

SEPARATE OPINION
OF JUDGE SEBUTINDE

The Advisory Opinion omits certain important facts from its narrative, which facts have a direct bearing upon the first question posed by the General Assembly — The Court has also missed the opportunity to recognize that the right to self-determination within the context of decolonization, has attained peremptory status (jus cogens), whereby no derogation therefrom is permitted — As a direct corollary of that right is the erga omnes obligation to respect that right — A failure to recognize the peremptory status of the said right has led to the failure of the Court to properly and fully consider the consequences of its violation when answering Question (b).

I. INTRODUCTION

1. From the outset, let me state that I agree that the Court should exercise its advisory jurisdiction in the matter referred to it by the United Nations General Assembly in resolution 71/292 of 22 June 2017. In my view, there are no compelling reasons for the Court not to do so. Secondly, the Court correctly recognizes that by 1960 the obligation to respect the right to self-determination of non-self-governing countries and peoples had attained the status of a customary rule opposable to all States (*erga omnes*) and was, therefore, applicable from 1965 to 1968 during the decolonization process of Mauritius (para. 180). The Court also correctly opines that during the process of decolonizing Mauritius, the United Kingdom as administering Power, was under a duty to respect the territorial integrity of the whole of Mauritius, including the Chagos Archipelago (para. 173). By unlawfully detaching the Chagos Archipelago in 1965 and incorporating it into a new colony known as the British Indian Ocean Territories (BIOT) prior to Mauritius' independence in 1968, the United Kingdom violated the right of the Mauritian people to self-determination in failing to respect the territorial integrity of the former colony as a whole unit.

2. Furthermore, I concur that the applicable law for determining the consequences of the United Kingdom's continued administration of the Chagos Archipelago (Question (b)) is the international law applicable today (para. 175). The Court rightly opines that the United Kingdom's continued administration of the Chagos Archipelago constitutes "a wrongful act . . . of a continuing character" entailing the international responsibility of that State (para. 177). In sum, I concur with the conclusions that the Court has reached and, therefore, have voted in favour of all points (1) to (5) in the operative paragraph 183 of the Advisory Opin-

ion. However, it is regrettable that, in recounting the history of this case and in its reasoning, the Court has glossed over certain vital facts that, in my view, deserve more attention and which facts could have strengthened its conclusions. In this separate opinion I attempt to shed more light on these areas.

3. In order to be able to answer the two questions referred to the Court in resolution 71/292 of 22 June 2017, the Court is required to address the following issues:

- (a) whether the right to self-determination was part of customary international law during the process leading up to the independence of Mauritius, (i.e. from 1965 when the Chagos Archipelago was separated from the rest of Mauritius until 1968 when independence was attained);
- (b) if so, whether the inhabitants of Mauritius were entitled to exercise that right in respect of the Chagos Archipelago;
- (c) whether the separation by the United Kingdom, of the Chagos Archipelago from the rest of Mauritius in 1965 was in conformity with the right of the inhabitants to self-determination;
- (d) whether the process of decolonization of Mauritius was lawfully completed in 1968, on attaining independence without the Chagos Archipelago; and
- (e) what consequences if any, arise under international law, from the United Kingdom's continued administration of the Chagos Archipelago.

4. I start, in Part II of this separate opinion, by recognizing the vital role the United Nations has played in the decolonization process and in the development of the right to self-determination as a rule of customary international law. In Part III, rather than analysing the role of the United Nations in decolonization only in relation to the resolutions specified in General Assembly resolution 71/292 of 22 June 2017, and in isolation of the facts surrounding the decolonization of Mauritius, as the Advisory Opinion appears to have done (see paragraphs 92-131; 144-162; 163-169 and 170-174), I hope to give the reader a deeper insight by rehearsing the historical facts leading to the separation of the Chagos Archipelago from Mauritius, with particular emphasis on the role of the United Nations prior to, during and after that separation. In Part IV, I examine the question whether the process of decolonization of Mauritius was lawfully completed in 1968, on attaining independence without the Chagos Archipelago. Lastly, in Part V, I wish to examine more thoroughly the consequences under international law of the United Kingdom's continued administration of the Chagos Archipelago.

II. THE ROLE OF THE UNITED NATIONS IN DECOLONIZATION
AND THE DEVELOPMENT OF THE RIGHT
TO SELF-DETERMINATION

5. In their written and/or oral statements, some States have suggested that the United Nations General Assembly has not demonstrated sufficient interest in the status of the Chagos Archipelago once Mauritius attained its independence; at least not enough to justify the Court entertaining the request now before it. Others have cast doubt on the existence of the right to self-determination during the period leading up to Mauritius' independence, suggesting that the request was in fact a ploy by the African Union to front a "bilateral dispute" on behalf of Mauritius. I respectfully disagree on both accounts.

6. Customary international law arises from a general and consistent practice of States, accepted as law¹. The Court in its jurisprudence, has relied on, and interpreted Article 38 (1) (b) of its Statute to include two elements that assist the Court to determine the existence of an alleged customary international law, namely, State practice and *opinio juris*. Furthermore, the Court has held that a series of resolutions may demonstrate the evolution of *opinio juris* towards the creation of a rule of customary international law. For example in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, the Court stated:

"General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."²

7. From its inception, the United Nations has played a unique, continuous and undeniable role in supporting non-self-governing countries and peoples break the yoke of colonial bondage and domination through a number of avenues. When the United Nations was established in 1945, 750 million people, almost one-third of the world's population, were under colonial domination. Today, as a result of efforts by the United Nations, fewer than two million people live in non-self-governing

¹ See Article 38 (1) (b) of the Statute of the Court.

² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70.

territories. In Article 1 (2) of the Charter of the United Nations (“Charter”) one of the purposes of the United Nations is to “develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. Article 55 of the Charter also refers to “conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination”. The right to self-determination is also reflected in Chapter XI (Arts. 73 and 74) of the Charter³. Under those provisions, administering Powers in charge of non-self-governing territories recognize the principle that the interests of the inhabitants of those territories are paramount; and to accept as a sacred trust the obligation to promote to the utmost, the well-being of the inhabitants of those territories, and to that end to ensure due respect for their social, economic, political, and educational advancement; to assist in developing appropriate forms of self-government and to take into account the political aspirations and stages of development and advancement of each territory. Administering Powers are also obliged to submit periodic reports to the United Nations on the condition of the territories under their control, which reports assist the United Nations to monitor progress on the decolonization process in those territories.

8. Subsequently in 1950, the General Assembly reaffirmed the right to self-determination in multiple resolutions. In resolution 421 (V) of 4 December 1950 the Assembly called upon the Commission of Human Rights “to study ways and means which would ensure the right of peoples and nations to self-determination”, whilst on 5 February 1952 the Assembly passed resolution 545 (VI) referring to “the right of peoples and nations to self-determination”, which the General Assembly noted, had been recognized as “a fundamental human right”. In that resolution, the Assembly also directed the Commission of Human Rights which was considering the drafting Covenants on human rights, to include an article to the effect that “[a]ll peoples shall have the right of self-determination”. That same year on 16 December 1952 the Assembly passed resolution 637 (VII) urging Member States to “recognize and promote the realization of the right to self-determination of the peoples of Non-Self-Governing and Trust Territories”, a right that was stated to be “a prerequisite to the full enjoyment of all fundamental human rights”. The General Assembly passed many resolutions in the 1950s urging respect for the right to self-determination⁴.

³ The Charter also established the International Trusteeship System (Chap. XII, Arts. 75-78) and Trusteeship Council (Chap. XIII, Arts. 86-91) to monitor Trust Territories formally administered under Mandates from the League of Nations.

⁴ General Assembly resolution 783 (VIII) of 28 November 1953; 837 (IX) of 14 December 1954; 1188 (XII) of 11 December 1957, etc.

9. On 14 December 1960 the General Assembly unanimously adopted (with 97 votes to none and four abstentions) resolution 1514 (XV) known as the Declaration on the Granting of Independence to Colonial Countries and Peoples⁵ (“Declaration 1514”). This resolution declared, *inter alia*, that “[a]ll peoples have a right to self-determination” and proclaimed that colonialism should be brought to “a speedy and unconditional end”, thereby crystallizing that right. For the first time, the General Assembly recognized that the right to self-determination was to be exercised by the non-self-governing countries and peoples in respect of the whole of their territory as a single unit. The resolution provided that, “all peoples have an *inalienable* right to complete freedom, the exercise of their sovereignty and the integrity of their national territory”, adding that, “*the integrity of their national territory shall be respected*”, and 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 United Nations”⁶. Thus resolution 1514 is a pivotal declaration upon which subsequent resolutions, including those enumerated in the request, hang. All General Assembly resolutions adopted after resolution 1514 and concerned with its implementation with regard to Mauritius, refer to “the inalienable right” of the inhabitants to self-determination and urge the administering Power to “*take no action which would dismember the territory of Mauritius and violate its territorial integrity*” (emphasis added).

10. A year later, the General Assembly established the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence (“Special Committee”)⁷, to monitor, on a case-by-case basis and in accordance with the relevant General Assembly resolutions on decolonization, the implementation of resolution 1514 and to make recommendations on its application. It is through this Special Committee that the United Nations General Assembly has, to date, kept its finger on the pulse of decolonization. Resolution 1514 was followed by many more General Assembly resolutions aimed at monitoring and calling for its implementation in response to the periodic findings of the Special Committee⁸. In the 15 years between the adoption of the Charter in 1954 and resolution 1514 in 1960,

⁵ Also known as the Declaration on Decolonization.

⁶ Resolution 1514, paras. 4 and 6; emphasis added.

⁷ Also known as the “United Nations Special Committee on Decolonization” or (United Nations) “Committee of Twenty-Four”.

⁸ Resolutions passed by the United Nations General Assembly on decolonization include resolution 1654 (XVI) of 27 November 1961; resolution 1810 (XVII) of 17 December 1962; resolution 1956 (XVIII) of 11 December 1963; resolution 2066 (XX) of 16 December 1965; resolution 2131 (XX) of 21 December 1965; resolution 2200 A (XXI) of 16 December 1966; resolution 2145 (XXI) of 27 October 1966; resolution 2189 (XXI) of 13 December 1966; resolution 2232 (XXI) of 20 December 1967 and resolution 2357 (XII) of 19 December 1967.

nine⁹ former non-self-governing territories gained independence, while between 1960 and 1965 a further 35¹⁰ were decolonized and attained self-determination. These newly independent States joined the United Nations family where they continue to date, to promote and urge the implementation of the right to self-determination by voting in favour of various resolutions of the General Assembly calling on administering Powers that still hold on to colonial territories to implement resolution 1514. In particular, the General Assembly passed specific resolutions calling for the full decolonization of Mauritius, including resolutions 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967.

11. During the same period, legal scholars considered resolution 1514 to represent the wishes and beliefs of the full membership of the United Nations, noting that it confirmed the right of self-determination as an enforceable international legal right¹¹. Furthermore, certain members of the International Law Commission (ILC) referred to the right of self-determination as “a settled rule of *jus cogens*”¹². In 1966, two human rights Covenants were adopted. Both recognized in common Article 1 that “[A]ll peoples have the right of self-determination” by which “they freely determine their political status and freely pursue their economic, social and cultural development” thereby reproducing the language of resolution 1514 verbatim. Article 3 thereof stated:

“The States parties to the 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.”¹³

⁹ Cambodia, Indonesia, Federation of Malaya (Malaysia), Gold Coast Colony and Togoland Trust Territory (Ghana), Guinea, Laos, Morocco, Tunisia and Viet Nam.

¹⁰ Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo Brazzaville (Republic of the Congo), Congo Leopoldville (Democratic Republic of the Congo), Cyprus, Dahomey (Benin), Gabon, Gambia, Ivory Coast (Republic of Côte d’Ivoire), Jamaica, Kenya, Kuwait, Malagasy Republic (Madagascar), Malawi, Maldives, Mali, Malta, Mauritania, Niger, Nigeria, Rwanda Samoa, Senegal, Sierra Leone, Singapore, Somalia, Togo, Trinidad and Tobago, Uganda, United Republic of Tanganyika and Zanzibar (Tanzania), Upper Volta (Burkina Faso) and Zambia.

¹¹ Rosalyn Higgins, *Development of International Law through Political Organs of the United Nations* (1963), pp. 177-178; James Crawford, *The Creation of States in International Law* (2nd ed. 2006), p. 604; P. Daillier and Alain Pellet, *Droit international public* (7th ed. 2002), pp. 519-520.

¹² *Yearbook of the International Law Commission (YILC)* (1963), Vol. 1, Summary Records of the Fifteenth Session (6 May-12 July 1963), doc. A/CN.4/SER.A/1963, p. 155, para. 56.

¹³ International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both adopted on 19 December 1966.

In 1990, the General Assembly proclaimed 1990-2000 as the International Decade for the Eradication of Colonialism and adopted a plan of action. 2001-2010 was declared as the Second Decade for the Eradication of Colonialism and 2011-2020 as the Third. In addition, the United Nations has through its various other organs assisted non-self-governing territories organize pre-independence processes such as referenda or plebiscites in order to ascertain the free will of the peoples concerned as to their future administration. Since 1945 more than 80 former colonies and trust territories have attained self-determination through independence or through free association with an independent State.

12. In its jurisprudence, the Court has endorsed the principle and right of self-determination as formulated in resolution 1514. In its Advisory Opinion on *Namibia*¹⁴, the Court referred to resolution 1514 as an “important stage” in the development of international law regarding non-self-governing territories. In the Advisory Opinion on *Western Sahara*¹⁵, the Court referred to that resolution as the process of decolonization, observing:

“The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV)¹⁶.”

In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [hereinafter *Construction of a Wall*], the Court noted that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV), pursuant to which “[e]very State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] of their right to self-determination”¹⁷.

13. There is no doubt that by 1965 when the United Kingdom as administering Power, separated the Chagos Archipelago from Mauritius, the inalienable right of non-self-governing countries and peoples to self-determination existed under customary international law. The right inhered in the Mauritian peoples, including the Chagossians, in respect of Mauritius as a single non-self-governing territorial unit. The preservation of the territorial integrity of Mauritius as a single unit, prior to the attainment of independence, was therefore an integral part of the right to

¹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 31, para. 52.

¹⁵ *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 32, para. 57.

¹⁶ *Ibid.*, p. 31, para. 55.

¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88.

self-determination. That right gave rise to a corresponding obligation upon the United Kingdom as administering Power, not to take any measure that would dismember the territory of Mauritius or prevent her peoples (including the Chagossians) from being able to freely and genuinely express and implement their will concerning their political future with respect to the whole of their territory. While the inalienable right to self-determination is *jus cogens* (i.e. from which no derogation is permitted), the corresponding obligation incumbent upon the administering Power, is an obligation *erga omnes* (in which the international community as a whole is interested.) This brings me to the question whether the separation by the United Kingdom of the Chagos Archipelago from Mauritius in 1965 was in conformity with the right of the inhabitants to self-determination.

III. WHETHER THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS WAS IN CONFORMITY WITH THE RIGHT TO SELF-DETERMINATION

14. In order for the separation of the Chagos Archipelago to have been in conformity with the right to self-determination, it would have had to occur subject to the free and genuine will of the people of Mauritius, including the Chagossians. Indeed some States that participated in these proceedings argue that Mauritius willingly ceded the archipelago to the United Kingdom (or at least acquiesced to its separation). However, the majority of States refute this assertion and maintain that the separation was without the free and genuine consent of the inhabitants of Mauritius. Accordingly, it is incumbent upon the Court to carefully examine the facts leading to the separation of the Chagos Archipelago in order to determine whether the free and genuine will of the Mauritians was obtained prior to the separation. I am of the view that the Court has glossed over some facts, which, in my view, are vital to this determination. In paragraph 172 of the Advisory Opinion, the Court opines that, “when the Council of Ministers agreed in principle to the detachment from Mauritius of the Chagos Archipelago, Mauritius was, as a colony, under the authority of the United Kingdom”. Citing from a report of the Special Committee of Twenty-Four to the effect that “real legislative or executive powers, and that authority is nearly all concentrated in the hands of the United Kingdom Government and its representatives”, the Court concludes that “it is not possible to talk of an international agreement when one of the parties to it, Mauritius . . . was under the authority of the latter”. In my view, the “free and genuine will of the people” was not necessarily vitiated simply because at the time of negotiating the separation Mauritius was a colony under the executive and legislative authority of the United Kingdom as administering Power. If that alone were the

measure, many former colonies would argue that being in similar fiduciary positions, they were unable to realize full independence. There are additional circumstances omitted from the Advisory Opinion, which when considered in the context of the relationship between the administering Power and the colony, vitiated any expression of the free and genuine will of the Mauritians to the separation of the Chagos Archipelago. As the Opinion does not detail these circumstances I will throw more light on them in this separate opinion.

*(a) Negotiations between the United Kingdom
and the United States of America*

15. As early as April 1963, the US State Department proposed discussions with the United Kingdom on the “strategic use of certain small British-owned islands in the Indian Ocean”, (including Diego Garcia administered by Mauritius and the island of Aldabra administered by the Seychelles) for purposes of establishing a communication facility that both States would jointly survey. Although the United States had the option to negotiate the acquisition and use of these islands directly with Mauritius and the Seychelles, the former preferred that the islands be detached and placed under direct British administration in order to ensure “security of tenure”; freedom from “local pressures” and to insulate the islands from “future political and economic encumbrances”, which problems the alternative option might have presented. On the other hand, the United Kingdom, while recognizing that it had full constitutional power to hand over these islands without the consent of Mauritius, was mindful of the damage this was likely to cause its reputation within the international community since by this time, the right to self-determination was taken very seriously within the United Nations. The United Kingdom was therefore concerned that it secure the prior consent of the Mauritian ministers or at least their acquiescence to the separation. At the same time the United Kingdom wanted to keep from the Mauritians and the Seychelles the involvement of the United States from the deal and reckoned that the best way was to present them with a “fait accompli”, and they would only “at a suitable time be informed in general terms about the proposed detachment of the islands”. The islands were jointly surveyed by the United Kingdom and the United States in July and August 1964, in order to determine the implications on the proposed acquisition of the islands for military purposes, on civilian population. In the view of the United Kingdom’s representatives, there would “be no insurmountable obstacle to the removal, resettlement and re-employment of the civilian population of the islands required for military purposes”. The Newton Report demonstrates that the United Kingdom was very much alert to the possibility of the Mauritian ministers rejecting the deal if they knew the full import of the separation, including that they were going to be

deprived of opportunities for improved trade and employment. Furthermore, in order to minimize international scrutiny, the United Kingdom and the United States agreed that the detachment of the various islands would be done as a single operation, rather than “taking two bites at the cherry of detachment”.

16. By March 1965 word of the impending separation of the Chagos Archipelago from Mauritius was rife amongst the international community, with growing “unfavourable reactions from the African and Asian States, the United Nations and the Cairo Conference of Non-Aligned Countries”. Nonetheless, the United Kingdom and the United States were determined to go ahead with the separation of the islands and the establishment of a military base thereon, regardless of the legal or international consequences. Another aspect that would require “great secrecy” was the financial *quid pro quo* that would be offered to the Mauritians in exchange for the loss of their territory. Thus by the time the United Kingdom held discussions with the Mauritians, legal and administrative decisions had already been taken by the United Kingdom as administering Power in consultation with the United States, behind the back of the Mauritians, to detach the Indian Ocean islands for military purposes, by forming a new colony known as the British Indian Ocean Territories. It was also already settled that compensation would be deposited into a fund, except that the amount was not yet agreed upon.

*(b) Negotiations between the United Kingdom
and the Mauritians*

17. Although negotiations between the United States and the United Kingdom over the separation of the islands had taken place nearly two years previously, the subject was only formally presented to the Mauritian Council of Ministers in July 1965. The Mauritian ministers were unanimously opposed to the detachment of the archipelago, preferring instead to offer the United Kingdom/United States a 99-year lease over the Chagos Archipelago. The Mauritians were also concerned that in any event, the fishing, agricultural and mineral rights of Mauritius needed to be preserved. They were under the misapprehension that their peoples would continue residing on the islands along with the military base. What the Mauritians did not get was that the presence of Mauritian inhabitants upon the islands in question had already been ruled out by the United Kingdom/United States as incompatible with the military purposes for which the islands were required. The Mauritians even proposed a tripartite negotiation with the United Kingdom and the United States, which was rejected outright. The United Kingdom made it abundantly clear that a leasehold arrangement was “extremely troublesome” and that acceptance by the Mauritians to the detachment “was the only acceptable

arrangement". This impasse paved the way for the famous Constitutional Conference held in London between 7 to 24 September 1965. The British Government organized this Conference in such a way that "independence" and "agreement to the detachment" formed part of an inseparable "package deal". It must be recalled that resolution 1514 (XV) adopted barely four years previously, specifically warned that "[a]ny attempt 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". Thus although the detachment took place some three years before Mauritius' independence, all parties involved knew full well that the two were inextricably linked, and that the proposed detachment would go against the provisions of the Charter and resolution 1514.

(c) The 1965 Constitutional Conference

18. One week before the talks, the British Prime Minister made it abundantly clear to the Colonial Secretary that the United Kingdom's "position on the detachment of the islands should in no way be prejudiced" during the Constitutional Conference. The talks between the Mauritian delegates and British colonial authorities took place against the backdrop of (a) uncertainty about whether the United Kingdom would grant Mauritius in view of the disagreement over the Chagos Archipelago; (b) an irreversible commitment on the part of the United Kingdom to separate the Chagos Archipelago, no matter what; (c) opposition by the Mauritian ministers to the detachment; and (d) insistence on the part of the Colonial Secretary that the Mauritian ministers agree or acquiesce to the detachment in order to shield the United Kingdom from domestic and international criticism. Ultimately, the Mauritian delegation believed that the United Kingdom as administering Power had the legislative and executive upper-hand to grant or withhold Mauritius' independence. The bottom line was that "if Mauritian acquiescence could not be obtained, then the course of . . . forcible detachment and compensation paid into a fund" seemed essential.

19. In order to try and resolve the impasse, the Colonial Office arranged a smaller parallel meeting on the side-lines of the Constitutional Conference, strictly to discuss the separation of the Archipelago. This private meeting was attended by Governor Rennie, Premier Ramgoolam, three Mauritian party leaders and a leading independent Mauritian Minister. This meeting was preceded by private meetings between Greenwood, Rennie and Ramgoolam on 13 and 20 September 1965, but no agreement was reached. While the Mauritians offered a 99-year lease, the British rejected the offer, insisting on forcible excision of the islands subject to compensation. Finally, one day before the end of the Constitutional Conference on 23 September 1965, a private meeting was arranged between Sir Ramgoolam (without his ministers) and Prime Minister Harold Wil-

son at 10 Downing Street. The object of this meeting was “to frighten [Ramgoolam] with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago”. In that meeting, Premier Ramgoolam caved in, agreeing to the detachment “in principle”, in exchange for independence. Years later after Mauritius attained independence without the Chagos Archipelago, Sir Ramgoolam confessed that he “agreed” to the detachment because “there was a nook [sic] around his neck. He could not say no . . . otherwise the nook [sic] could have tightened.”

(d) The Lancaster House Undertakings

20. The third and final private meeting between the Mauritian ministers and Colonial Secretary Greenwood on “defence matters” took place only a few hours after Premier Ramgoolam’s meeting with Prime Minister Wilson. Once again Secretary Greenwood did not miss the opportunity to heap pressure on the Mauritians when he suggested that “he was required to inform his colleagues at 4 p.m. of the outcome of his talks with the Mauritian ministers about the detachment of the archipelago. He was therefore anxious that a decision should be reached at the present meeting.” Greenwood made it abundantly clear that forcible detachment by Order in Council was a very likely fall-back option. At this meeting Premier Ramgoolam who did not speak much, made one last attempt to reject detachment in favour of a lease but he was quickly put in his place. Thereafter an elaborate set of conditions upon which the detachment would occur. Many of these conditions were still-born as Mauritian civilians were never going to be allowed on the islands once the military base was established. It was, however, important to the United Kingdom/United States for it to appear that the detachment had been agreed to by a majority if not all the Mauritian ministers and this is exactly the narrative that was peddled in international meetings, from this point forward.

21. Given the above circumstances in which the Mauritians are alleged to have agreed to or acquiesced to the detachment, enabled by the unequal relationship between the United Kingdom and Mauritius, it cannot be said that the people of Mauritius freely and genuinely agreed to cede the Chagos Archipelago to the United Kingdom, before attaining their independence. Accordingly, the separation by the United Kingdom of the Chagos Archipelago from Mauritius in 1965 was clearly in violation of the right of the inhabitants of Mauritius to self-determination in as far as it was contemplated that Mauritius would be granted independence without part of its territory. The detachment flew in the face of resolution 1514 (XV) as well as provisions of the Charter. It was precisely against this background that the General Assembly adopted additional resolutions calling for the implementation of resolution 1514.

IV. WHETHER THE PROCESS OF DECOLONIZATION WAS LAWFULLY COMPLETED IN 1968 WHEN MAURITIUS ATTAINED INDEPENDENCE WITHOUT THE CHAGOS ARCHIPELAGO

22. As shown above, although Mauritius attained independence three years after the detachment of the Chagos Archipelago, the United Kingdom had ensured that the negotiations for the detachment and for independence formed a single package. Needless to say there was much international reaction to the detachment of the Chagos Archipelago from Mauritius and the forcible removal of the Chagossians from the islands. Unsurprisingly, there were statements of disapproval from Mauritius itself, from the United Nations and from important groupings like the Organization of African Unity; the African Union; the Non-Aligned Movement; the Group of 77 and China; the African, Caribbean and Pacific Group of States and the Africa-South America Summit. Upon attaining independence, Sir Ramgoolam became the first Prime Minister of Mauritius but his Government faced widespread criticism over the detachment. He was however steadfast in pledging that Mauritius would seek the return of the archipelago from the United Kingdom by means of “patient diplomacy at bilateral and international levels”.

23. The immediate reaction of the United Nations General Assembly was to adopt resolution 2066 (XX) on 16 December 1965 specifically on Mauritius, in which it not only called upon the United Kingdom to take effective measures to implement resolution 1514 (XV), but also called upon it “to take no action which would dismember the Territory of Mauritius and violate its territorial integrity”¹⁸. It can be argued that up until the day of Mauritius’ independence, it was legally possible for the United Kingdom to give back the archipelago to Mauritius. But perhaps that would have been wishful thinking on the part of the United Nations. More resolutions followed on 20 December 1966¹⁹ and 19 December 1967²⁰ calling upon the United Kingdom and other colonial Powers to implement resolution 1514. In the case of Mauritius these exhortations fell on deaf ears. Not only did Mauritius attain independence without the Chagos Archipelago, which by now formed part of a new colony under the United Kingdom (the British Indian Ocean Territories or “BIOT”); but its entire population on the islands was forcibly removed and prevented from returning thereto.

24. To answer the above question, the process of decolonization of Mauritius was not lawfully completed in 1968 when she attained independence because part of her territory (the Chagos Archipelago) remained

¹⁸ Resolution 2066 (XX), paras. 3-4.

¹⁹ Resolution 2232 (XXI).

²⁰ Resolution 2357 (XXII).

colonized, to date. In order for decolonization to have been completed, the people of Mauritius, including the Chagossians, would have had to exercise their right to self-determination in respect of the whole of their territory. This brings me to Part V where I discuss in more detail, the consequences under international law, of the United Kingdom's continued administration of the BIOT.

V. CONSEQUENCES UNDER INTERNATIONAL LAW,
OF THE UNITED KINGDOM'S
CONTINUED ADMINISTRATION OF THE CHAGOS ARCHIPELAGO

25. The Court makes an oblique reference, as late as paragraph 180, to "the right to self-determination [being] an obligation *erga omnes*". However, the Court fails in the Opinion to recognize that the right to self-determination has evolved into a peremptory norm of international law (*jus cogens*), from which no derogation is permitted and the breach of which has consequences not just for the administering Power concerned, but also for all States. The legal controversy that the General Assembly has presented to the Court directly implicates the territorial integrity rule in the context of decolonization. Therefore, it is incumbent on the Court to properly identify the content and nature of the rule in order to render maximum assistance to the General Assembly. Having failed to recognize the peremptory nature of the rule at issue, the Court has, in my view, insufficiently articulated the consequences of the United Kingdom's continued administration of the Chagos Archipelago for third States. This represents a regrettable retreat from the more thorough and insightful explications of the right to self-determination that the Court has offered in previous opinions.

26. I will proceed in Section (a), by recalling the nature of peremptory norms and the consequences arising from their breach. In Section (b), I will demonstrate that, in the context of decolonization, the right to self-determination, including its territorial integrity component of self-determination has evolved into a peremptory norm of international law. In Section (c), I will explain why the United Kingdom's violation of the territorial integrity of Mauritius during the decolonization process amounted to a serious breach of a peremptory norm. Finally, in Section (d), I will explain the consequences that should flow from that serious breach for third States.

*(a) Peremptory Norms and the Consequences arising
from Their Breach*

27. Peremptory norms occupy a superior position within the hierarchy of customary international law. As set forth in Article 53 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), a peremptory norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which

no derogation is permitted". The Court has expressly recognized the supremacy of peremptory norms in the international legal order and has held that the prohibitions against genocide and torture are norms of a peremptory character²¹.

28. The status of a norm as peremptory has significant consequences. As reflected in Article 53 of the Vienna Convention, the primary consequence is non-derogation. The consequence of invalidity of treaties that conflict with a peremptory norm, which follows from the rule of non-derogation, is set forth in Articles 53 and 64 of the Vienna Convention. Article 53 provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm". Article 64 further provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". These rules are now part of customary international law. This is reflected in the extensive practice of States declaring that a given treaty was invalid due to a purported inconsistency with a peremptory norm²².

29. Additionally, the serious breach of a peremptory norm of international law has significant consequences for all States. As set forth in Article 41 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles on State Responsibility"):

- (a) States shall co-operate to bring to an end through lawful means any serious breach within the meaning of Article 40.
- (b) No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.

These rules have also achieved the widespread State practice and *opinio juris* necessary to constitute customary international law²³.

²¹ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015 (I)*, p. 47, para. 87 (acknowledging that the prohibition on genocide is a peremptory norm); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2006*, pp. 31-32, para. 64 (same); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 457, para. 99 (recognizing that the prohibition against torture is a peremptory norm). Cf. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010 (II)*, p. 437, para. 81 (suggesting that the prohibition on the use of force is a peremptory norm).

²² Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, United Nations General Assembly, ILC, Seventieth Session, UN doc. A/CN.4/714, pp. 12-14, para. 31.

²³ *Ibid.*, p. 39, para. 99. See also *La Cantuta v. Peru*, Inter-American Court of Human Rights (IACtHR), Merits, Reparations and Costs, Series C, No. 162, judgment of 29 November 2006, para. 160.

(b) The Status of the Right to Self-Determination as a Peremptory Norm

30. There can be no doubt that the inalienable right to self-determination sits at the pinnacle of the international legal order. It is set forth in Article 1, paragraph 2, of the United Nations Charter as one of the purposes and principles of the United Nations. Characterizations of the right to self-determination as a peremptory norm stretch back many decades and are now far too common to ignore. Eminent jurists, including former and current Members of this Court, have recognized the peremptory character of the right to self-determination²⁴. It has also been recognized as a peremptory norm by courts and tribunals²⁵, United Nations Special Rapporteurs²⁶, ILC members²⁷, and the ILC itself²⁸. In 1964, when the Sixth Committee of the General Assembly discussed the ILC's draft articles on the law of treaties, many States endorsed the characterization of the right to self-determination as a peremptory norm and only one State voiced opposition²⁹. These statements and instruments inexorably demonstrate that the right to self-determination is a rule of special importance in the international legal order.

31. In my view, the Court should have expressly recognized that in the context of decolonization, the rule requiring respect for the territorial integrity of a self-determination unit is now a peremptory norm. It lies at

²⁴ See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, pp. 89-90, para. 12 (separate opinion of Judge Ammoun); James Crawford, *The Creation of States in International Law* (2007), p. 101; M. Bedjaoui, in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, 2nd ed., 1991, pp. 1082-1083; John Dugard, *International Law: A South African Perspective* (1994), p. 76.

²⁵ See e.g. *La Cantuta v. Peru*, IACtHR, Merits, Reparations and Costs, Series C, No. 162, judgment of 29 November 2006, para 160; case concerning the *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal)*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 20, Part Two, pp. 135-136, paras. 40-43 (1989); Note No. 78/2016 of the Permanent Mission of the Federal Republic of Germany in Response to the Report of the ILC on its Sixty-Seventh Session (2015) (A/70/10), p. 2.

²⁶ *The Right to Self-Determination*, Study prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/405/Rev.1 (1980), p. 11, paras. 71-87.

²⁷ Report of the ILC on the work of its Fifteenth Session, 6 May-12 July 1963, United Nations, *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, UN doc. A/5509 (A/CN.4/163), pp. 198-199, para. 3; Report of the ILC on the work of its Eighteenth Session, 4 May-19 July 1966, United Nations, *Official Records of the General Assembly, Twenty-First Session, Supplement No. 9*, UN doc. A/6309/Rev.1 (A/CN.4/191), p. 248, para. 3.

²⁸ Report of the ILC on the work of its Fifty-Third Session, 23 April-1 June and 2 July-10 August 2001, United Nations, *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10*, UN doc. A/56/10, p. 85, para. 5.

²⁹ *The Right to Self-Determination*, Study prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/Sub.2/405/Rev.1 (1980), p. 11, paras. 71-72.

the very heart of the right to self-determination. Any derogation from this rule during a decolonization process would present the colonial Power with the opportunity to endlessly perpetuate colonial domination, thereby rendering the right to self-determination illusory.

32. State practice demonstrates that in the context of decolonization, the relevant self-determination unit is the entirety of a colonial territory. Since resolution 1514, the General Assembly has routinely taken this position. On a few rare occasions the international community has made exceptions to this practice in recognition that the relevant people for the purposes of self-determination did not correspond to the colonial boundaries. However, this was strictly in accordance with the expression of the free and genuine will of the peoples concerned and did not constitute a derogation from their peremptory right to self-determination. For example, the decolonization processes in the colonial territories of the British Cameroons and Ruanda-Urundi both recognized two self-determination units within the respective colonial boundaries entitled to separately express their will as to their future political status.

33. With respect to Ruanda-Urundi, the United Nations Commission tasked with seeking the “reconciliation of the various political factions in the Territory”³⁰, was “compelled to admit the regrettable fact that the Territory was divided” along sectarian lines³¹. The Fourth Committee acknowledged the existence of two separate peoples wishing to accede to independence as separate States³². In resolution 1746 (XVI), the General Assembly accepted decolonization on this basis as legitimate and declared that Ruanda-Urundi would emerge as the two independent and sovereign States of Rwanda and Burundi on 1 July 1962. The international community accepted the decolonization process as legitimate and Rwanda and Burundi were each admitted as Members to the United Nations shortly thereafter.

34. In the case of the British Cameroons, the United Kingdom administered the northern part of the territory as part of Nigeria and the southern part as a separate unit. In 1958, the United Nations Visiting Mission to the Cameroons under British Administration observed that the northern region had close affinities with the people of northern Nigeria whereas the southern region had close affinities with the people of the French Cameroons³³. Accordingly, it recommended that, “the wishes of the

³⁰ General Assembly resolution 1743, para. 3 (*a*).

³¹ Report of the United Nations Commission for Ruanda-Urundi, UN doc. A/5126, p. 91, para. 319.

³² General Assembly, 16th Session, Fourth Committee, 1305th Meeting, p. 904, para. 14.

³³ United Nations Visiting Mission to Trust Territories in West Africa, 1958: Report of the Trust Territory of the Cameroons under British Administration, UN doc. T/1426 (1959), p. 16, para. 16.

northern and southern peoples of the Trust Territory should be determined separately”³⁴. Consistent with the recommendation of the Visiting Mission, in resolution 1350 (XIII) the General Assembly requested for “separate plebiscites in the northern and southern parts of the Cameroons under United Kingdom administration”³⁵. In the plebiscite in the northern region in 1959, in which the options were either joining Nigeria or postponing the decision, a majority of the concerned people voted in favour of postponing the decision³⁶. In the plebiscite in the southern region in 1961, in which the options were joining Nigeria or joining Cameroon, the majority voted to join Cameroon³⁷. In the second plebiscite in the northern region later on that same year, in which the options were joining Nigeria and joining Cameroon, the majority voted to join Nigeria³⁸. Again, the General Assembly endorsed the outcome of the plebiscites as a legitimate expression of the free and genuine will of the peoples concerned³⁹.

35. The decolonization processes in Ruanda-Urundi and the British Cameroons do not constitute derogations from the rule protecting the territorial integrity of a self-determination unit. They constitute derogations from the principle of *uti possidetis*. The Court explained the principle of *uti possidetis* in *Frontier Dispute* as follows:

“The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term . . . *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.”⁴⁰

36. Thus, *uti possidetis* is properly understood as one means of identifying the self-determination unit in the context of decolonization. It is a doctrine related to, but clearly distinct from the territorial integrity component of self-determination. The latter guarantees the territorial integ-

³⁴ UN doc. T/1426 (1959), p. 79, para. 170.

³⁵ General Assembly resolution 1350 (XIII), para. 1.

³⁶ *Ibid.*, para. 2.

³⁷ General Assembly resolution 1352 (XIV), para. 2.

³⁸ General Assembly resolution 1473 (XIV), para. 3.

³⁹ General Assembly resolution 1608 (XV), para. 2.

⁴⁰ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *I.C.J. Reports 1986*, p. 566, para. 23.

rity of a country or a self-determination unit, not necessarily the integrity of colonial boundaries as such. Unlike the right to self-determination, the Court has never suggested that *uti possidetis* may be a peremptory norm of international law.

37. On the other hand, the Court has repeatedly alluded to the peremptory nature of the rule protecting the territorial integrity of a self-determination unit in cases in which that aspect of the right to self-determination was implicated. The Advisory Opinion in *Namibia* concerned South Africa's failure to respect the territorial integrity of Namibia in violation of General Assembly resolution 2145 (XXI) terminating the mandate for South West Africa. The Court implied that the right to self-determination had peremptory character in that context by indicating that all States had a duty of non-recognition which flowed not only from Security Council resolution 276 but also from general international law⁴¹.

38. In *East Timor*, another case implicating territorial integrity and self-determination in the context of decolonization, the Court made an important contribution to the understanding of international law by observing that the "right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character"⁴². It also alluded to the peremptory status of the rule protecting the territorial integrity of a self-determination unit by describing self-determination in that context as "one of the essential principles of contemporary international law"⁴³.

39. In *Construction of a Wall*, the Court recognized that Israel's construction of a wall and Israeli settlements in occupied Palestinian territory could disrupt the territorial integrity of the Palestinian self-determination unit by "creat[ing] a 'fait accompli' on the ground that could . . . become permanent"⁴⁴. The Court did not expressly hold that the right to self-determination is a peremptory norm. However, again, it implied the elevated status of that right within the hierarchy of international legal norms by venerating its "character and . . . importance"⁴⁵. Consequently, the Court held that the breach of the right of the Palestinian people to self-determination entailed the consequences applicable for the breach of

⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, pp. 54-55, paras. 119-121.

⁴² *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 102, para. 29.

⁴³ *Ibid.*

⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, p. 184, para. 121.

⁴⁵ *Ibid.*, p. 200, para. 159.

a peremptory norm in language strikingly similar to Article 41 of the Articles on State Responsibility:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.”⁴⁶

40. These cases should be read as confirming the widespread State recognition that the rule requiring respect for the territorial integrity of a self-determination unit in the context of decolonization is non-derogable. It is implicit in the third principle set forth in the Atlantic Charter of 1941, recognized in the Final Communiqué of the 1955 Asian-African Conference of Bandung, declared as customary international law in paragraph 6 of General Assembly resolution 1514 (XV) of 1960 — reiterated in General Assembly resolution 2625 (XXV) of 1960 and resolution 1654 (XVI) of 1961, and reinforced by the Charter of the Organization of African Unity of 1963. As today’s Advisory Opinion confirms, it has come to be embodied in Articles 1, paragraph 2, 55, and 73 of the United Nations Charter. Presently, there is no State on the planet that has not signed on to an international legal instrument protecting the territorial integrity of a self-determination unit during the process of decolonization.

41. The international community’s consistent opposition to any act that disrupts territorial integrity during the decolonization process developed very early in United Nations practice. In its very first session the General Assembly passed resolution 65 (I) rejecting South Africa’s proposal to annex South West Africa. In 1966, it passed resolution 2145 (XXI) declaring that South Africa had failed to fulfil its obligations to South West Africa under the mandate and terminating it. Resolution 2325 (XXII) of 1966, which the General Assembly passed in response to South Africa’s continued presence in South West Africa, is particularly pertinent. It called on all Member States to co-operate to end South Africa’s flagrant violation of South West Africa’s territorial integrity⁴⁷. The General Assembly reprised that call in resolution 2372 (XXII) of 1968 and further invoked the duty of non-recognition by calling on all States “to desist

⁴⁶ *I.C.J. Reports 2004 (I)*, p. 200, para. 59.

⁴⁷ General Assembly resolution 2325 (XXII), paras. 4 and 6.

from those dealing . . . which would have the effect of perpetuating South Africa's illegal occupation of Namibia". These duties achieved near universal compliance and eventually South West Africa became the independent Republic of Namibia.

42. Similarly, the international community strenuously opposed the attempt of a racist minority régime to establish the State of Southern Rhodesia in 1965 in violation of the right of the Zimbabwe people to self-determination. The General Assembly adopted resolution 2022 (XX) appealing to States not to recognize the minority government⁴⁸, and to co-operate to end the unlawful situation by, *inter alia*, rendering moral and material help to the people of Zimbabwe in their struggle for independence⁴⁹. These duties were nearly universally observed by States and the people of Southern Rhodesia ultimately achieved independence in 1980 and became the Republic of Zimbabwe. Thus, South West Africa and Southern Rhodesia are both examples of the General Assembly invoking the universal co-operation and non-recognition duties associated with the breach of a peremptory norm due to violations of the territorial integrity of a self-determination unit.

43. The General Assembly also has a history of implying the special character of the territorial integrity rule. In resolution 35/118, the General Assembly "[c]ategorically reject[ed] any agreement, arrangement or unilateral action by colonial and racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence". Its characterizations of self-determination as an "inalienable right" in a long string of resolutions concerning the territorial integrity of a self-determination unit imply that that right has a peremptory character in this context⁵⁰. If the rule protecting the territorial integrity of a self-determination unit is inalienable, it is difficult to imagine any circumstance under which its derogation would be permitted. The United Nations has also repeatedly characterized any attempt by a colonial administration to annex territory during the decolonization process as an act of aggression within the meaning of the United Nations Charter⁵¹. The rule prohibiting aggression, or the unlaw-

⁴⁸ General Assembly resolution 2022 (XX), para. 9.

⁴⁹ *Ibid.*, para. 10. See also *ibid.*, paras. 6 and 9; Security Council resolution 216 (1965); Security Council resolution 217 (1965).

⁵⁰ See e.g. General Assembly resolution 2073 (XX), para. 3; General Assembly resolution 2074 (XX), para. 3; General Assembly resolution 2232 (XXI), para. 2; General Assembly resolution 1817 (XVII), para. 1; General Assembly resolution 2145 (XXI), para. 1; General Assembly resolution 2325 (XXII), preamble; General Assembly resolution 2357 (XXII), para. 2; General Assembly resolution 2403 (XXIII), para. 1; General Assembly resolution 3485 (XXX), para. 1; General Assembly resolution 33/39; General Assembly resolution 33/31, para. 2; General Assembly resolution 37/28, para. 1.

⁵¹ See e.g. General Assembly resolution 1817 (XXII), para. 6; General Assembly resolution 2074 (XX), para. 6, cf. Security Council resolution 269, para. 3.

ful use of force, has been widely recognized as a peremptory norm⁵². Thus, when the General Assembly equates self-determination to non-aggression, it implies that self-determination also has a peremptory character.

*(c) The United Kingdom's Breach
of the Territorial Integrity Rule Is Serious*

44. There can be no doubt that the United Kingdom's breach of the peremptory rule requiring respect for the territorial integrity of Mauritius during the decolonization process is serious. The United Kingdom used its position as the administering Power for the purposes of territorial aggrandizement at the expense of the people of Mauritius. Its actions amounted to a *de facto* annexation that subverted the right of the people of Mauritius to self-determination by denying them any opportunity to express their will as to the fate of the Chagos Archipelago. This conduct is wholly irreconcilable with the right to territorial integrity. It negates the very *raison d'être* of Article 73 of the Charter — "to develop self-government [with] due account of the political aspirations of the peoples"⁵³.

(d) Consequences

45. Having failed to recognize the peremptory status of the territorial integrity rule in the context of decolonization, the Court has failed to properly articulate the consequences of the United Kingdom's internationally wrongful conduct. Any treaty that conflicts with the right of the Mauritian people to exercise their right to self-determination with respect to the Chagos Archipelago is void. This has clear implications for the agreement between the United Kingdom/United States. Further consequences flow from the serious nature of the United Kingdom's internationally wrongful conduct. All States are under an obligation to co-operate to bring an end to the United Kingdom's unlawful administration of the Chagos Archipelago. Moreover, all States are under an obligation not to recognize as lawful the situation created by the United Kingdom's continued administration of the Chagos Archipelago and not to render aid or assistance in maintaining the illegal situation.

46. The consequences prescribed for serious breaches of peremptory norms reflect the special interest that the international community has in guaranteeing that they are honoured. Without the right to self-determination the entire international legal order would crumble. It is a bedrock principle on which so many rights that the international community holds

⁵² See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010 (II), p. 437, para. 81.

⁵³ United Nations Charter, Art. 73 (b).

dear are built. It is regrettable that almost six decades after the General Assembly passed resolution 1514 (XV), the odious institution of colonization is yet to be eradicated and the right to self-determination is yet to be universally recognized. The Court's words in the *Namibia* Advisory Opinion of 1971 remain applicable to Mauritius today; "all States should bear in mind that the injured entity is a people which must look to the international community for assistance" in its struggle for self-determination⁵⁴.

CONCLUSION

47. In answer to the two questions posed by the United Nations General Assembly in resolution 71/292 my opinion is as follows. The right of non-self-governing countries and peoples to self-determination existed under customary international law as a peremptory norm (*jus cogens*) by 1965 when the United Kingdom as administering Power, separated the Chagos Archipelago from Mauritius. The right inhered in the Mauritian peoples, including the Chagossians, as a single non-self-governing territorial unit. The preservation of the territorial integrity of Mauritius as a single unit, prior to the attainment of independence, was an integral part of her right to self-determination. That right gave rise to a corresponding obligation upon the United Kingdom as administering Power, not to take any measure that would dismember the territory of Mauritius or prevent her peoples (including the Chagossians) from being able to freely and genuinely express and implement their will concerning their political future with respect to the whole of their territory.

48. By detaching the Chagos Archipelago from Mauritius in 1965 and establishing a new colony in respect thereof known as the BIOT, prior to ascertaining the free and genuine will of the Mauritian people in that regard, the United Kingdom violated its obligation *erga omnes*, not just to Mauritius, but to the international community as a whole, not to take any measure that would prevent the Mauritian people from freely exercising their right to self-determination with respect to the whole of their territorial unit to which that right related. As a result, the process of decolonization of Mauritius was not lawfully completed when she attained independence in 1968.

49. Accordingly the people of Mauritius still possess the right to self-determination in relation to the whole of their territory (including with respect to the Chagos Archipelago) and the United Kingdom's con-

⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 56, para. 127.

tinued administration of the Chagos Archipelago (as part of the BIOT) constitutes a continuing wrongful act in international law, entailing the international responsibility of that State. The United Kingdom remains under an obligation first, not to take any measure that would prevent the people of Mauritius from freely exercising their right to self-determination in relation to the whole of their territory; secondly, to immediately bring to an end its administration over the Chagos Archipelago and to return it to Mauritius. Thirdly, the United Kingdom is under an obligation to “as far as possible, wipe out all the consequences of the unlawful act” (including the forcible displacement of the Chagossians), and to “reestablish the situation which would, in all probability, have existed if that [unlawful] act had not been committed⁵⁵”.

50. Since the obligation to respect the right to self-determination, including the obligation to respect the territorial integrity of the non-self-governing territory as a single unit, is an obligation *erga omnes*, all States have an obligation to co-operate to bring an end to the United Kingdom’s unlawful administration of the Chagos Archipelago. Moreover, all States are under an obligation not to recognize as lawful the situation created by the United Kingdom’s continued administration of the Chagos Archipelago and not to render aid or assistance in maintaining the illegal situation.

51. The United Nations, in accordance with its role on decolonization, should continue supporting Mauritius until it realizes full self-determination for all its peoples, including the Chagossians. I wish to say a word about the resettlement of the Chagossians. Now that Mauritius is an independent State, it is not inconceivable that some Chagossians may wish to return home to the archipelago, while others may wish to remain part of a third State such as the Seychelles or even the United Kingdom. Consistent with the right to self-determination, that choice is entirely in the hands of the Chagossians, which they must be permitted to exercise freely and genuinely.

(Signed) Julia SEBUTINDE.

⁵⁵ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.*