prosperity that fortune which always be their friend;  
I, too, was prosperous once, but am so no longer;  
a single day robbed me of all my wealth, my happiness”<sup>201</sup>.

221. Likewise, in Euripides’ *Suppliant Women* (also *circa* 423 b.C.), there are expressions of the need “to learn the truth from human suffering”<sup>202</sup>; after all, those who generate human suffering do not recognize their duty towards the others<sup>203</sup>. An end should be put to that, ceasing struggles and living in peace with each other (951), as, after all,

“Life is such a brief moment; we should pass through it  
as easily as we can, avoiding pain”<sup>204</sup>.

222. Despite the awareness in such warning, the occurrence of human tragedy persisted. In Euripides’ *Trojan Women* (415 b.C.), the lamentations of distinct characters seem remindful, some 25 centuries ago, of those of the expelled Chagossians in the present matter before the ICJ; one of them asks:

“Are the Trojan women firing their quarters because  
their transportation from this land to Argos is imminent,  
and are they setting fire to their bodies in a suicide bid?”<sup>205</sup>.

Another character says: “She will not go onto the same ship as us. (...) And once she has reached Argos, the wretched woman will meet the wretched death”<sup>206</sup>. And the chorus complains:

“The name of our land will go into oblivion.  
All is scattered and gone,  
and unhappy Troy is no more”<sup>207</sup>.

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<sup>200</sup> Transcript of Statement reproduced *in*: ICJ, doc. CR 2018/20, of 03.09.2018, pp. 73-75.

<sup>201</sup> Verses 281-285.

<sup>202</sup> Verse 549.

<sup>203</sup> Verses 307-309.

<sup>204</sup> Verses 952-953. After all, “sovereignty belongs to the people” (verses 405-406).

<sup>205</sup> Verses 300-302.

<sup>206</sup> Verses 1053 and 1055-1056.

<sup>207</sup> Verses 1322-1324.

223. Imposed human suffering is perennial, as much as the presence of good and evil are, everywhere. Tragedy thus kept on being studied along so many centuries; it was found to disclose, as paradigm, in addition to its inevitability, human insecurity and blindness, and the need to face truth; attention was to be turned to human fate, given the imperfection of human justice<sup>208</sup>. Euripides was particularly sensitive to human suffering and guilt, given the inhumanity with which many people treat each other, and the need for all to work together towards the common good.

224. Along the centuries, there have fortunately been, from time to time, a few lucid thinkers who were attentive to this need. For example, in the mid-XXth. century, the historian Marc Bloch, killed during the II world war (in 1944) by the nazis, left for posterity his book *Apologie pour l'histoire, ou Métier d'historien*, published only posthumously (in 1949); it contains a reflection worth recalling here briefly.

225. M. Bloch was, for example, critical of the positivist approach to history, having stressed the need to go beyond the simple observation of facts, in search of truth and values and the lessons from the past, given the persistence of human cruelty<sup>209</sup>. This also applied to the history of law<sup>210</sup>. Having experienced and kept in mind the profound sufferings during the two world wars in the XXth. century, in his *Apology of History* he further stressed the need to find truth and justice together, thus briefly referring to the contemporaneity of Aeschylus's *Oresteia* as a whole<sup>211</sup>.

226. In this respect, may I here add that, in Aeschylus's *Oresteia*, - composed of the trilogy of tragedies *Agamemnon*, *The Libation Bearers*, and *Eumenides*, - first performed in 458 b.C. (two years before Aeschylus's death), - in face of human cruelty the contrast is shown between revenge and justice. Hope finds expression in the transition from personal revenge to institutionalized litigation and trial; towards the end of *Eumenides*, it is made clear that, instead of vengeance or retaliation, resort is to be made to the jury trial in order to render justice, and the chorus states:

“The murderous man-killing stroke  
we forbid from taking your life (...).  
Grant this, you mighty gods, (...)  
spirits of justice and right. (...)  
Justice is your communion (...).  
Let all together find joy in each other,  
a commonwealth for friend and foe,  
one joint spirit shared by all,  
for this heals the sufferings of humankind”<sup>212</sup>.

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<sup>208</sup> Cf., *inter alia*, e.g., W. Kaufmann, *Tragedy and Philosophy* [1968], Princeton, Princeton University Press, 1992 (reed.), pp. 115, 117, 120, 124, 126, 130-133, 311 and 314-315.

<sup>209</sup> M. Bloch, *Apologia da História, ou O Ofício do Historiador* [1949], Rio de Janeiro, Zahar Ed., 2017 (reed.), pp. 85, 107 and 123-124.

<sup>210</sup> *Ibid.*, pp. 131 and 153.

<sup>211</sup> *Ibid.*, pp. 122 and 124.

<sup>212</sup> Verses 956-957, 960, 963, 966 and 984-987.

227. Along the centuries, sufferings inflicted by human cruelty have persisted, but human conscience has awakened for the need to bring justice to the victims. The sufferings imposed by colonialism throughout the last centuries continue nowadays to be studied<sup>213</sup>, with growing attention, for the sake of the preservation of memory in the search of justice. In his testimony of decolonization, Frantz Fanon pointed out in 1958 that, ever since the Conference of Bandung three years earlier (cf. *supra*), the emancipated Afro-Asian countries, moved by solidarity, were seeking to enhance the “libération” of human beings, giving rise to “un nouvel humanisme”<sup>214</sup>, thus contributing to “le processus d’humanisation du monde”<sup>215</sup>.

228. The statement which I have reproduced above (para. 219), made by the representative of the Chagossian community (Ms. M. Liseby Elysé) during the present ICJ’s advisory proceedings on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, brings to the fore, in my perception, the concern of ancient Greek tragedies with the painful human condition aggravated by violence and the imposition of human suffering, to the detriment of the vulnerable victims.

229. Already at their time, there was acknowledgment of the links between the living and their dead (e.g., in Sophocles’s *Antigone*, of circa 442 b.C.), the right of all to be buried together, in the same place, - as here claimed by the forcefully displaced Chagossians. To ancient Greek tragedians, as death is inevitable, it is important to keep in mind the human condition, particularly in face of adversity. The perennial lesson remains, of the imperative of respect for the equal dignity of all human beings.

230. Along the years, in my Individual Opinions, both in the ICJ and earlier on in the IACtHR, I have been not seldom referring to ancient Greek tragedies, as I again do in the present Separate Opinion, in face of the urgent need to put a definitive end to colonialism unduly and unjustly prolonged in time. The United Nations, as I have pointed out (cf. parts II-III, *supra*), since its earlier years in the fifties, engaged itself in support of the prevalence of the fundamental right of peoples to self-determination, conscious of the need to put an end to the cruelty and evil of colonialism, the persistence of which amounts, in my understanding, to a continuing breach of *jus cogens* nowadays (cf. *supra*).

231. In our times, as to the matter here presented to the ICJ by the U.N. General Assembly’s request for the present Advisory Opinion, the Chagossians expelled from their homeland were abandoned in other islands in extreme poverty, in slums and empty prisons, - in chronic poverty with social marginalization or exclusion which led even to suicides<sup>216</sup>. In my aforementioned Dissenting Opinion in the case of the *Application of the CERD Convention* (2011), after upholding

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<sup>213</sup> Cf., *inter alia*, e.g., [Various Authors,] *Le livre noir du colonialisme XVIe.-XXIe. siècle: de l’extermination à la repentance* (ed. M. Ferro), Paris, Fayard/Pluriel, 2018 (reed.), pp. 9-1056.

<sup>214</sup> F. Fanon, *Oeuvres* [1952-1964], Paris, Ed. La Découverte, 2017 (reed.), pp. 809-810, 826-827 and 835.

<sup>215</sup> *Ibid.*, p. 828. - Three years later, in 1961, F. Fanon pondered with insight that:

- “Le combat victorieux d’un peuple ne consacre pas uniquement le triomphe de ses droits. Il procure à ce peuple densité, cohérence et homogénéité. Car le colonialisme n’a pas fait que dépersonnaliser le colonisé. Cette dépersonnalisation est ressentie également sur le plan collectif au niveau des structures sociales. Le peuple colonisé se trouve alors réduit à un ensemble d’individus qui ne tirent leur fondement que de la présence du colonisateur” (*ibid.*, p. 660).

<sup>216</sup> Cf. also: *Stealing a Nation - A Special Report* (by J. Pilger), ITV, 2004, pp. 8-9 (and documentary); J. Trinidad, *Self-Determination in Disputed Colonial Territories*, Cambridge, Cambridge University Press, 2018, p. 84.

that the fundamental principle of equality and non-discrimination belongs to the realm of *jus cogens*<sup>217</sup>, I sustained that

“In contemporary *jus gentium*, the conditions of living of the population have become a matter of legitimate concern of the international community as a whole, and contemporary *jus gentium* is not indifferent to the sufferings of the population” (para. 195).

#### **XV. OPINIO JURIS COMMUNIS IN U.N. GENERAL ASSEMBLY RESOLUTIONS.**

232. This is a key point, likely to remain in mind of the U.N. General Assembly, under the relevant provisions of the U.N. Charter, as from today’s delivery by the ICJ of its present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. After all, as already surveyed in the present Separate Opinion, successive U.N. General Assembly resolutions have been giving a remarkable contribution to the universal acknowledgment and consolidation of the right of peoples to self-determination (cf. *supra*).

233. In historical perspective, such contribution has been regarded as a most significant one in the history of the United Nations, bringing justice to peoples in the light of principles and in pursuance of universalism<sup>218</sup>. The two respective Declarations contained in General Assembly resolutions 1514(XV) of 1960 and 2625(XXV) of 1970 are of utmost significance<sup>219</sup>, for their contribution to the progressive development of international law.

234. Other resolutions are also significant: for example, it has not passed unnoticed that General Assembly resolution 2621(XXV), also of 1970, characterized ongoing colonialism as a *crime* (in breach of the 1960 Declaration the Granting of Independence to Colonial Countries and Peoples, and of the principles of international law); and the subsequent 1974 U.N. Charter of Economic Rights and Duties of States determined that persisting colonialism called for a duty of restitution and full compensation, and the duty of liberating a territory occupied by force (Article 16)<sup>220</sup> (cf. part XVI, *infra*).

235. In the course of the present advisory proceedings of the ICJ, several participating Delegations have stressed the incompatibility with successive U.N. General Assembly’s resolutions (1514(XV), 2066(XX), 2232(XXI) and 2357(XXII)) of the detachment of Chagos from Mauritius and the forced displacement of the Chagossians in the period 1967-1973. This has been underlined by *India* in its *Written Statement* (paras. 36-43 and 53), which has called for a rectification by the United Kingdom of such continuing situation not in accordance with international law (paras. 62 and 65).

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<sup>217</sup> For a study, cf. A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

<sup>218</sup> Cf. e.g., D. Uribe Vargas, *La Paz es una Trégua - Solución Pacífica de Conflictos Internacionales*, 3rd. ed., Bogotá, Universidad Nacional de Colombia, 1999, p. 120, and cf. p. 112.

<sup>219</sup> They were promptly examined in respect of their declaratory and law-making nature, pursuant to a universalist outlook of the “organized international community”; cf., e.g., G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, pp. 1-301, spec. pp. 131-142 (on self-determination).

<sup>220</sup> A. Remiro Brotóns, *Derecho Internacional Público - I: Principios Fundamentales*, Madrid, Tecnos, 1983 (reed.), pp. 130 and 134.

236. Likewise, *Cuba* has stated, in its *Written Statement*, that such situation was in breach of the aforementioned U.N. General Assembly's resolutions, and has invoked *jus cogens* in support of compliance with these latter (pp. 1-2). *Brazil's Written Statement* has recalled the relevance of the warning of U.N. General Assembly's resolution 2066(XX) against the detachment of Chagos from Mauritius (para. 22). In the same line of reasoning, *Guatemala*, in its *Written Statement*, has contended that the present situation of the Chagos Archipelago remained a continuing wrongful act, which must be brought to an end by the United Kingdom, in order to complete the decolonization of Mauritius (para. 36).

237. For its part, *China* has drawn attention, in its *Written Statement*, to the importance of the function of the U.N. General Assembly revealed by its several resolutions on the decolonization of Mauritius; it circumstances so required, it has added, the General Assembly may seek guidance from the ICJ on decolonization issues (paras. 5-6, 9-11 and 16-17). After reiterating the importance of self-determination of peoples as affirmed in General Assembly resolution 1514(XV) and subsequent resolutions (such as General Assembly resolution 2625(XXV) of 24.10.1970 (paras. 7-8 and 13), it has also drawn attention to its support to the historical process of decolonization advanced by a large number of countries of Asia, Africa and Latin America (paras. 6, 12-13 and 18-19).

238. The *African Union's Comment* has identified, in the present General Assembly's request for an ICJ Advisory Opinion, the ascertainment of the administering authority's violation of territorial integrity, affecting the exercise of the right to self-determination (para. 51). Furthermore, in its *Statement*, the African Union has referred, first, to General Assembly resolutions, - like resolution 2066(XX), - holding the separation of the Chagos Archipelago to be a breach of international law (paras. 158 and 160-161); and, secondly, to resolutions of the former Organization of African Unity (OAU)<sup>221</sup>, expressing concern at the unilateral detachment of the Chagos Archipelago from Mauritius, and the situation of the island Diego Garcia (paras. 176-177).

239. Likewise, *Mauritius* has invoked, in its *Statement*, the relevant resolutions of the General Assembly (2066(XX), 2232(XXI) and 2357(XXII)) and the resolutions and decisions of the old OAU and the African Union (AU) to put an end to the unlawful occupation of the Chagos Archipelago, returning it to Mauritius, and to complete the process of decolonization thereon (paras. 2.41, 4.23-4.44 and 7.3). In this context, *Liechtenstein's Written Statement* has emphasized the role of the U.N. General Assembly in overseeing decolonization (paras. 16-17).

240. In its *Written Statement*, *South Africa* has addressed the human rights effects of the violation of territorial integrity at issue. South Africa has held that it considered, - like the ECtHR's Judgment (of 10.05.2001) in the case *Cyprus versus Turkey*, - that forced displacement of persons constitutes a continuing violation of the International Law of Human Rights (paras. 80-84). There have been other statements to the same effect.

241. For example, *Cyprus*, for its part, in its *Written Statement*, has addressed the direct concern and role of the U.N. General Assembly in the decolonization process at issue, the *jus cogens* character of the right to self-determination, and the *erga omnes* nature of the obligations relating to self-determination (paras. 26-27). And *Namibia* has added, in its *Written Statement*, that

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<sup>221</sup> OAU, resolutions AHG/Res. 99(1980), and AHG/Res. 159(2000).

the “firmly established” right to self-determination (including in the work of the United Nations on decolonization) requires the “free and genuine consent” of the population concerned, expressed through *referenda* or plebiscites, so as to determine the future of the country (p. 3).

## **XVI. THE DUTY TO PROVIDE REPARATIONS FOR BREACHES OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION.**

### **1. Temporal Perspective.**

242. There has been yet another key issue, which I now turn to, that has been duly addressed by some participating Delegations in the course of the present advisory proceedings, namely, that of the duty to provide reparations to peoples, deprived of their means of subsistence, self-determination and development, and thus entitled to just and fair redress. May I at first observe that the issue can be properly approached in historical perspective. It is to be kept in mind that the successive abuses and atrocities that, along the XXth. century and beginning of the XXIst. century, have victimized millions of individuals, never faded humanist thinking, which has continued flourishing in the hope of a better future.

243. An example is afforded, *inter alia*, by the assertion, shortly after the II world war, of juridical “*personalism*” (e.g., in the writings of Emmanuel Mounier, 1949-1950), aiming at doing justice to the *individuality of the human person*, to her inner life, and stressing the need for transcendence (on the basis of one’s own experience of life)<sup>222</sup>. In a world of violence amidst the misuses of language, there were thus also endeavours of preservation of lucidity. As I have pondered in this respect,

“This and other precious trends of humanist thinking, almost forgotten (surely by the legal profession) in our hectic days, can, in my view, still shed much light towards further development of reparations for moral damages done to the human person”<sup>223</sup>.

244. In this respect, may I here recall that the aforementioned U.N. Declaration on the Rights of Indigenous Peoples, contained in General Assembly resolution 61/295, of 13.09.2007 (cf. part VII, *supra*), has some provisions on the duty of redress or reparation for damages in respect of the right of peoples to self-determination (Articles 8, 10-11, 20, 28 and 32). According to them, just and fair redress or reparation is due when: a) people are dispossessed of their land or territory or resources<sup>224</sup>; b) people are deprived of their cultural values<sup>225</sup>; c) people are subjected to forced population transfer in breach of their rights<sup>226</sup>; d) people are deprived of their means of subsistence or development<sup>227</sup>, or subjected to adverse impact<sup>228</sup>. The Declaration expressly refers

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<sup>222</sup> Cf. E. Mounier, *O Personalismo* [1949-1950], transl. 17<sup>th</sup>. ed., Lisbon, Ed. Texto & Grafia, 2010, pp. 29, 50, 104 and 130-131.

<sup>223</sup> A.A. Cançado Trindade, “Genesis and Evolution of the State’s Duty to Provide Reparation for Damages to Rights Inherent to the Human Person”, in *L’homme et le droit - En hommage au Professeur J.-F. Flauss* (eds. E. Lambert Abdelgawad *et alii*), Paris, Pédone, 2014, p. 176.

<sup>224</sup> Article 8(2)(b).

<sup>225</sup> Article 8(2)(a).

<sup>226</sup> Article 8(2)(c), and Article 28(1) and (2).

<sup>227</sup> Article 20.

<sup>228</sup> Article 32 (adverse impact of any kind, such as “adverse environmental, economic, social, cultural or spiritual impact”).

to reparations in distinct forms, such as restitution<sup>229</sup>, or, when this is not possible, just, fair and equitable compensation<sup>230</sup>, or other appropriate redress<sup>231</sup>.

## 2. Reassertions of the Duty to Provide Reparations in the Present Advisory Proceedings.

245. It is reassuring that, in the course of the present ICJ's advisory proceedings on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, several participating Delegations have expressly addressed the right to reparations, stressing the need of providing adequate redress. Distinct forms of reparation have been claimed, such as *restitutio in integrum*, compensation and satisfaction.

246. In its *Written Statement*, the African Union has advanced its view that there is here an obligation to make *restitutio in integrum*, entailing "the full return of the Chagos Archipelago to Mauritius", as reflected in its own resolutions and decisions and earlier in those of the OAU; it added that the United Kingdom must "*expeditiously end its unlawful occupation of the Chagos Archipelago*", and facilitate "*the early and unconditional return*" of it, "including Diego García", to Mauritius<sup>232</sup>.

247. According to the African Union, *restitutio* may have to be accompanied by compensation, as expressly pointed out by the ICJ itself in its Advisory Opinion (para. 153) on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (of 09.07.2004)<sup>233</sup>. The African Union has then also submitted that "the violation of the right of permanent sovereignty over natural resources", as a "principle of customary international law" enshrined in General Assembly resolution 1803(XVII) of 14.12.1962, is likely "to have caused reparable damage"<sup>234</sup>, for which Mauritius and its people should be granted compensation to repair the damage caused by the incomplete decolonisation of Mauritius and the unlawful administration of the Chagos Archipelago<sup>235</sup>.

248. The African Union has next pondered that simple resettlement "would not be sufficient to repair the damage caused to the Chagossians and their property", as a result of their removal from the Archipelago, followed by the prohibition of return to it. Hence the need of "an additional measure of compensation, covering both the material and moral damage suffered", to be granted to the Chagossians, in accordance with a principle acknowledged by the African Court on Human and Peoples' Rights (in a Judgment on reparations of 05.06.2015)<sup>236</sup>.

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<sup>229</sup> Article 11 and Article 28(1).

<sup>230</sup> Article 10 and Article 28(1) and (2).

<sup>231</sup> Articles 8(2), 11(2), 20(2), 28(2) and 32(3).

<sup>232</sup> ICJ, *Written Statement* of the African Union, para. 238.

<sup>233</sup> *Ibid.*, paras. 239 and 241. The African Union also referred to the ICJ's Judgment (merits, of 30.11.2010) in the *A.S. Diallo* case; *ibid.*, para. 240.

<sup>234</sup> *Ibid.*, para. 242; in this paragraph, the African Union has further referred to General Assembly resolution 3175(XXVIII) of 17.12.1973, on "Permanent Sovereignty over Natural Resources".

<sup>235</sup> *Ibid.*, para. 243.

<sup>236</sup> *Ibid.*, para. 244.

249. The African Union has further recalled that the 1974 U.N. Charter on Economic Rights and Duties of States, contained in General Assembly resolution 3281(XXIX) of 12.12.1974, stated that States practising coercive policies, such as colonialism, are “responsible for restitution and full compensation” to the countries and peoples concerned (Article 16). It further stated that, in case the Chagossians were not thereby fully repaired, it could be necessary to provide an appropriate satisfaction<sup>237</sup>.

250. In addition, also in its oral pleadings, the *African Union* has pointed out that all legal consequences (starting with those for the United Kingdom) flowing from the unlawful decolonisation process should be considered, notably the reparations to which the Chagossians are entitled<sup>238</sup>, given “the continued and illicit presence of the United Kingdom in the Archipelago of Chagos”, with its “military preoccupations” together with the United States affecting the Mauritius people’s right to development<sup>239</sup>.

251. For its part, *Mauritius*, in its *Written Comments* (on other Written Statements), has sustained that the United Kingdom is under an obligation to put an “immediate end” to the current “untenable” and “unlawful situation”, and to provide “full reparation to Mauritius for the injury caused”<sup>240</sup>. Mauritius added that the United Kingdom is obliged under general international law to “make *restitutio in integrum* by returning the Chagos Archipelago to Mauritius”, and to provide compensation for the material and moral damage suffered by the Chagossians<sup>241</sup>, in addition to satisfaction, by means of an ICJ’s acknowledgment of the United Kingdom’s failure of compliance with its international obligations towards Mauritius and its people, in particular the Chagossians<sup>242</sup>.

252. In its oral pleadings, *Nicaragua* has contended that, as a consequence of the fact that the United Kingdom had not completed the process of decolonization of Mauritius, it now has the obligation “to complete the process of decolonization of Mauritius by reverting to it the Archipelago of Chagos and making reparation for any injury caused by the prolonged occupation”<sup>243</sup>. The reparation due to Mauritius should include the means “to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin”; Nicaragua then added that the United Kingdom should, after more than 50 years of this occupation of Chagos, “as soon as possible proceed to end this prolonged colonial occupation”<sup>244</sup>.

253. For its part, *Belize*, in its oral pleadings, has likewise upheld that, as the United Kingdom, administering State, had maintained the separation of the Chagos Archipelago from Mauritius, it was under obligation “to cease forthwith its internationally wrongful conduct and to make reparation for the breach”, so as to restore its territorial integrity<sup>245</sup>. In its understanding, the administering State has remained responsible for that “internationally wrongful act”, and it was

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<sup>237</sup> *Ibid.*, para. 246.

<sup>238</sup> *Oral Pleadings* of the African Union, in: ICJ, doc. CR 2018/27, pp. 27-28, paras. 22-23.

<sup>239</sup> *Ibid.*, p. 28, para. 25.

<sup>240</sup> ICJ, *Written Comments* of Mauritius, para. 237.

<sup>241</sup> *Ibid.*, para. 238(e)(iii-iv).

<sup>242</sup> *Ibid.*, para. 251.

<sup>243</sup> *Oral Pleadings* of Nicaragua, in: ICJ, doc. CR 2018/25, p. 47, para. 65.

<sup>244</sup> *Ibid.*, pp. 47-48, para. 65.

<sup>245</sup> *Oral Pleadings* of Belize, in: ICJ, doc. CR 2018/25, pp. 22-23, para. 62(e).

under the duty “to restore the territorial integrity of Mauritius as it was immediately prior to the commencement of the breach of international law in 1965”<sup>246</sup>.

254. *South Africa* has asserted, in its *Written Statement*, that, as a consequence of “the non-completion of the decolonization of Mauritius”, that breach of an international obligation entails the duty of the responsible State of providing “appropriate reparations” for the damages caused to “Mauritius and the Chagossian people” by the violations of international law<sup>247</sup>. *South Africa* has added that that in instances where the damages entail a “serious breach of a peremptory norm of international law (*jus cogens*), such as the maintenance of colonialism by force in violation of the *jus cogens* right to self-determination”, such damages “may be regarded as extraordinarily injurious”<sup>248</sup>.

255. In its *Written Statement*, *Seychelles*, for its part, has denounced that, in “the process of being removed from their homes and resettled elsewhere, the Seychellois Chagossians faced a myriad of indignities and disrespect for their fundamental human rights”; it has considered “essential to note that no compensation has ever been rendered to the community in the Seychelles in comparison to Chagossian communities located in other jurisdictions”<sup>249</sup>. *Seychelles* has then called for “due consideration” to the “legitimate concerns of the Seychellois Chagossian community”<sup>250</sup>.

256. May I add that other participating Delegations (e.g., of *Namibia*, *Argentina*, *Brazil*, *Kenya*, *Serbia*) have also submitted that the United Kingdom should pursue promptly the measures for the *resettlement* of Chagossians on the Chagos Archipelago, without expressly characterizing them as measures of reparation<sup>251</sup>. Even so, it should be kept in mind that the resettlement of Chagossians on the Archipelago of Chagos is directly linked to *restitutio in integrum* as a form of reparation.

### 3. The Indissoluble Whole of Breaches of the Right and Duty of Prompt Reparations.

257. In my understanding, the provision of appropriate redress to the victims is clearly necessary and ineluctable here. As just seen, it has attracted much attention, and has been carefully addressed by some participating Delegations in the present ICJ’s advisory proceedings. In my perception, there is no justification for the ICJ not having addressed in the present Advisory Opinion the right to reparations, in its distinct forms, to those forcibly expelled from Chagos and their descendants.

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<sup>246</sup> *Ibid.*, pp. 22-23, para. 62(a), (b), and (e).

<sup>247</sup> ICJ, *Written Statement* of *South Africa*, para. 92, and cf. para. 87.

<sup>248</sup> *Ibid.*, para. 88.

<sup>249</sup> *Written Statement* of *Seychelles*, para. 5.

<sup>250</sup> *Ibid.*, para. 6.

<sup>251</sup> Cf. *Written Statement* of *Namibia*, p. 4; *Written Statement* of *Argentina*, para. 68; *Oral Pleadings* of *Brazil*, in: ICJ, doc. CR 2018/23, p. 45, para. 18; *Oral Pleadings* of *Kenya*, in: ICJ, doc. CR 2018/25, p. 33, para. 49; *Written Comments* of *Serbia*, para. 50.

258. Even more so as, in the present Advisory Opinion, the ICJ has correctly asserted the occurrence of breaches by the “administering power”, the United Kingdom, in the detachment of the Chagos Archipelago without consultation with the local population, and in disrespect of the territorial integrity of Mauritius (paras. 172-173), as pointed out in successive resolutions of the U.N. General Assembly.

259. This has led the ICJ further to assert, also correctly, that “the United Kingdom’s continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State” (para. 177). It then added that

“Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination” (para. 178).

In concluding on this point, the ICJ reiterated that “the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible”, and added that “all States must co-operate with the United Nations to complete the decolonization of Mauritius” (para. 182).

260. The ICJ thus responded here to the two questions contained in the request for its Advisory Opinion by the General Assembly (cf. *supra*). Yet, its responses are not complete, as it has not addressed the breach of *jus cogens*, nor the due reparations (in its distinct forms) to those victimized. Time and time again I have been sustaining, within this Court, that the breach of a right and the duty of prompt reparation form an indissoluble whole; the duty of redress cannot be overlooked.

261. For example, in my Separate Opinion in the ICJ’s Order (of 06.12.2016) in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), after observing that breach and reparation conform an indissoluble whole (paras. 10-19), I pondered that

“Breach and reparation, in my understanding, cannot be separated in time, as the latter is to cease promptly all the effects of the former. The harmful effects of wrongdoing cannot be allowed to prolong indefinitely in time, without reparations to the victims. (...) The duty of reparation, a fundamental obligation, arises immediately with the breach, to be promptly complied with, so as to avoid the aggravation of the harm already done, and restore the integrity of the legal order.

Hence its fundamental importance, especially if we approach it from the perspective of the centrality of the victims, which is my own. The indissoluble whole conformed by breach and reparation admits no disruption by means of undue and indefinite prolongation of time. (...)” (paras. 21-22).

262. More recently, one year ago, in the case of *Certain Activities Carried out by Nicaragua in the Border Area* (*Compensation owed by Nicaragua to Costa Rica*), I appended to the ICJ’s Judgment (of 02.02.2018) a lengthy Separate Opinion, wherein, *inter alia*, I made the point that:

“Reparation comes indeed together with the breach, so as to cease all the effects of this latter, and to secure respect for the legal order. The original breach is ineluctably linked to prompt compliance with the duty of reparation. I have already sustained this position on earlier occasions within this Court (as in, e.g., my Dissenting Opinion in the case of *Jurisdictional Immunities of the State*, Germany *versus* Italy, Greece intervening, Judgment of 03.02.2012).

Later on, in my Declaration appended to the Court’s Order of 01.07.2015 in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), I reiterated that breach and prompt reparation, forming, as they do, an indissoluble whole, are not separated in time. Any breach is to be promptly followed by the corresponding reparation, so as to secure the integrity of the international legal order itself. Reparation cannot be delayed or postponed.

As cases concerning environmental damage show, the indissoluble whole formed by breach and reparation has a temporal dimension, which cannot be overlooked. In my perception, it calls upon looking at the past, present and future altogether. The search for *restitutio in integrum*, e.g., calls for looking at the present and the past, as much as it calls for looking at the present and the future. As to the past and the present, if the breach has not been complemented by the corresponding reparation, there is then a *continuing situation* in violation of international law.

As to the present and the future, the reparation is intended to cease all the effects of the environmental damage, cumulatively in time. It may occur that the damage is irreparable, rendering *restitutio in integrum* impossible, and then compensation applies. In any case, responsibility for environmental damage and reparation cannot, in my view, make abstraction of the intertemporal dimension (...). After all, environmental damage has a longstanding dimension. (...)

As the breach and the prompt compliance with the duty of reparation form an indissoluble whole, accordingly, this duty is, in my perception, truly *fundamental*, rather than simply ‘secondary’, as commonly assumed in a superficial way. Already in the previous case on reparations decided by this Court, that of *A.S. Diallo* (Guinea *versus* D.R. Congo, reparations, Judgment of 19.06.2012) I pointed this out in my Separate Opinion [paras. 97-98]: the duty of reparation is truly *fundamental*, of the utmost importance, as it is ‘an imperative of justice’” (paras. 12-16).

263. Another point which I addressed in that Separate Opinion was that a proper consideration of reparations cannot at all limit itself only to compensation; it has to consider reparations in all its forms (paras. 30-36 and 59-65). The examination of the subject-matter of the present Advisory Opinion, and the ICJ’s finding of the occurrence of breaches in relation to decolonization (*supra*), bring to the fore the corresponding prompt reparation due, in all its forms, namely: *restitutio in integrum*, appropriate compensation, satisfaction (including public apology), rehabilitation of the victims, guarantee of non-repetition of the harmful acts or omissions.

## **XVII. THE VINDICATION OF THE RIGHTS OF PEOPLES, WITH REPARATIONS, AND THE MISSION OF INTERNATIONAL TRIBUNALS.**

264. Another point which should not here pass unnoticed is that, nowadays, there is vindication of, besides rights of individuals and groups, also of rights of peoples, encompassing reparations. This brings to the fore the mission of contemporary international tribunals in this respect. In the course of the present advisory proceedings on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, references have been made by some of the participating Delegations to illustrative decisions of international tribunals.

265. In this connection, may I recall that the 1981 African Charter on Human and Peoples' Rights expressly dwells upon the rights of peoples. As from its preamble, it refers to the consciousness of the duty of undertaking "to eliminate" colonialism and neo-colonialism, and "to dismantle aggressive foreign military bases" (para. 9). After asserting the equality of peoples (Article 19), it affirms that all peoples "have the unquestionable and inalienable right to self-determination" (Article 20(1)). Moreover, the Charter adds that all peoples are entitled to dispose of their natural resources (Article 21(1)), and, in "case of spoliation, the dispossessed people" has the right to recovery of its property and to "an adequate compensation" (Article 21(2))<sup>252</sup>. The Charter also asserts the States' right to development (Article 22(2)).

266. This being so, it is understandable, and reassuring, that the issue started being addressed under the African Charter even before the era of the African Court of Human and Peoples' Rights<sup>253</sup>, also by its predecessor, the older African Commission on Human and Peoples' Rights (set up in 1987). The issue has nowadays been considered by both the Commission and the Court, in the two relevant cases of the *Endorois* and the *Ogiek* communities (both concerning Kenya).

267. The landmark *Endorois* case, originally filed with the African Commission in 2003, was decided by it on 25.11.2009<sup>254</sup>. The Commission declared that the expulsion of the Endorois indigenous community from their land in Kenya was unlawful, having violated some rights protected under the African Charter<sup>255</sup>. Accordingly, in its recommendations, the Commission awarded reparations to the Endorois people for their forced eviction from their ancestral land, and for all the loss suffered (para. 298, and *dispositif* n. 1).

268. Having considered the situation of *vulnerability* of the victims, the reparations envisaged by the Commission comprised *restitution* of traditional land to the Endorois people, and *compensation* for the harm they suffered during their forced displacement. Furthermore, the Commission's decision referred to the interrelationship, under the African Charter, between civil and political rights, and economic, social and cultural rights, which cannot be dissociated from each other (para. 242). For the first time, a decision of the Commission addressed the right to development as well (para. 277).

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<sup>252</sup> It further provides that State Parties "undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources" (Article 21(5)).

<sup>253</sup> As from the coming into effect, on 25.01.2005, of the 1998 Protocol to the African Charter establishing the African Court, which started operating in 2006.

<sup>254</sup> Decision released by it in February 2010, when it was promptly endorsed by the African Union.

<sup>255</sup> Namely, freedom of religion (Article 8); right to property (Article 14); right to culture (Article 17); right to natural resources (Article 21); and right to development (Article 22).

269. Still in its decision in the *Endorois* case (merits), the African Commission, in order to reach its recommendations, examined carefully the relevant international jurisprudence on the matter, in particular and extensively that of the IACtHR (paras. 159-162, 190, 197-198, 205, 258-266, 284-285, 287 and 289)<sup>256</sup>. Its award of reparations in the *Endorois* case was received with attention and good will, and its repercussions were promptly acknowledged in expert writing<sup>257</sup>.

270. Subsequently, in 2012, the African Commission referred the other case, concerning the *Ogiek* community, to the African Court, which rendered its Judgment on 26.05.2017. The Court likewise found that the forced eviction of the *Ogiek* people from their ancestral lands in Kenya violated their rights to land (para. 131), in addition to some other rights protected under the African Charter<sup>258</sup>. The Court then ordered that all appropriate measures should be taken within a reasonable time to provide distinct forms of reparations to the forcibly displaced *Ogiek* people: a separate judgment has thus been foreseen to that effect (paras. 222-223 and 227)<sup>259</sup>. The matter remains currently with the African Court, expected to rule soon on the issue of reparations in the *Ogiek* case. The Judgment of 2017 of the African Court has likewise already had its first repercussions<sup>260</sup>.

271. References can also be made here to other regional (European and Inter-American) systems of international protection of human rights. As to the ECtHR, I have already indicated (part XV, *supra*), e.g., that, in the course of the present ICJ's advisory proceedings on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, South Africa referred, in its *Written Statement*, to the Judgment (of 10.05.2001) of the ECtHR in the case of *Cyprus versus Turkey*, concerning forced displacement of Greek-Cypriot nationals (para. 82); South Africa added that, as to the continuing forced displacement of Chagossians by the United Kingdom in the matter of the present ICJ's Advisory Opinion, it constituted a "continuing injury" calling for reparations (para. 84).

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<sup>256</sup> For example, the Judgments of the IACtHR in the cases of *Mayagna Awas Tingni Community versus Nicaragua* (of 31.08.2001), *Indigenous Community Yakye Axa versus Paraguay* (of 17.06.2005), *Moiwana Community versus Suriname* (of 15.06.2005), *Indigenous Community Sawhoyamaya versus Paraguay* (of 29.03.2006), *Saramaka People versus Suriname* (26.11.2007). The significance of this case-law is studied in my book of memories of the IACtHR: A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 5th. rev. ed., *op. cit. infra* n. (261), pp. 95-97, 163-169, 220-221, 224-226, 371 and 377-379.

<sup>257</sup> Cf., *inter alia*, e.g., E. Ashamu, "Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council *versus* Kenya: A Landmark Decision from the African Commission", 55 *Journal of African Law* (2011) pp. 301-302, 307 and 309-313; S. Smis, D. Cambou and G. Ngende, "The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources", 35 *Loyola of Los Angeles International and Comparative Law Review* (2013) pp. 508, 518, 526-531 and 534-535; G. Lynch, "Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois", 111 *African Affairs* (2012) pp. 39-40; D.M.K. Inman, "The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond", 5 *International Indigenous Policy Journal* (2014) n. 4, pp. 8, 10-17 and 20-21.

<sup>258</sup> Namely, right to non-discrimination (Article 2); right to culture (Articles 17(2) and (3)); right to religion (Article 8); right to property (Article 14); right to natural resources (Article 21); and right to development (Article 22).

<sup>259</sup> Such as, the *Ogiek's* restitution of ancestral lands to the *Ogiek*; compensation for harm suffered; issuance of a public apology to the *Ogiek*, erection of a public monument in acknowledgement of the rights of the *Ogiek*.

<sup>260</sup> Cf., e.g., L. Claridge, "Victory for Kenya's *Ogiek* as African Court Sets Major Precedent for Indigenous Peoples' Land Rights", in *Briefing – Minority Rights Group International* (2017) pp. 3 and 6-8; E. Tramontana, "The Contribution of the African Court on Human and Peoples' Rights to the Protection of Indigenous Peoples' Rights", 6 *Federalismi - Rivista di Diritto Pubblico Italiano, Comparato, Europeo* (2018) pp. 3, 7 and 19.

272. In effect, the ECtHR provided reparations in the aforementioned case of *Cyprus versus Turkey*, in its subsequent Judgment of 12.05.2014, - a decision which shows the relevance of that *cas d'espèce*, invoked by South Africa before the ICJ. Yet, the same cannot be said in respect of another decision (of 11.12.2012), of a Chamber the ECtHR, namely, the one it rendered in the case of *Chagos Islanders versus United Kingdom*, - briefly referred to by the ICJ in the present Advisory Opinion (para. 128). That decision, dismissive of the Chagossians' claim as inadmissible, was unfortunate, as, apart from 471 of them, most of the Chagossians had received no reparation at all.

273. Moreover, in unduly requiring the large majority of the Chagossians then to exhaust local remedies, it left them without protection. In further holding that new generations of Chagossians, not born there (in Chagos), could not claim to be "victims" of expulsions, the ECtHR/4<sup>th</sup>. Chamber further limited their ability to seek redress in the future, inconsistently with the European Convention on Human Rights and with general principles of international law. An unknown "waiver" of the kind does further harm to the forcibly expelled Chagossians as well as to their victimized descendants.

274. In my understanding, the harm suffered by the originally expelled Chagossians extends to their descendants, to the new generations (even if regarded as "indirect" victims). May I add that the IACtHR has adopted a position quite distinct from that of the ECtHR/4<sup>th</sup>. Chamber in the *Chagos Islanders* case, and a far more advanced one. In my book of memories of the IACtHR, I have dedicated a whole chapter (XIX) of it to the projection of human suffering of victims in time<sup>261</sup>.

275. Not surprisingly, Chagossians have much resented the ECtHR Chamber's decision in the case of *Chagos Islanders*, which, in their perception, has endorsed the "colonial mentality", in holding that the fact that only a part of the forcibly expelled persons received some compensation at domestic law level, in its view, unduly preempted the Chagossians, in their great majority, from lodging their claim with the ECtHR<sup>262</sup>. Furthermore, such a decision of the ECtHR/4<sup>th</sup>. Chamber of 11.12.2012, in the case of *Chagos Islanders*, briefly referred to by the ICJ in the present Advisory Opinion (para. 128), - may I add, - is not in conformity with the *jurisprudence constante* of the ECtHR itself on the matter.

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<sup>261</sup> Cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 5th. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2018, ch. XIX, pp. 163-169; and, for a significant illustration, cf. A.A. Cançado Trindade, "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in *Multiculturalism and International Law - Essays in Honour of E. McWhinney* (eds. Sienho Yee and J.-Y. Morin), Leiden, Nijhoff, 2009, pp. 477-499.

<sup>262</sup> Furthermore, they had expressed their hope of change in the ECtHR Chamber's decision of 11.12.2012 in the case of *Chagos Islanders*, so as to pave the way for providing justice to all those victimized, - a change which has not occurred to date. - On their negative reaction to the injustice done to them by the aforementioned decision of the ECtHR/4<sup>th</sup>. Chamber, and their criticisms of it, cf.: O. Bancoult, "The Historic Legal Battle of the Chagossians to Return to Their Homeland, the Chagos Islands, and to Be Compensated for Their Deportation: A Narrative", 39 *South African Yearbook of International Law* (2014) pp. 21-31, esp. pp. 28-30; C. Grandison, S. Niki Kadaba and A. Woo, "Stealing the Islands of Chagos: Another Forgotten Story of Colonial Injustice", 20 *Human Rights Brief* (2012) pp. 38-42; C. Alexandre and K. Koutouki, "Les déplacés de Chagos: Retour sur la lutte de ces habitants pour récupérer leur terre ancestrale", 27 *Revue québécoise de droit international* (2014) pp. 21 and 23; M. Tong, "The Concept of 'Peoples' in the African Human Rights System: The Matter of the People of the Chagos Islands", 39 *South African Yearbook of International Law* (2014) pp. 33-34 and 46-47.

276. Moreover, the ECtHR/4<sup>th</sup>. Chamber, in dismissing the claims of the petitioners, stated that they had already been “settled” in domestic courts “definitively” (para. 83). At the same time that it decided to do nothing for the petitioners, it at least acknowledged that

“The heart of the applicants’ claims under the Convention is the callous and shameful treatment which they or their antecedents suffered from 1967 to 1973, when being expelled from, or barred from return to, their homes on the islands and the hardships which immediately flowed from that” (para. 83).

277. This having been so, the petitioners deserved to have been treated by the ECtHR/4<sup>th</sup>. Chamber in full accordance with the European Convention, as their claims had not at all been settled in domestic courts, and the great majority of them had received no compensation at all; moreover, along all this prolonged time, they and their descendants have been seeking justice. This is a situation to be kept in mind, in the United Nations search for the realization of justice, reflected, *inter alia*, in the already examined labour of the HRC (cf. part V, *supra*).

278. As to the IACtHR, - in another regional system of protection of human rights, - its contribution has been substantial in providing reparations for breaches of peoples’ rights, - like in its Judgments in the cases, *inter alia*, of *Mayagna Awas Tingni Community versus Nicaragua* (of 31.08.2001), of *Indigenous Community Yakye Axa versus Paraguay* (of 17.06.2005), of *Moiwana Community versus Suriname* (of 15.06.2005), of *Indigenous Community Sawhoyamaxa versus Paraguay* (of 29.03.2006).

279. As I have analysed this issue elsewhere<sup>263</sup>, suffice it here, in the present Separate Opinion, to single out briefly a couple of those cases, which in fact concerned the peoples’ fundamental right to life *lato sensu*, comprising their cultural identity. To all the IACtHR’s Judgments on such cases I appended my Separate Opinions, focusing on these points. Those Judgments have had a direct bearing on the safeguard of the rights of peoples, their cultural identity and their very survival.

280. Thus, shortly after the aforementioned Judgment of 2005 (merits and reparations) in the case of the *Indigenous Community Yakye Axa*, the IACtHR issued its Interpretation of Judgment of (06.02.2006); I appended likewise my Separate Opinion thereto, wherein I warned that:

“One cannot live in constant uprootedness and abandonment. The human being has the spiritual need of roots. The members of traditional communities value particularly their lands, that they consider that belongs to them, just as, in turn, they ‘belong’ to their lands. In the present case, the definitive return of the lands to the members of the Community Yakye Axa is a necessary form of reparation, which moreover protects and preserves their own cultural identity and, ultimately, their fundamental right to life *lato sensu*” (para. 14).

281. This case of the *Yakye Axa Community* (2005-2006), like the case of the *Indigenous Community Sawhoyamaxa* (2006), pertained both to the forced displacement of the members of two local communities out of their lands (as a result of State-sponsored commercialization of such

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<sup>263</sup> Cf. n. (261), *supra*.

lands), and their survival at the border of a road in conditions of extreme poverty. In the latter case of the *Indigenous Community Sawhoyamaxa* (2006), in my Separate Opinion I deemed it fit to ponder:

“The concept of *culture*, - originated from the Roman ‘*colere*’, meaning to cultivate, to take into account, to care and preserve, - manifested itself, originally, in agriculture (the care with the land). With Cicero, the concept came to be used for questions of the spirit and of the soul (*cultura animi*). With the *passing of time*, it came to be associated with humanism, with the attitude of preserving and taking care of the things of the world, including those of the past. The peoples - the human beings in their social *milieu* - develop and preserve their cultures to understand, and to relate with, the outside world, in face of the mystery of life. Hence the importance of cultural identity, as a component or aggregate of the fundamental right to life itself” (para. 4).

282. Moreover, in the same Separate Opinion in the case of the *Sawhoyamaxa Community*, I further stressed the “close and ineluctable relationship” between the right to life *lato sensu* and cultural identity (as one of its components). In so far as members of indigenous communities are concerned, - I added, - “cultural identity is closely linked to their ancestral lands. If they are deprived of these latter, as a result of their forced displacement, their cultural identity is seriously affected, and so is, ultimately, their very right to life *lato sensu*, that is, the right to life of each one and of all the members of each community” (para. 28). When this occurs, they are driven into a situation of “great vulnerability”, of social marginalization and abandonment, as in the *cas d’espèce* (para. 29).

283. On yet another occasion in the aforementioned case of the *Moiwana Community* (2005), the IACtHR addressed the massacre of the N’djukas of the Moiwana village in Suriname and the drama of the forced displacement of the survivors. The Court duly valued the relationship of the N’djukas in Moiwana with their traditional land, having warned that “larger territorial land rights are vested in the entire people, according to N’djuka custom; community members consider such rights to exist in perpetuity and to be unalienable” (para. 86(6)). The Court’s Judgment ordered a series of measures of reparations<sup>264</sup>, including measures to foster the voluntary return of the displaced persons to their original lands and communities, in Suriname, respectively<sup>265</sup>.

284. In my extensive Separate Opinion (paras. 1-93), I recalled that the surviving members of the Moiwana Community had complained, in the course of the proceedings (public hearing of 09.09.2004) before the IACtHR, of the destruction (in 1986) of their “the cultural tradition” (para. 80)<sup>266</sup>. There was, thus, in the *cas d’espèce*, beyond moral damage, - I added, - the

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<sup>264</sup> Comprising indemnizations as well as non-pecuniary reparations of distinct kinds.

<sup>265</sup> The delimitation, demarcation and the issuing of title of the communal lands of the N’djukas in the Moiwana Community, as a form of non-pecuniary reparation, has much wider repercussions than one may *prima facie* assume.

<sup>266</sup> Ever since this has tormented them; they were unable, - I added, - to give a proper burial to the mortal remains of their beloved ones, and underwent the strains of uprootedness, a human rights problem confronting the universal juridical conscience in our times (paras. 13-22). Their suffering projected itself in time, for almost two decades (paras. 24-33). In their culture, mortality had an inescapable relevance to the living, the survivors (paras. 41-46), who had duties towards their dead (paras. 47-59).

configuration of a true *spiritual damage* (paras. 71-81). And, even beyond the *right to a project of life*, I dared to identify and attempted to conceptualize what I termed the *right to a project of after-life* (paras. 67-70)<sup>267</sup>. In fact, the expert evidence produced before the IACtHR referred expressly to “spiritually-caused illnesses”<sup>268</sup>. I then sustained, in my Separate Opinion, on this particular point, that

“*Spiritual damage*, like the one undergone by the members of the *Moiwana Community*, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated. (...)”

The N’djukas had their right to the project of life, as well as their *right to the project of after-life*, violated, and continuously so (...). Some of the measures of reparations ordered by the Court in the present Judgment duly stand against oblivion, so that this atrocity never occurs again. (...)

In sum, the wide range of reparations ordered by the Court in the present Judgment in the *Moiwana Community* case (...) has concentrated on, and enhanced the centrality of, the position of the victims (...). In the *cas d’espèce*, the collective memory of the Maroon N’djukas is hereby duly preserved, against oblivion, honouring their dead, thus safeguarding their right to life *lato sensu*, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead” (paras. 81 and 91-92)<sup>269</sup>.

285. There are, thus, as it can be seen, elements in international jurisprudence in support of the vindication of the rights of peoples, accompanied by the provision of due reparations. In my perception, there was no reason for the ICJ, in the present Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, not to have taken into due account this significant issue of the vindication of the rights of peoples with due reparations, in pursuance of the mission of contemporary international tribunals.

286. After all, as I have already pointed out in the present Separate Opinion (cf. part XVI, *supra*), the duty to provide reparations for breaches of the right of peoples to self-determination has been addressed by some of the participating Delegations in the course of the present advisory proceedings. This should have been taken expressly into account by the Court in the present Advisory Opinion, in conformity with general principles of international law.

287. In any case, - as I have also already indicated (para. 259, *supra*), - the ICJ itself has correctly found (para. 177) that the United Kingdom’s “continued administration” of the Chagos Archipelago “constitutes a wrongful act entailing the international responsibility of that State”. The ICJ has also rightly found (para. 181), as to “the resettlement on the Chagos Archipelago of

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<sup>267</sup> I further observed, in my Separate Opinion, that the testimonial evidence produced before the Court in the *cas d’espèce* indicated that, in the N’djukas cosmovision, in circumstances like those of the present case, “the living and their dead suffer together, and this has an intergenerational projection”, and implications for the kinds of reparations due, also in the form of *satisfaction* (e.g., honouring the dead in the persons of the living) (para. 77).

<sup>268</sup> Paragraphs 77(e) and 83(9) of the IACtHR’s Judgment.

<sup>269</sup> For a case-study, cf. A.A. Cançado Trindade, “The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights”, in *Multiculturalism and International Law - Essays in Honour of E. McWhinney*, op. cit. *supra* n. (260), pp. 477-499.

Mauritian nationals, including those of Chagossian origin”, that “this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius”.

**XVIII. THE VINDICATION OF THE RIGHTS OF INDIVIDUALS AND OF PEOPLES  
AND THE IMPORTANT ROLE OF GENERAL PRINCIPLES OF LAW  
IN THE REALIZATION OF JUSTICE.**

288. This brings me to my last line of reflections. Fundamental principles are, in effect, the foundations of the realization of justice itself, and jusnaturalist thinking has always stressed their importance. The *jus necessarium* is thus conformed by laws which are just, emanating from *recta ratio*. General principles of law, grasped by human conscience along the centuries, are thus of the utmost relevance in the interpretation, application, and progressive development of international law<sup>270</sup>.

289. The recognition of the “general principles of law”, and their insertion into the indication of “formal” sources of international law found in Article 38 of the Statute of the Hague Court (PCIJ/ICJ), are of the utmost relevance, and require greater attention on the part of contemporary legal thinking. After all, they inform and conform the norms of international law. The aforementioned general principles of law have always marked presence in the search for the realization of justice, wherein basic considerations of humanity have a role of the utmost importance.

290. The basic posture of an international tribunal can only be *principiste*, without making undue concessions to State voluntarism. Legal positivism has always attempted, in vain, to minimize the role of general principles of law, but the truth is that, without those principles, there is no legal system at all. Those principles give expression to the idea of an *objective justice*, paving the way to the application of the *universal* international law, the new *jus gentium* of our times.

291. Those principles assume a great importance, in face of the growing contemporary tragedy of forced displaced persons, or undocumented migrants, in situations of utmost vulnerability, in distinct parts of the world<sup>271</sup>. Such continuing and growing human tragedy shows that lessons from the past seem to be largely forgotten. This reinforces the relevance of fundamental principles and values, already guiding the action of the United Nations - in particular

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<sup>270</sup> Cf. A.A. Cançado Trindade, “Foundations of International Law: The Role and Importance of Its Basic Principles”, 30 *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* - OAS (2003) pp. 359-415.

<sup>271</sup> For recent assessments, in historical perspective, of such current and worrisome situations, cf. A.A. Cançado Trindade, L. Ortiz Ahlf and J. Ruiz de Santiago, *Las Tres Vertientes de la Protección Internacional de los Derechos de la Persona Humana*, 2<sup>nd</sup>. rev. ed., Mexico, Ed. Porrúa/Escuela Libre de Derecho, 2017, pp. 1-225; A.A. Cançado Trindade, “Les tribunaux internationaux et leur mission commune de réalisation de la justice: Développements, état actuel et perspectives”, 391 *Recueil des Cours de l’Académie de Droit International de La Haye* (2017) pp. 19-101; J. Ruiz de Santiago, “Aspects juridiques des mouvements forcés de personnes”, 393 *Recueil des Cours de l’Académie de Droit International de La Haye* (2018) pp. 348-462; and cf. C. Swinarski, “Effets pour l’individu des régimes de protection de droit international”, 391 *Recueil des Cours de l’Académie de Droit International de La Haye* (2017) pp. 306-310 and 334-339.

its General Assembly, as shown in the present Separate Opinion, - as well as international jurisprudence (mainly of the IACtHR) on the matter<sup>272</sup>.

292. In effect, I have had the occasion to ponder, e.g., in my Concurring Opinion in the ground-breaking IACtHR's Advisory Opinion n. 18 (of 17.09.2003) on the *Juridical Condition and Rights of Undocumented Migrants*, that

“Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (...) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law. (...)

From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (...), the realization of justice (...), the necessary primacy of law over force (...). (...) [I]f there are no principles, nor is there truly a legal system. Without the principles, the ‘legal order’ simply is not accomplished, and ceases to exist as such” (paras. 44 and 46).

293. In the ICJ likewise, I have been sustaining the same position. For example, in my lengthy Separate Opinion in the ICJ's earlier Advisory Opinion (of 22.07.2010) on the *Declaration of Independence of Kosovo*, I singled out, *inter alia*, the relevance of the principles of international law in the framework of the Law of the United Nations, and in relation with the *human ends* of the State (paras. 177-211), leading also to the overcoming of the strictly inter-State paradigm in contemporary international law. I do so again, in the present Separate Opinion in the ICJ's new Advisory Opinion of today, 25.02.2019, on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

294. The addition, in Article 38(1)(c) of the PCIJ/ICJ Statute, to general principles of law, of the qualification “recognized by civilized nations”, was, in my perception, distracted, done without reflection and without a minimal critical spirit, - keeping in mind that in 1920, in 1945, and nowadays, it was and remains impossible to determine which are the “civilized nations”. No country is to consider itself as essentially “civilized”; we can only identify the ones which behave in a “civilized” way for some time, and while they so behave.

295. In my view, the aforementioned qualification was added to the “general principles of law” in Article 38 of the Statute of the PCIJ in 1920 by mental lethargy, and was maintained in the Statute of the ICJ in 1945, wherein it remains until now (beginning of 2019), by mental inertia, and without a critical spirit. We ought to have some more courage and humility, much needed, in

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<sup>272</sup> For a study, cf. A.A. Cançado Trindade, “Le déracinement et la protection des migrants dans le Droit international des droits de l'homme”, 19 *Revue trimestrielle des droits de l'homme* - Bruxelles (2008) n. 74, pp. 289-328; A.A. Cançado Trindade, “El Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal”, *op. cit. infra* n. (274), pp. 65-120.

relation to our human condition, given the notorious human propensity to unlimited cruelty. From the ancient Greek tragedies to contemporary ones, human existence has always been surrounded by tragedy. Definitively, there do not exist nations or countries “civilized” *per se*, but only those which behave in a civilized way for some time, and while they so behave<sup>273</sup>.

296. It is important to keep this awareness, especially in an epoch like the present one, in which there is lesser and lesser dedication to reading and thinking, and to seeking to extract lessons from the past. In sum, it is to be kept always in mind that, in effect, there are no nations which are by their own nature civilized. There are, precisely, nations which for some time behave in a civilized way, while and to the extent they act in conformity with international law, and with due respect to the rights of the human person and of peoples. And the ultimate *material* source of international law, and of all Law, is, as I have been sustaining for years<sup>274</sup>, the *human conscience*, the universal juridical conscience.

297. The ICJ cannot here keep on pursuing a strictly inter-State outlook, as it is used to: in the present General Assembly’s request for its Advisory Opinion, we are in face of the relevant *rights of peoples*, - which the U.N. General Assembly has always been attentive and sensitive to, - on the foundation of the United Nations Charter itself. The focus here is on the importance of the rights of peoples, such as their right to self-determination, which count on the firm support of the great majority of participating Delegations.

298. In the present Advisory Opinion, the ICJ is attentive, - as it is used to, - to individual States’ “consent”, either in referring to arguments of participating Delegations (paras. 67, 83, 95, 106) or in presenting its own reasoning (paras. 85, 90, 172); the ICJ even refers to “consent” as being a “principle” (para. 90). For years, within this Court, I have been sustaining that “consent” is not - cannot be - a “principle”.

299. Thus, in my extensive Dissenting Opinion in the ICJ’s Judgment (of 01.04.2011) in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russian Federation), - in which the Court found it had no jurisdiction to examine the application, - I pointed out the ICJ’s “outdated voluntarist conception”, together with the attitude of “a considerable part of the legal profession” to keep on stressing “the overall importance of individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level” (para. 44, and cf. para. 127).

300. After referring to the dissatisfaction of the more lucid international legal doctrine with States’ reliance on their own terms of consent, and its endeavours “to overcome the vicissitudes of the ‘will’ of States” (paras. 188-189), I stressed the importance of general principles of law and fundamental values, standing well above State consent (para. 194), such as the fundamental

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<sup>273</sup> “Civilized” countries can be conceptualized as being those which fully respect and secure, in their respective jurisdictions, the free and full exercise of the rights of individuals and peoples, to the extent and while they so respect and secure them, - this being, ultimately, the best measure of the degree of “civilization attained”; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, *op. cit. supra* n. (175), p. 344.

<sup>274</sup> Cf., *inter alia*, A.A. Cançado Trindade, “El Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal”, in *Forum Deusto - Movimientos de Personas e Ideas y Multiculturalidad* (ed. J. Elzo), Bilbao, University of Deusto, 2003, pp. 65-120; A.A. Cançado Trindade, “La *Recta Ratio* dans les Fondements du *Jus Gentium* comme Droit International de l’Humanité”, 10 *Revista do Instituto Brasileiro de Direitos Humanos* (2010) pp. 11-26; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2<sup>nd</sup>. rev. ed., *op. cit. supra* n. (171), pp. 3-789.

principle of equality and non-discrimination, belonging to the realm of *jus cogens* (para. 195). And I added, in concluding my Dissenting Opinion, that:

“(...) The ICJ cannot remain indifferent to such injustice of ‘human fates’, and to human suffering. It cannot keep on overlooking tragedy. As this latter persists, being seemingly proper to the human condition, the need also persists to *alleviate* human suffering, by means of the *realization of justice*. (...) This goal - the realization of justice - can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep on paying lip service to what it assumes as representing the State’s ‘intentions’ or ‘will’. (...)”

(...) [I]n my understanding, consent is not ‘fundamental’, it is not even a ‘principle’. What is ‘fundamental’, i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice* (...). State consent is but a rule to be observed (...). It is a means, not an end, it is a procedural requirement (...); it surely does not belong to the domain of the *prima principia*. (...).

Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* - at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole *corpus juris* of International Human Rights Law, International Humanitarian Law, and International Refugee Law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of International Human Rights Law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations<sup>275</sup>.

These are some of the true *prima principia*, which confer to the international legal order its ineluctable axiological dimension. These are some of the true *prima principia*, which reveal the values which inspire the *corpus juris* of the international legal order, and which, ultimately, provide its foundations themselves. *Prima principia* conform the *substratum* of the international legal order, conveying the idea of an *objective* justice (proper of natural law). In turn, State consent does not belong to the realm of the *prima principia*; recourse to it is a concession of the *jus gentium* to States, is a rule to be observed (...).

Such rule or procedural requirement will be reduced to its proper dimension the day one realizes that *conscience stands above the will*. This sums up an old dilemma (faced by the Court as well as by States appearing before it), revisited herein, in the framework of contemporary *jus gentium*. To this Court, conceived as an International Court of *Justice*, the *realization of justice* remains an ideal (...). After all, there is nothing so invincible as an ideal, - such as that of the realization of justice, - which has not yet been realized: it keeps on banging human conscience until it blossoms and sees the light of the day” (paras. 209 and 211-214).

301. The arguments of a tiny minority of participating Delegations overlooking or minimizing the rights of the human person and of peoples (such as their right to self-determination), could even have been dismissed by the Court, which however gave space to them in its own reasoning (cf. e.g., paras. 133-134). In this respect, the narration by the ICJ of the arguments presented to it by participating Delegations requires a precision, if not a correction.

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<sup>275</sup> And restated in the U.N. General Assembly resolution 2625(XXV) of 24.10.1970, containing the U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

302. For example, *inter alia*, in paragraphs 133 and 159, when the Court refers to arguments of “some participants”, they were only two (United Kingdom and United States); when in paragraph 145 it refers to “others”, they were only the same two participants; when in paragraph 176 it refers to “a few participants”, once again they were only the same two participants; when in paragraph 145 it again refers to “some participants”, although the language is the same, this time they were numerous, a majority of twenty participants (namely, African Union, Argentina, Belize, Botswana, Brazil, Chile, Cyprus, Djibouti, Guatemala, Kenya, Marshall Islands, Mauritius, Namibia, the Netherlands, Nicaragua, Serbia, Seychelles, South Africa, Vanuatu, Zambia).

303. The Court’s narration is imprecise, using the same expression, e.g., “some participants”, which may refer to contentions by the majority of twenty of the participating Delegations, or else by only two of them. Inadequacies of the kind speak for themselves. Furthermore, the ICJ does not address *opinio juris communis* in a wider sense (keeping in mind all subjects of the law of nations, including individuals and peoples), it refers only to the element of *opinio juris* in the traditional sense. Some of the arguments of several participating Delegations (e.g., on *jus cogens*, and on the duty of reparations for damages) have not been addressed, nor even mentioned, by the Court, unlike other points (that it considered) raised by a tiny minority of participating Delegations (United Kingdom and United States).

304. After all, in examining a matter of the importance of the one contained in the General Assembly’s request for an Advisory Opinion of the ICJ on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, - may I reiterate, - one cannot pursue here a strictly inter-State outlook. This is a matter of concern to the United Nations as a whole, whose Charter is particularly attentive to the right of peoples.

305. In any case, the conclusions of the ICJ, set forth in the *dispositif*, are constructive and deserving of attention, in addition to its findings - as I have also already indicated (paras. 259 and 287, *supra*), - of the occurrence of a continuing “wrongful act” entailing the international responsibility of the State concerned, and of the identification of the issue of “the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin”, as “an issue relating to the protection of the human rights of those concerned”, to be duly “addressed by the General Assembly during the completion of the decolonization of Mauritius”. I thus trust this Advisory Opinion of the ICJ, despite its insufficiencies, may assist, with its conclusions in the *dispositif*, the U.N. General Assembly in seeking the realization of justice for those victimized in the Chagos Archipelago, in conformity with the United Nations Charter and the general principles of international law.

#### **XIX. EPILOGUE: A RECAPITULATION.**

306. With the conclusion and presentation of my present Separate Opinion, I feel in peace with my conscience: from all the preceding considerations, I trust to have made it crystal clear that my own reasoning in respect of some of the points dealt with in the present Advisory Opinion is clearly distinct from that of the Court itself, as well as in respect of some points not addressed by it. My position is grounded not only on the assessment of the arguments produced before the ICJ by the participating Delegations, but above all on issues of principle and on fundamental values, to which I attach even greater importance.

307. This being so, I have thus felt obliged, in the faithful exercise of the international judicial function, to lay on the records, in the present Separate Opinion, the foundations of my reasoning, covering issues of principle and touching on the foundations of contemporary international law. I deem it fit, at this concluding stage, to recapitulate all the points I have made, faithful to my own conception of the law of nations, expressed herein, for the sake of clarity, also stressing their interrelatedness.

308. *Primus*: The United Nations has, from its earlier years onwards, made clear its longstanding acknowledgment of, and commitment to, the fundamental right of peoples to self-determination. *Secundus*: Illustrations to this effect are found in successive General Assembly resolutions, from 1950 onwards, stressing the importance of respect for that right of peoples to sustain friendly relations among nations, in conformity with the principles and purposes of the United Nations.

309. *Tertius*: General Assembly resolution 1514(XV), of 14.12.1960, containing the landmark Declaration on the Granting of Independence to Colonial Countries and Peoples, much contributed to the consolidation of the right to self-determination of peoples. Turning attention to the rights of peoples, it went beyond the strictly inter-State dimension. *Quartus*: Already in 1961, the General Assembly established the Special Committee on Decolonisation, to secure the implementation of the 1960 Declaration, endowed with a law-making character.

310. *Quintus*: The right to self-determination of peoples became solidly grounded in the contemporary law of nations, as acknowledged by successive General Assembly resolutions along the sixties. *Sextus*: In its resolution 2066(XX), of 16.12.1965, the General Assembly warned that the detachment of certain islands from the Territory of Mauritius “for the purpose of establishing a military base” would be in breach of the 1960 Declaration.

311. *Septimus*: On the occasion of the tenth anniversary of the 1970 Declaration, the General Assembly adopted resolution 2621(XXV), of 12.10.1970, wherein it typified the continuation of colonialism as a *crime*. *Octavus*: In the same year, General Assembly resolution 2625(XXV), of 24.10.1970, containing the new Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, called for the realization of self-determination of peoples, so as to put a speedy end to colonialism.

312. *Nonus*: More recently, along the last decade, new General Assembly resolutions have insisted on the pressing need of prompt eradication of colonialism as one of the priorities of the United Nations, in the proper implementation of the inalienable right of all peoples to self-determination. *Decimus*: This comprises the termination of military bases and activities in non-self-governing territories.

313. *Undecimus*: The new era of the international law of decolonization, impelled by Asian-African countries as from the 1955 Conference of Bandung, saw the light of the day, with the support also of Latin American and Arab countries. *Duodecimus*: Such international law of decolonization became a manifestation of the *humanization* of contemporary international law. *Tertius decimus*: The *corpus juris gentium* was thereby enriched, stressing the fundamental right of peoples to self-determination.

314. *Quartus decimus*: Other resolutions, adopted successively by the Organization of African Unity, and later on by the African Union, condemned the militarization of Diego Garcia and called for the return of the Chagos Archipelago (including Diego Garcia) to Mauritius, so as to complete the process of decolonization. *Quintus decimus*: Moreover, at United Nations level, the right of all peoples to self-determination was significantly inserted, with historical influence, in the two U.N. Covenants on Human Rights of 1966 (Civil and Political Rights; and Economic, Social and Cultural Rights, respectively).

315. *Sextus decimus*: The right to self-determination, under Article 1 of the two U.N. Covenants, is formulated in the same terms, thus enhancing the indivisibility of all human rights. *Septimus decimus*: The Human Rights Committee (HRC), in its General Comment n. 12 (of 1984), related the right to self-determination of peoples under Article 1 of the two U.N. Covenants to the 1970 Declaration on Principles of International Law.

316. *Duodevicesimus*: Furthermore, the HRC, in its Observations on a report by the United Kingdom, called for compliance with the right to return of Chagos islanders, and compensation for the prolonged denial of that right. *Undevicesimus*: In other General Comments, the HRC stressed the principle of humanity; the vulnerability of certain groups of persons; the right of redress (reparations).

317. *Vicesimus*: The foundations of the right to self-determination came to be found at normative, doctrinal and jurisprudential levels, including, as to this latter, the case-law of the International Court of Justice (ICJ). *Vicesimus primus*: It was, moreover, sustained in a wider framework by the U.N. II World Conference on Human Rights (1993). *Vicesimus secundus*: Such developments, with its repercussions, fostered the aforementioned historical process of *humanization* of contemporary international law.

318. *Vicesimus tertius*: It became clear that the *corpus juris* in this domain has become a true law of protection (*droit de protection*) of the rights of human beings and peoples, and not of States. *Vicesimus quartus*: The primacy of the *raison d'humanité* came to prevail over the old *raison d'État*, in the framework of the new *jus gentium* of our times. *Vicesimus quintus*: The participating Delegations, in their written answers (and comments thereon) to a question I put to them at the end of the present advisory proceedings, stressed the *opinio juris communis* as to the considerable importance of the fundamental right to self-determination to the progressive development of international law.

319. *Vicesimus sextus*: Such fundamental right became an imperative for the United Nations, belonging to the realm of *jus cogens*. *Vicesimus septimus*: Already in its work in the mid-sixties, the International Law Commission (ILC) also gave its contribution on the matter (*jus cogens*). *Vicesimus octavus*: A *rapporteur* of the old U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, on the implementation of U.N. resolutions on the right to self-determination, did the same, upholding the character of *jus cogens* of this fundamental right to self-determination.

320. *Vicesimus nonus*: Likewise, in the course of the present advisory proceedings, this issue has been brought to the ICJ's attention in several written and oral submissions of the participating Delegations, in support of the *jus cogens* nature of the fundamental right to self-determination, and the *erga omnes* obligations ensuing therefrom. *Trigesimus*: There is no justification for the ICJ not having addressed *jus cogens* in the present Advisory Opinion.

321. *Trigesimus primus*: The United Nations itself has, from the start, been deeply committed to, and engaged in, the realization of the fundamental right to self-determination of peoples, endowed with a *jus cogens* character. *Trigesimus secundus*: In the case-law of the ICJ, there are brief references to *jus cogens*, which, however, deserves far greater attention. *Trigesimus tertius*: The ICJ should have developed much further its jurisprudence on *jus cogens*.

322. *Trigesimus quartus*: There is a relationship between *jus cogens* and the realization of justice itself. *Trigesimus quintus*: There is here need of a people-centred approach: the *raison d'humanité* prevails over the *raison d'État*, in the line of jusnaturalist thinking. *Trigesimus sextus*: There is an *opinio juris communis* as to the fundamental right to self-determination in the domain of *jus cogens*, as shown by the great majority of participating Delegations in the present advisory proceedings.

323. *Trigesimus septimus*: The “consent” of individual States cannot deprive *jus cogens* of all its legal effects, nor of the legal consequences of its breach. *Trigesimus octavus*: This applies in respect of distinct situations, including the right of peoples to self-determination. *Trigesimus nonus*: Conscience - the universal juridical conscience - stands above the “will”. *Quadragesimus*: There is a manifest incompatibility with *jus cogens* (and the corresponding obligations *erga omnes*) of the positivist voluntarist conception of international law.

324. *Quadragesimus primus*: The current historical process of *humanization* of international law (inspired in the legacy of the thinking of the “founding fathers” of the law of nations) stands in reaction to the injustice done to all those in situations of vulnerability and repression. *Quadragesimus secundus*: There is, in humanist thinking, a conscience of the dignity inherent in all human beings. *Quadragesimus tertius*: The new *jus gentium* of our times pursues a universalist outlook, values objective justice, and is oriented by general principles of law.

325. *Quadragesimus quartus*: When the matter lodged with the Court concerns the *rights of peoples*, as in the present advisory proceedings, the ICJ reasoning is to transcend ineluctably the strictly inter-State outlook; otherwise justice cannot be done. *Quadragesimus quintus*: The nature of the matters lodged with the ICJ is to lead to its proper reasoning. *Quadragesimus sextus*: Along the centuries, sufferings inflicted by human cruelty have persisted (e.g., such as the ones imposed by colonialism), but human conscience has awakened for the need to bring justice to the victims.

326. *Quadragesimus septimus*: The fundamental principle of equality and non-discrimination belongs to the domain of *jus cogens*. *Quadragesimus octavus*: In contemporary *jus gentium*, the conditions of living of the population have become a matter of legitimate concern of the international community as a whole. *Quadragesimus nonus*: In the course of the present advisory proceedings, several participating Delegations have acknowledged the *opinio juris communis* expressed clearly in successive U.N. General Assembly resolutions as to the duty of all to respect the fundamental right of peoples to self-determination.

327. *Quinquagesimus*: Another key issue addressed by some participating Delegations in the course of the present advisory proceedings has been that of the duty to provide reparations to peoples for breaches of their fundamental right to self-determination. *Quinquagesimus primus*: Those Delegations sustained that the peoples who suffered harm are entitled to just and fair redress. *Quinquagesimus secundus*: The breaches of that right correctly established in this Advisory Opinion call for the ineluctable duty of reparation, in all its forms.

328. *Quinquagesimus tertius*: The breach of a right and the duty of prompt reparation form an indissoluble whole; the duty of redress cannot be overlooked. *Quinquagesimus quartus*: The provision of appropriate redress to the victims is clearly necessary and ineluctable here. *Quinquagesimus quintus*: There is no justification for the ICJ not having addressed their right to reparations, in their distinct forms, in the present Advisory Opinion.

329. *Quinquagesimus sextus*: This matter brings to the fore the mission of contemporary international tribunals in this respect - as to rights of peoples, - as also pointed out by some of the participating Delegations. *Quinquagesimus septimus*: There are relevant decisions in the case-law of the international courts (African, Inter-American, European) of human rights, in support of the vindication of rights of peoples, with reparations (in its distinct forms) for forced displacement.

330. *Quinquagesimus octavus*: General principles of law have always marked presence in the search for the realization of justice, wherein basic considerations of humanity are of the utmost importance. *Quinquagesimus nonus*: Legal positivism has always attempted, in vain, to minimize the role of general principles of law, but without them there is no legal system at all; they are in the foundations of any legal system.

331. *Sexagesimus*: It is the general principles of law (*prima principia*) which confer to the legal order its ineluctable axiological dimension. *Sexagesimus primus*: General principles of law give expression to the idea of an *objective justice*, paving the way to the application of the *universal* international law, the new *jus gentium* of our times. *Sexagesimus secundus*: The basic posture of an international tribunal can only be *principiste*, without making undue concessions to State voluntarism.

332. *Sexagesimus tertius*: General principles of law do not need the distracted qualification found in Article 38(1)(c) of the PCIJ/ICJ Statute. After all, it is impossible to determine which are the “civilized nations”; we can only identify the countries which behave in a “civilized” way for some time, and while they so behave. *Sexagesimus quartus*: In the present Advisory Opinion the ICJ is attentive to State “consent”, which however is not a “principle”.

333. *Sexagesimus quintus*: General principles of law and fundamental values stand well above State consent. *Sexagesimus sextus*: In addressing the *jus cogens* right of peoples to self-determination, *opinio juris communis* and the duty of reparations for damages have to be kept in mind; they cannot be overlooked, as they were in the present Advisory Opinion. *Sexagesimus septimus*: In addressing a matter of the importance of the *jus cogens* right of peoples to self-determination, one cannot pursue a strictly inter-State outlook: this is a matter of concern to the United Nations as a whole, whose Charter is particularly attentive to the rights of peoples.

334. *Sexagesimus octavus*: In any case, in the present Advisory Opinion the ICJ correctly determined the occurrence of a continuing “wrongful act” entailing the international responsibility of the State concerned. *Sexagesimus nonus*: The Court further related this to the protection of human rights, i.e., requiring “the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin”, to be duly “addressed by the General Assembly during the completion of the decolonization of Mauritius”.

335. *Septuagesimus*: The present Advisory Opinion, thus, despite its insufficiencies, may assist, with its conclusions in the *dispositif*, the General Assembly in seeking the realization of justice for those victimized in the Chagos Archipelago, in conformity with the United Nations Charter and the general principles of international law. *Septuagesimus primus*: Fundamental principles are, in effect, the foundations of the realization of justice, giving expression to the idea of an *objective justice* for the application of the *universal* international law, the humanized new *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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