

THE INTERNATIONAL COURT OF JUSTICE  
AND THE DEVELOPMENT OF THE RIGHT  
TO SELF-DETERMINATION: *AN APPROACH  
TO THE CASE OF PUERTO RICO*

ARTICLE

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*It is my argument that the most fundamental  
of all human rights is that of self-determina-  
tion and that no other right overrides it.*

Makau Mutua<sup>1</sup>

I. INTRODUCTION .....	669
II. THE INTERNATIONAL COURT OF JUSTICE: <i>JURISDICTION</i> .....	671
III. THE RIGHT TO SELF-DETERMINATION: <i>BRIEF HISTORY AND IMPORTANT INSTRUMENTS</i> .....	673
IV. THE RIGHT TO SELF-DETERMINATION: <i>PRONOUNCEMENTS OF THE ICJ</i> .....	677
V. CONCLUSION.....	697

**I. Introduction**

The International Court of Justice (ICJ) and the most highly qualified publicists<sup>2</sup> have stated that the right to self-determination is a fundamental norm of international law and an *erga omnes* human right. In contradiction with standard, Puerto

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<sup>1</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique*, 94 (2002).

<sup>2</sup> Under article 38(1) of the Statute of the International Court of Justice, both, judicial decisions and

Rico has been kept for more than a century as an “unincorporated territory” of the United States. A series of articles published by the Harvard Law Review in 1899<sup>3</sup> provided the building blocks used by the Supreme Court since 1901, in the so called *Insular Cases* that have defined the relation between the United States and its territories since then.<sup>4</sup> These cases decided that Puerto Rico belongs to, but is not part of the United States, and is subject to the plenary powers of Congress under the Territory Clause of the Constitution,<sup>5</sup> despite the absence of political participation of the inhabitants of Puerto Rico in the federal government.

The territorial nature of the legal and political relationship between Puerto Rico and the United States has been reiterated by the Supreme Court.<sup>6</sup> More recently, the December 2007 *Report by the President’s Task Force on Puerto Rico’s Status*, restated the judicial doctrine that Puerto Rico is still subject to those plenary powers. Only a few months ago, the Supreme Court of the United States again invoked the doctrine of the *Insular Cases* in a decision concerning Guantánamo.<sup>7</sup> To this day, Congress may indefinitely exercise total control over unincorporated territories, even though its disenfranchised inhabitants do not participate in the government that rules them. The regime of the United States over Puerto Rico is illegal under the international law, a violation of human rights.

The solution to the contradiction between the constitutionalized colonial rule of a so called unincorporated territory and the right of the people of the territory to self-determination requires that Congress, through its plenary powers, dispose of the territory of Puerto Rico. Congress is obligated by the international law of human

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the teachings of the publicists are to be deemed as secondary sources of international law:

1. The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>3</sup> Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291 (1899); Charles C. Langdell, *Status of Our New Territories*, 12 Harv. L. Rev. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393 (1899); James Bradley Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464 (1899); Abbot Lawrence Lowell, *Status of Our New Possessions — A Third View*, 13 Harv. L. Rev. 155 (1899).

<sup>4</sup> The most important of these cases decided between 1901 and 1922 are *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Balzac v. Porto Rico*, 218 U.S. 298 (1922).

<sup>5</sup> U.S. Const., art. IV, § 3, cl. 2

<sup>6</sup> *Harris v. Rosario*, 446 U.S. 651 (1980).

<sup>7</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

rights to facilitate a process whereby the people of Puerto Rico may freely opt for a non-colonial, non-territorial arrangement. However, in the various attempts over the past two decades to prod decolonization legislation, Congress has stalled, refusing to approve legislation for the self-determination of the people of Puerto Rico.

In the vivid context of tension between the international law and Puerto Rico's ongoing status, the development of this paper seems timely. This work is a case study, an analysis of the jurisprudence of the International Court of Justice (hereinafter ICJ) that has dealt with the right to self-determination, its scope of application and its enforceability; moreover, our main purpose is to facilitate the integration of these cases to the debates in relation to the decolonization process of Puerto Rico. Certainly, this paper's goal is to provoke (maybe force) the discussion of the jurisprudence of the ICJ and its intersections with the case of Puerto Rico.

In this paper, the discussion of the jurisprudence of the ICJ in conjunction with the opinion of the publicists, is oriented to identify an adequate tool (or pretext) to move beyond the passions of the purely political discourses regarding the decolonization of Puerto Rico, to the realms of a legal perspective. However, this paper recognizes the preeminent role of politics as the arena and as the fundamental instrument for the discussion.

## II. The International Court of Justice: *Jurisdiction*

The ICJ is a "Charter-based body", in other words, an entity created by the Charter of the United Nations.<sup>8</sup> The Statute of the ICJ provides that "[o]nly states may be parties in cases before the Court"<sup>9</sup> and according to the provisions of the United Nations Charter, "[a]ll members of the United Nations are *ipso facto* parties to the Statute of the [ICJ]",<sup>10</sup> so all States members are subject to the scrutiny of the Court in relation to their performance in the sphere of the international community. Therefore, the ICJ Statute provides in a very broad scope that "The jurisdiction of the Court comprises all cases which the parties [States] refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."<sup>11</sup> Nevertheless, in all matters involving States as parties, the Court's authority "depends on the consent of the states concerned".<sup>12</sup>

All cases brought before the Court, begin either with the filing of an "application" or with the filing of an "agreement." In cases initiated through the filing of

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<sup>8</sup> The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter. UN CHARTER ART. 92.

<sup>9</sup> ICJ STATUTE ART. 34 (1).

<sup>10</sup> UN CHARTER ART. 93 (1).

<sup>11</sup> ICJ STATUTE ART. 36 (1).

<sup>12</sup> J.G. Merrills, *International Dispute Settlement* (Cambridge University Press. Fourth Ed. 2005) p. 128.

an application, one State moves before the Court against another member to the United Nations that, as a member, has unavoidably consented to the ICJ's jurisdiction. In words of Merrills, this is "an unilateral reference of a dispute to the Court".<sup>13</sup> In other cases initiated with the filing of an "agreement", parties jointly request the intervention of the Court in an ongoing controversy between them. According to Merrills, "The most commonly used method of consenting to the exercise of the Court's jurisdiction after a dispute has arisen is the negotiation of a special agreement[...], similar to an arbitral *compromis*."<sup>14</sup> Merrills asserts that in these cases, parties "defines the issues in dispute and, subject to the provisions of the Statute [...] indicate the basis on which the Court should give its decision."<sup>15</sup> The ICJ Statute also provides that the states parties to the Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation the jurisdiction of the court in all legal disputes concerning: **a.** The interpretation of a Treaty; **b.** Any question of international law; **c.** The existence of any fact which, if established, will constitute a breach of an international obligation; **d.** The nature or extent of the reparation to be made for the breach of an international obligation.<sup>16</sup> According to Merrills, this provision in the Statute of the ICJ is known as the "optional clause".<sup>17</sup>

Finally, the ICJ, as most international tribunals, has the ability to issue advisory opinions. However, only the United Nations General Assembly, the Security Council and other few authorized entities are entitled to request such opinions. The Charter of the United Nations delegates a very broad jurisdiction to the ICJ to issue advisory opinions "on any legal question."<sup>18</sup> Thus, the ICJ statute provides for "an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."<sup>19</sup> Although, by definition, the ability of the ICJ to issue advisory opinions is not related to an adversary proceeding, States involved in a controversy may be affected by such an opinion, and are entitled to appear before the Court by filing *Memorials*, in order to submit their positions regarding the issue before the Court. Under the ICJ statute the Court's Registrar is thus obligated to "give notice of the request for an advisory opinion to all states entitled to appear."<sup>20</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 129.

<sup>15</sup> *Id.*

<sup>16</sup> ICJ STATUTE ART. 36 (2).

<sup>17</sup> Merrills, *supra* n. 12, at 129.

<sup>18</sup> UN CHARTER ART. 96 (1).

<sup>19</sup> ICJ STATUTE ART. 65 (1).

<sup>20</sup> *Id.* at 66 (1).

### **III. The Right to Self-Determination: *Brief History and Important Instruments***

The existence and recognition of a “right to self-determination” as we have it today, is preceded (as well as most of the human rights recognized in this point in history) by three other stages that paved the way: the theoretical, the aspirational and the judicial. However, most publicists agree that it was the granting of the *American Declaration of Independence* in 1789, and the *French Revolution* in 1792 the two events in history in which the basic notions of a right to self-determination emerged for the very first time. Both of these events manifested two radical principles; first, that “governments derive their just powers from the consent of the governed” so the governmental entity is “answerable to the people” and second, that “the newly defined entity of the state earns separate and equal station in the community of states by demonstrating a decent respect to the opinion of mankind.”<sup>21</sup>

The *American Declaration of Independence* and the *French Revolution* served as preconditions for the development of the theoretical debates; the main actors in that stage were V.I. Lenin and Woodrow Wilson. “Lenin was championing self-determination with an eye towards a worldwide socialist revolution”, meanwhile, Wilson engaged in the developing of a “typically Western democratic theory”.<sup>22</sup> The rhetoric between these main actors eventually gave rise to two different components embedded in the concept of self-determination. On the first hand, the “external self-determination”, defined as the right of the people “to choose their own sovereignty – that is, to be free from external coercion or alien domination”<sup>23</sup> and on the second hand, the “internal self-determination”, defined as “the peoples’ right to freely chose their own rulers”<sup>24</sup> or the right of the peoples’ to have a “meaningful participation in the political process” and “choose their own social order and form of government”.<sup>25</sup>

In the middle of the debates previously identified in the theoretical stage, the First World War marked the beginning of the aspirational stage; “Indeed, most of the Allies claimed that the primary purpose of their war effort was the realization of the principle of nationality and the right of peoples to decide their own destiny.”<sup>26</sup>

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<sup>21</sup> Joshua Castellino, *International law and Self-Determination: the interplay of the politics of territorial possession with formulations of post-colonial ‘national’ identity*, 9 (The Hague; Boston: Martinus Nijhoff Publishers, c2000), citing Franck, *Emerging Right to Democratic Governance*, 86 AJIL, 46 (1992).

<sup>22</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 19 (Cambridge Univ. Press 1995).

<sup>23</sup> Morton H. Halperin and David J. Scheffer with Patricia L. Small, *Self-Determination in the New World Order*, 16 (Halperin, Morton H. Washington, D.C.: Carnegie Endowment for International Peace, c1992).

<sup>24</sup> Cassese, *supra* n. 22, at 12.

<sup>25</sup> Michla Pomerance. *Self-Determination in law and practice: the new doctrine in the United Nations*, 30 (The Hague; Boston: M. Nijhoff, 1982).

<sup>26</sup> Cassese, *supra* n. 22, at 24.

With the victory of the Allies in the First World War, the granting of the Versailles Settlement<sup>27</sup> and the creation of the League of Nations,<sup>28</sup> the aspirational stage reached its highest level of success; specifically with the creation of a *Mandate System*<sup>29</sup> in which the colonies of the defeated powers were “entrusted to the control of the Allies”,<sup>30</sup> contrary to the Allies themselves who “were allowed their colonial territories without regulation.”<sup>31</sup> In 1920 the Council of the League of Nations<sup>32</sup> was called to intervene in a dispute in which the people from the Åland Islands<sup>33</sup> (part of Finland), claimed their right to secession and stated their preference to join Sweden.<sup>34</sup> Although the Council did not grant the request of the former, “a special Commission of Rapporteurs was established by the Council of the League of Nations to establish conditions favorable to the maintenance of peace in that part of the world.”<sup>35</sup>

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<sup>27</sup> The treaty was concluded between the Allied and Associated Powers and Germany in June 1919 and it has 440 clauses. Part I contained the Covenant of the League of Nations. Parts II and II covered the new frontiers. By it Germany lost Alsace-Lorraine to France; Posen and West Prussia went to Poland; the Memel territory came under Allied sovereignty. In addition, Danzig was made a Free City; the Saar was put under the rule of the League of Nations for 15 years; the three zones of the Rhineland remained occupied for five, 10 and 15 years. In northern Schleswig, parts of East Prussia, and Upper Silesia, plebiscites would be held. By Parts IV and V, Germany had to give up its foreign rights and its colonies, which would become mandated territories of the League of Nations. Its army had to be reduced to 100,000 men and Allied commissions would supervise its disarmament. Parts VI and VII covered prisoners of war and war criminals. By Part VIII, Germany was found guilty of provoking World War I and therefore had to pay considerable reparations to the Allies. Anique H.M. Van Ginneken, *Historical Dictionary of the League of Nations, 1914-1919* (The Scarecrow Press Inc. 2006).

<sup>28</sup> The League of Nations was created in 1919 over the ideals of international peace and justice, promulgated mainly by the former American president Woodrow Wilson. The League of Nations was the first permanent organization with a general competence to promote all forms of international relations, to settle disputes, and to protect against aggression. The League, indeed, often fulfilled its promises, especially in the initial period. It was able to settle the dispute between Finland and Sweden over the Åland Islands in 1921; it saved Austria from financial ruin in 1922; it drew up the Statute of the Memel, and allocated Mosul to Iraq, in 1924-1925. Moreover, it initiated many activities in the social and economic field. The enthusiasm for the League and the “spirit of Geneva” resulted in the establishment of National League of Nations societies. *Id.* at 8.

<sup>29</sup> See, *infra* n. 89.

<sup>30</sup> Castellino, *supra* n. 21, at 14-15.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> Though Article III of the Covenant gave the Assembly the right to deal “with any matter within the sphere of action of the League or affecting the peace of the world,” it was clear that the intention of the drafters that the Council should be the main decision-making organ of the League. Only the Council was entitled to supervise the reduction of armaments (Article VIII) and to preserve the territorial integrity of the member states (Article X). Disputes or threats of war had to be brought to the attention of the Council (Article XI, XII, XV) and the Council could propose what steps should be taken if a member state failed to carry out the decision of the Permanent Court of International Justice (Article XIII). Disputes that could not be settled by arbitration or judicial settlements were to be submitted to the Council, which would draw up a report. Van Ginneken, *supra* n. 27, at 64.

<sup>33</sup> Åland Islands Case *PCIJ Reports* (1919).

<sup>34</sup> Halperin and Scheffer, *supra* n. 23, at 19.

<sup>35</sup> *Id.*

Eventually, the League of Nations dissolved and with the end of the Second World War the United Nations emerged. In its constitutive document, contrary to the League of Nations, the United Nations adopted as one of its main purposes “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>36</sup> Furthermore, under Chapter IX of the Charter, the General Assembly also adopted a list of goals to be promoted in order to assure “the creation of 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.”<sup>37</sup> These declarations definitely marked the beginning of the judicial stage in the development of the right to self-determination. In fact, Kirgis labels that the right to self-determination became “squarely involved in the quasi-constitutive role of the U.N. General Assembly”<sup>38</sup> and Cassese asserts that the inclusion in the UN Charter of several provisions related to the right to self-determination marked “the starting point of a gradual law-making process.”<sup>39</sup>

In 1948 the adoption of the Universal Declaration of Human Rights “intended gradually to turn the few provisions of the UN Charter into a set of legally binding treaty provisions.”<sup>40</sup> Then, the year 1960 labeled the beginning of the development of the right to self-determination in the colonial context.<sup>41</sup> In said year, the General Assembly adopted Resolution 1514 (XV), known as the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.<sup>42</sup> According to Castellino, this was the result “of the need to condemn Portuguese behavior in refusing to report on its colonies”<sup>43</sup> to the General Assembly, as required under article 73 of the Charter of the United Nations.<sup>44</sup> Indeed, Resolution 1514 (XV) was passed by a vote of 89 to 0 with 9 abstentions, including Austria, Belgium, the Dominican Republic, France, Portugal, Spain, South Africa, the United Kingdom and the United States.<sup>45</sup> According to Castellino, the adoption of Resolution 1514 (XV) transformed the right of self-determination from a “political principle of uncertain application” to a “quasi-legal principle”<sup>46</sup> and a fundamental human right.<sup>47</sup>

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<sup>36</sup> UN CHARTER ART. 1 (2).

<sup>37</sup> *Id.*, at 55.

<sup>38</sup> Frederic L. Kirgis, Jr. *International Organizations in their Legal Setting*, 891 (West Publishing Co. Second Ed. 1993).

<sup>39</sup> Cassese, *supra* n. 22, at. 126.

<sup>40</sup> *Id.* at 47.

<sup>41</sup> Halperin and Scheffer, *supra* n. 23, at 22.

<sup>42</sup> GA Res. 1514 (XV), 15 U.N. GAOR, Supp. No. 16 at 66, UN Doc. A/4684 (1960).

<sup>43</sup> Castellino, *supra* n. 21, at 27.

<sup>44</sup> *See*, UN CHARTER ART. 73, *infra* n. 78.

<sup>45</sup> Halperin and Scheffer, *supra* n. 23, at 23.

<sup>46</sup> Castellino, *supra* n. 21, at 22.

<sup>47</sup> *Id.*, at 23.

Finally, it is important to underline that Resolution 1514 (XV) was adopted under the premise that “the process of liberation is irresistible and irreversible and that in order to avoid serious crises an end must be put to colonialism”, and to declare that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status.”<sup>48</sup>

The day after the adoption of Resolution 1514 (XV) the United Nations General Assembly adopted Resolution 1541 (XV), known as *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit Information Called for Under Article 73e of the Charter*.<sup>49</sup> Through this resolution the General Assembly “made a distinction based on the final result of self-determination, that is, according to whether a colonial country would (i) end up as a sovereign independent State; (ii) associate with an independent State, or instead; (iii) integrate into an independent State.”<sup>50</sup>

In order to achieve a status of independence, Resolution 1541 (XV) does not require the administering power to consult the colonial peoples’ will, but to grant it in the context of Resolution 1514 (XV). On the other hand, in regards to free association, Resolution 1541 (XV) *Principle VI (a)* establishes that it “should be the result of a free and voluntary choice by the peoples of the territory, expressing their concern through informed and democratic processes”. Regarding annexation, *Principle VIII* set a higher threshold: “The integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed democratic processes, impartially conducted.”<sup>51</sup>

In 1966 two main instruments were adopted by the United Nations’ General Assembly. These were the *International Covenant on Economic, Social and Cultural Rights*,<sup>52</sup> and the *International Covenant on Civil and Political Rights*.<sup>53</sup> Despite the fact that these instruments are not as specific as the Resolutions in relation to the right to self-determination, Halperin and Scheffer underline that Article I of both *Covenants* do recognize that “[a]ll peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>54</sup>

In 1970, the United Nations General Assembly adopted Resolution 2625 (XXV), known as the *Declaration on Principles of International Law Concerning Friendly*

<sup>48</sup> See, *supra* n. 42.

<sup>49</sup> G.A. Res 1541 (XV), 15 U.N. GAOR, Supp. No. 16 at 29, UN Doc. A/4684 (1960).

<sup>50</sup> Cassese, *supra* n. 22, at 73.

<sup>51</sup> See, *supra* n. 49.

<sup>52</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>53</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>54</sup> Halperin and Scheffer, *supra* n. 23, at 22.

*Relations and Co-operation among States in Accordance with the Charter of the United Nations*.<sup>55</sup> Although the Declaration reiterates that “every State has the duty to refrain from any forcible action which deprives people of their right to self-determination, freedom and independence”, an additional option to decolonization was introduced as to recognize, as well as independence, integration and free association, “the emergence of another political status freely determined by a people” as a viable way to achieve decolonization.<sup>56</sup>

Finally, it is important to note that the renowned legal writers whose opinions have been included in this section, agree that the right to self-determination is undoubtedly a customary rule and arguably (and debatable) a *jus cogens* norm, except in its interplay with the principle of “territorial integrity”<sup>57</sup> which will be a matter of discussion in the following pages.

#### **IV. The Right to Self-Determination: Pronouncements of the ICJ**

##### **A. Dadra And Nagar-Aveli**

The principle of self-determination appeared for the first time in an ICJ decision in 1960.<sup>58</sup> That year, the Court entered its judgment in the case of *Portugal v. India*, known as the *Case Concerning Right of Passage over Indian Territory*.<sup>59</sup> Proceedings began on December 22, 1995 with the filing of an application<sup>60</sup> in which Portugal requested *inter alia*, an order (injunction) in recognition of its “Right of Passage” over Dadra and Nagar-Aveli,<sup>61</sup> two enclaves surrounded by India, treated by Portugal as its “overseas territories”.<sup>62</sup> Portugal’s main contention was that India engaged in practices oriented to diminish the former’s sovereignty by limiting its right to transit over the enclaves.<sup>63</sup> According to the facts alleged by Portugal in its *Application* and its *Memorial*, India permitted or encouraged “events leading to the overthrow of Portuguese authority at Dadra and Nagar-Aveli”, particularly, the incursion of subversive elements against Portugal’s sovereignty over those enclaves.<sup>64</sup>

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<sup>55</sup> G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28 at 121, UN Doc. A/5217 (1970).

<sup>56</sup> *Id.*

<sup>57</sup> Castellino, *supra* n. 21, at 41; Cassese, *supra* n. 22, at 70; Halperin and Scheffer, *supra* n. 23, at 23-5.

<sup>58</sup> Thomas D. Musgrave, *Self-determination and national minorities*, 77 (Oxford: Clarendon Press; New York: Oxford University Press, 1997).

<sup>59</sup> *Portugal v. India*, International Court of Justice Reports, 6 (1960).

<sup>60</sup> *Id.*, at 9.

<sup>61</sup> *Id.*, at 9-10.

<sup>62</sup> *Id.*, at 9.

<sup>63</sup> *Id.*, at 9-10.

<sup>64</sup> *Id.*, at 30.

The applicant's claim of a "Right of Passage" was grounded mainly on *States' practices*;<sup>65</sup> Portugal alleged that established practices and customs permitted and tolerated (in the nature of an obligation) said passage.<sup>66</sup> The Portuguese also argued that the "overseas territories" of Dadra and Nagar-Aveli were sovereign Portuguese territories and that as such, it was Portugal's right to access them at its convenience.<sup>67</sup> To that end, the applicant State alleged that under the Treaty of Poona of 1779 and the *Sanads* (decrees) of 1783 and 1785, sovereignty over the enclaves was conferred to Portugal as well as the right of passage over these areas.<sup>68</sup>

India contended "that the right claimed by Portugal [was] too vague and contradictory to enable the Court to pass judgment upon it."<sup>69</sup> India argued "that the vague and contradictory character of the right claimed by Portugal [was] proved by Portugal's admission that [...] the exercise of the right [was] subject[ed] to India's regulation and control as the territorial sovereign."<sup>70</sup> In relation to the Treaty and the *Sanads*, India questioned their validity and enforceability, and in the alternative, alleged that taken together, they never had the effect of transferring sovereignty to Portugal.<sup>71</sup> Consequently, India challenged the existence of any binding "practice" between the States and, thus of any obligation to tolerate the passing of Portugal over the lands in controversy.<sup>72</sup>

After pointing out that it was called to "adjudicate upon the claim as thus presented, stating whether the right invoked by Portugal is or is not a right possessed by that State", the Court entered in the merits of the controversy.<sup>73</sup> In relation to the Treaty and the *Sanads*, the Court held that none of those instruments conceded any "Right of Passage", or the exercise of any power by Portugal under its alleged inherent sovereignty over the enclaves or territories within the Indian boundaries.<sup>74</sup> On the other hand, the Court did determine that the practices between the States, by virtue of which India had tolerated the passage of Portuguese "private persons, civil officials and goods", had the effect to bound both Portugal and India to the force of law.<sup>75</sup> In regards to the passage of armed forces, the Court analyzed the historical precedents in the contexts of British and post-British periods in India.<sup>76</sup> It concluded that during the existence of both empires in India (Portugal and the UK), the course

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<sup>65</sup> *Id.*, at 11.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, at 9-10. *See also*: Castellino, *supra* n. 21, at 25.

<sup>68</sup> *ICJ Reports* 1960, at 37.

<sup>69</sup> *Id.*, at 36.

<sup>70</sup> *Id.*, at 37.

<sup>71</sup> *Id.*, at 37-38.

<sup>72</sup> *Id.*, at 23-24.

<sup>73</sup> *Id.*, at 28.

<sup>74</sup> *Id.*, at 38.

<sup>75</sup> *Id.*, at 39-40.

<sup>76</sup> *Id.*

of armed forces over the enclaves was not considered a right. The passage of the Portuguese armed forces over the enclaves was permitted or tolerated by the British as a practice requiring previous authorization, but not automatically.<sup>77</sup>

The determination of the ICJ in this case is particularly important given the fact that Portugal never considered itself obligated to file reports under Chapter XI of the Charter of the United Nations,<sup>78</sup> in relation to Dadra and Nagar-Aveli. “The Portuguese insisted that, by virtue of a domestic Act which made all overseas territories integral parts of Portugal, reporting on them would constitute a violation of sovereign Portuguese rights.”<sup>79</sup> According to Castellino, in this case “The ICJ ruled that Portugal did not possess this right of passage, since the enclaves concerned were colonial property.”<sup>80</sup> In this case, the Court refused to recognize the validity of any statutory “annexation” or “incorporation” of the territories to Portugal’s sovereignty.<sup>81</sup> The judgment entered by the ICJ, reminded Portugal’s of its pending agenda for the liberation of Dadra and Nagar-Aveli through the observance of a genuine process of self-determination.<sup>82</sup>

## B. Namibia

In 1971, the ICJ entered its advisory opinion in the case of Namibia;<sup>83</sup> “the first case in which the Court as a whole [...] pronounced on the issue of self-determination.”<sup>84</sup> The General Assembly and the Security Council had passed other

<sup>77</sup> *Id.*, at 42-43.

<sup>78</sup> Members of the United Nations which have assumed responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

...

- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply. UN CHARTER ART. 73

<sup>79</sup> Castellino, *supra* n. 21, at 25.

<sup>80</sup> *Id.*, at 27.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Namibia / South Africa, International Court of Justice Reports*, 16 (1971).

<sup>84</sup> Musgrave, *supra* n. 58, at 80.

resolutions before the final request for an advisory opinion was made to the Court.<sup>85</sup> These resolutions<sup>86</sup> were passed to censor South-African presence in Namibia and to declare as illegal the regime instated in the territory.<sup>87</sup> The United Nations moved to adopt these resolutions in light of the wrongful exercise of South Africa's powers by virtue of the Mandate System created by the League of Nations,<sup>88</sup> under Article 22 of the League's Covenant.<sup>89</sup>

The Court's opinion was requested through a resolution passed by the United Nations Security Council.<sup>90</sup> In said resolution, the Court was asked to enter an opinion addressing "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"<sup>91</sup> In this case, South Africa was imputed of acting against the principles established in the Mandate System,<sup>92</sup> which were to avoid the annexation of territories under "custody" and to facilitate the achievement of self-determination and independence for peoples subjected to colonial rules.<sup>93</sup> In relation to South

<sup>85</sup> *ICJ Reports*, 1971, at 43, 84; at 51, 107-108.

<sup>86</sup> On October 27, 1966, the United Nations General Assembly adopted Resolution 2145 (XXI) known as the *Resolution on Termination of the Southwest Africa Mandate*, G.A. Res. 2145 (XXI), UN GAOR, 21st Sess., Supp. No. 16 U.N. Doc. A/6316 (1966) at 2.

On January 30, 1970, The United Nations Security Council adopted a Resolution known as the *Resolution on Illegality of South African Presence in Namibia*, in order to reaffirm General Assembly Resolution 2145 (XXI). S.C.Res. 276, 25 SCOR, Resolutions & Decisions 1-2.

<sup>87</sup> *ICJ Reports*, 1971, at 45, 86; at 51, 108.

<sup>88</sup> *See, supra* n. 28.

<sup>89</sup> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility [...] this tutelage should be exercised by them as Mandatories on behalf of the League.

There are territories [...] which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory. *Covenant of the League of Nations*, Art. 22.

<sup>90</sup> *ICJ Reports*, 1971, 17, 1.

<sup>91</sup> *See*, S.C Resolution 284 (1970), adopted on 29 July 1970.

<sup>92</sup> The territory of South West Africa, a German Colony prior to First World War, was entrusted to South Africa in 1920 as a Mandate under the League of Nations Covenant. The Mandate System comprised certain colonies and territories, which, as a consequence of the war, has ceased to be under the sovereignty of the defeated states. [...]The heart and essence of the system is embodied in Article 22 of Covenant. Kirgis (1993), *supra* n. 38, at 485. (citing: Gross, *The South Africa Case: What Happened?*, 45 *Foreign Affairs* 36 [1966]).

<sup>93</sup> *ICJ Reports*, 1971, 45, 86; 51, 108.

Africa's violations to its Mandate, the United Nations General Assembly passed Resolution 2145 (XXI),<sup>94</sup> "Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations, General Assembly Resolution 1514 (XV)[...] and earlier Assembly resolutions." Resolution 2145 (XXI) also stated that:

[T]he provisions of General Assembly resolution 1514 (XXV) [were] fully applicable to the people of the Mandated Territory of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations.<sup>95</sup>

Similarly, the resolution passed by the Security Council in the same context, reaffirmed "[T]he inalienable right of the people of Namibia to freedom and independence recognized in General Assembly resolution 1514 (XV)." Moreover, it declared "that the continued presence of the South African authorities in Namibia [was] illegal and that consequently all acts taken by the Government of South Africa on behalf of, or concerning Namibia, after the termination of the Mandate [were] illegal and invalid."<sup>96</sup>

According to Buchanan, these resolutions declared "South Africa was not a legitimate State because of the massive human rights violations."<sup>97</sup> Buchanan also maintains that these resolutions revealed a "*normative* conception of statehood or of political legitimacy"<sup>98</sup>. He further states: [O]nly those political units that meet the most basic standards of human rights are to be recognized as members of the community of states; only those units that meet this fundamental normative standard are entitled to recognition by the state system.<sup>99</sup>

The Court entered in the merits of the question with the benefit of South Africa's appearance. In its allegations, South Africa contended that its "right to administer the Territory" of Namibia was no longer under the provisions of the Covenant of the League of Nations, now extinct "but from military conquest".<sup>100</sup>

With regard to the nature of the Mandate System, the Court pointed out that it was created "in the interest of the inhabitants of the territories" and not for the benefit of the administering powers.<sup>101</sup> According to the Court, the Mandate System was not

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<sup>94</sup> See, G.A. Res. 2145 (XXI), UN GAOR, 21st Sess., Supp. No. 16 U.N. Doc. A/6316 (1966) at 2.

<sup>95</sup> See, *supra* n. 86.

<sup>96</sup> *Id.*

<sup>97</sup> Allen Buchanan, *Democracy and Secession*, in Margaret Moore, *National self-determination and secession*, 27 (Oxford; New York: Oxford University Press, 1998).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *ICJ Reports* 1971, 43, (82).

<sup>101</sup> *Id.* at 29, (46-47).

created to concede to the mandatory States any proprietary right over the territories, but to impose the burden of a paramount moral obligation upon the international community.<sup>102</sup> The Court further stressed that, “The claims of title, which apart from other considerations are inadmissible in regards to the mandated territory, lead by South Africa’s own admission to a situation which vitiates the object and purpose of the Mandate.”<sup>103</sup> The Court, citing a previous opinion of its own, further stated that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form a sacred trust.”<sup>104</sup>

As a result of the scrutiny made by the Court in relation to the history of violations perpetrated by the South-African regime in Namibia, the Court found that “the official governmental policy pursued by South Africa in Namibia [was] to achieve a complete physical separation of races and ethnic groups in separate areas within the territory”.<sup>105</sup> Consequently, the Court confirmed the validity of the previous Security Council and the General Assembly resolutions,<sup>106</sup> and effectively found South Africa in violations of its Mandate.<sup>107</sup>

The Court determined that under article 10 of the United Nations Charter,<sup>108</sup> a transfer of the supervisory powers of the League Council<sup>109</sup> was made to the General Assembly of the United Nations;<sup>110</sup> so the United Nation’s organization, as successor of the former League of Nations, was entitled to terminate the Mandate of South Africa with respect to Namibia.<sup>111</sup> In order to justify the termination of the mandate, the Court also invoked the general principle incorporated in the *Vienna Convention on the Law of Treaties*,<sup>112</sup> establishing the right to terminate a treaty on account of its breach by another party.<sup>113</sup>

Finally, the Court held that the termination of the Mandate of South Africa was not only valid but binding to all the State members of the United Nations and non-

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at 43, (83).

<sup>104</sup> *Id.* at 28, (45).

<sup>105</sup> *Id.* at 57, (130).

<sup>106</sup> *ICJ Reports 1971*, at 49, (103-104); at 51 (109).

<sup>107</sup> *Id.* at 54, 118.

<sup>108</sup> The General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters. UN CHARTER ART. 10.

<sup>109</sup> *See, supra* n. 32.

<sup>110</sup> *ICJ Reports 1971*, 37, (71-72).

<sup>111</sup> *Id.*

<sup>112</sup> *Vienna Convention on the Law of Treaties* (Art. 60, 3). Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, 331. (1155 U.N.T.S. 331).

<sup>113</sup> *ICJ Reports 1971*, 47, (94-96).

members as well.<sup>114</sup> It stated that since the continued presence of South Africa in Namibia was illegal, South Africa was under the obligation to immediately withdraw its administration and put an end to its occupation of the territory.<sup>115</sup> In order to assure this, the Court declared, as a prospective norm, that none of the bodies of the United Nations were to recognize the validity of any treaty in which the government of South Africa purported to act on behalf or concerning Namibia.<sup>116</sup> The Court concluded that:

As to general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people, which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.<sup>117</sup>

According to Cassese, this Opinion configures the first instance in which the ICJ authoritatively stated “the legal regulation of the self-determination of colonial peoples.”<sup>118</sup> Cassese also asserts that the case of Namibia was not about a “foreign military occupation of a Sovereign State”, nor a case of “civil strife” before an invasion, but about a “territory and a population living on it [...] under the authority of an alien State that illegally exercises its powers there.”<sup>119</sup> In that same context, this jurist points out that the outcomes of *Namibia* and the “execution” of the Court’s Opinion had established:

The simple withdrawal of alien authority is not sufficient for the realization of the right of the occupied people to self-determination. It is also necessary for the people of the territory to be put in a position freely to choose its internal institutions and its rulers, as well as its international status.<sup>120</sup>

According to Cassese, the case of *Namibia* serves as the example of the “right way of implementing the principle of self-determination” in other similar cases<sup>121</sup> and, that in this case, the ICJ seemed to promote the view that the application of

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<sup>114</sup> *Id.*, at 54 (118); at 56, 126.

<sup>115</sup> *Id.*, at 54 (118).

<sup>116</sup> *ICJ Reports 1971*, 55, 122.

<sup>117</sup> *Id.*, at 56, 127.

<sup>118</sup> Cassese, *supra* n. 22, at 88.

<sup>119</sup> *Id.*, at 149.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

the right to self-determination “with regards to colonial peoples favors a liberal interpretation of the matter.”<sup>122</sup>

Knob says that this case revealed the two stages or phases of decolonization, as promoted by the international community. On one hand, through the Charter of the United Nations, and on the other, through United Nations General Assembly resolutions. The intentions under the Charter were to “protect a colonial people while preparing them politically, economically, socially and educationally for self-government;” but resolutions further sought to “demand the immediate exercise of self-determination, which was assumed to result in independence.”<sup>123</sup>

Kirgis asserts that, in this case, the Court viewed the Charter of the United Nations as a source of international human rights on the basis of the Court’s expression stating that the situation in Namibia “constitutes a denial of fundamental human rights” and a “flagrant violation of the purposes of the Charter”.<sup>124</sup> Like Kirgis, Musgrave believes that the pronouncement of the Court in *Namibia* includes an expression that specifically recognizes decolonization as “part of international law”. To support his point, Musgrave cites the Court’s assertion that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.”<sup>125</sup> Finally, he stresses the Court’s conclusion “that it was necessary, in the process of self-determination, to pay regards to the freely expressed will of the peoples.”<sup>126</sup>

### C. Western Sahara

In 1975 the ICJ resolved *Western Sahara*. This was an Advisory Opinion,<sup>127</sup> requested by the United Nations General Assembly through Resolution 3292 (XXIX)<sup>128</sup> of December 13, 1974.<sup>129</sup> The questions posed by the General Assembly were as follows: Was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)<sup>130</sup>?; Second, What were the legal ties between

<sup>122</sup> *Id.*, at 89.

<sup>123</sup> Karen Knob, *Diversity and Self-Determination in International Law*, 200-201 (Cambridge, U.K.; New York: Cambridge University Press, 2002).

<sup>124</sup> Kirgis, *supra* n. 38, at 892.

<sup>125</sup> Musgrave, *supra* n. 58, at 96. (See also *ICJ Reports 1971*, 31, 52).

<sup>126</sup> *Id.*, at 86.

<sup>127</sup> *Western Sahara, International Court of Justice Reports 1975*, at 12.

<sup>128</sup> See, GA Res 3292 (XXIX), 29 UN GAOR Supp. No. 31, UN Doc . A/9631 (1974).

<sup>129</sup> *ICJ Reports 1975*, 13, 1.

<sup>130</sup> The expression “*terra nullius*” was a legal term of art employed in connection with “occupation” as one of the accepted legal methods of acquiring sovereignty over territory. “Occupation” being legally an original means of peaceably acquiring sovereignty over territory otherwise then by cession or succession, it was a cardinal condition of a valid “occupation” that the territory should be a *terra nullius*-a territory belonging to no one at the time of the act alleged to constitute the “occupation”. *Id.* at 39, 79.

this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>131</sup> In order to address these questions, the Court discussed several resolutions adopted by the United Nations General Assembly: Resolution 1514 (XV) of 1 December 14, 1960;<sup>132</sup> Resolution 1541 (XV) of December 15, 1960<sup>133</sup> and Resolution 2625 (XXV) of October 24, 1970.<sup>134</sup>

For purposes of historical background, it is important to point out that Western Sahara became a colony of Spain in 1884. Although Spain did not occupy the entire territory of Western Sahara during its first four decades, until it was necessary to quash the rebellion that erupted in Morocco in the 1930s.<sup>135</sup> With the emergence of various liberation movements in the region, and the beginning of international pressure between the late 1960s and the early 1970s towards the decolonization of Western Sahara, Spain was urged to facilitate the people's self-determination process.<sup>136</sup> In the interim, the Moroccan and Mauritanian people claimed their "rights" over Western Sahara, contending that ethnic and historical ties with each of them existed before the colonization.<sup>137</sup>

On the basis of these alleged ties, the Moroccans claimed that "decolonization may come about through the reintegration of a province with the mother country from which it was detached in the process of decolonization" and Mauritians "maintained that the principle of self-determination cannot be dissociated from that of respect for national unity and territorial integrity" to the extent to which "Resolutions 1541 (XV) and 2625 (XXV) have laid down various methods and possibilities for decolonization."<sup>138</sup> According to Cassese, the underlying dilemma of the questions posed before the Court was whether "decolonization lead to the political independence of the colonial territory or could the contiguous States claiming historic title over the territory demand integration?" and "how should the principle of self-determination be acted upon in such a case?"<sup>139</sup>

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<sup>131</sup> *Id.* at 14, 1.

<sup>132</sup> *See, supra* n. 42.

<sup>133</sup> *See, supra* n. 49.

<sup>134</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28 at 121, UN Doc. A/5217 (1970).

<sup>135</sup> Cassese, *supra* n. 22, at 214.

<sup>136</sup> *Id.*, at 215.

<sup>137</sup> In 1974 Morocco proposed to Spain that they submit this issue to the ICJ in a contentious proceeding (which would have required Spain's consent, under ICJ Statute article 36[1]). Spain did not consent, but proposed referendum among the nomadic people of the Western Sahara. Meanwhile, the General Assembly on several occasions had considered the Saharan question in the context of decolonization and self-determination for the Saharan peoples. In December 1974 it decided that it should seek an advisory opinion on the legal aspects of the problem. Kirgis, *supra* n. 38, at 506.

<sup>138</sup> *ICJ Reports 1975*, 30,48-50.

<sup>139</sup> Cassese, *supra* n. 22, at 214.

In its remarks on the resolutions of the General Assembly related to the right to self-determination, the Court stated that Resolution 1514 (XV) was adopted “for the purpose of bringing all colonial situations to a speedy end.”<sup>140</sup> It affirmed that said Resolution “provided the basis for the decolonization process since 1960.”<sup>141</sup> Regarding Resolution 1541 (XV), the Court stated that its adoption was achieved in order to complement the provisions previously included in Resolution 1541 (XV), and to provide for the options available to non-self-governing territories in order to become sovereign entities. Said options were: “(a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State.”<sup>142</sup> The Court elaborated on the legal significance of Resolution 1541 (XV) by stating that principles VII and IX of the Resolution, both require that “free association” and “integration”, respectively, be opted by peoples subject to colonial rules “through informed and democratic processes.”<sup>143</sup> In the language of Resolution 1541 (XV), that “[f]ree association should be the result of a free and voluntary choice by the peoples of the territory concerned”, and that “the integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status” through a process of “impartially conducted and based on universal adult suffrage.”<sup>144</sup> With regards to Resolution 2625 (XXV), the Court pointed out that it “mentions other possibilities besides independence, association or integration” but it stills “reiterates the basic need to take account of the wishes of the people concerned.”<sup>145</sup> Furthermore, the Court emphasized on the provisions of Resolution 2625 (XXV) to the extent that it is the duty of the States to promote the realization of the principle of equal rights and self-determination and to “render assistance to the United Nations in carrying out the responsibilities entrusted by the Charter regarding the implementation of the principle.”

The Court declared that Western Sahara was *not* a territory belonging to no one at the time of its colonization by Spain because there were inhabitants with a social and political organization.<sup>146</sup> In relation to the second question, the Court assessed that “what must be of decisive importance in determining its answer [...] are not indirect inferences drawn from events in past history, but evidence directly relating to effective display of Western Sahara at the time of its colonization by Spain and during the period immediately preceding that time.”<sup>147</sup> On the basis of

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<sup>140</sup> *ICJ Reports 1975*, 31, 55.

<sup>141</sup> *Id.* at 32, 57.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*, at 33, 57.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, at 33, 58.

<sup>146</sup> *Id.*, at 39, 81-82; *Id.*, at 40, 82-83.

<sup>147</sup> *Id.*, at 43, 93.

said “standard of proof” the Court finally held that Morocco had failed to support its “claim to have exercised territorial sovereignty over Western Sahara.”<sup>148</sup> As a result, the Court concluded that the ties between Morocco and Mauritania with Western Sahara, were in any way strong enough as reason capable of depriving the people of Western Sahara from exercising their right to self-determination [and] to freely express their will.<sup>149</sup>

According to Musgrave “[w]ith respect to the second question the Court found that, although some Saharan tribes had had ties of personal allegiance to Morocco, there was no evidence which demonstrated political authority amounting to sovereignty, on the part of either Morocco or Mauritania.”<sup>150</sup> Finally, the Court held that the decolonization process envisaged by the United Nations under Resolution 1514 (XV),<sup>151</sup> was oriented to the respect of the right of all peoples under colonial rules to determine their future political status by their own freely expressed will, notwithstanding the interests of third parties, strangers to the bipolar colonial relation.

According to Castellino, the case of *Western Sahara* shows the two components of the right to self-determination; the legal and the political.<sup>152</sup> According to this scholar, the ICJ decision ordering the celebration of a plebiscite, with no further enumeration of remedies, shows how the situation of Western Sahara was “moved from the realms of the law... to the political process.”<sup>153</sup> In some ‘right to self-determination’ cases, the duty of the adjudicatory bodies is to identify the problem, not to provide for any specific solution other than the initiation of the political processes. According to Castellino, “[w]hile this should not be held as a defeat for the international law of self-determination, it nonetheless highlights the subjugation of legal norms to political processes that have become part of the practice within international relations.”<sup>154</sup>

Knop maintains that the ICJ’s pronouncement in this case is important, among other reasons, because of its recognition of General Assembly Resolutions 1514 (XV) and 2625 (XXV) as the “sources of the right to self-determination in international law”.<sup>155</sup> Halperin and Scheffer also assert that in this case the Court found no legal impediments to the application of General Assembly Resolution 1514 (XV) and the principle of self-determination in the decolonization of Western Sahara.<sup>156</sup>

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<sup>148</sup> *Id.*, at 48, 105.

<sup>149</sup> *Id.*, at 64, 150-152; *Id.*, at 68, 162.

<sup>150</sup> Musgrave, *supra* n. 58, at 86.

<sup>151</sup> *Id.*, *supra* n. 42.

<sup>152</sup> Castellino, *supra* n. 21, at 257.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*, at 258.

<sup>155</sup> Knop, *supra* n. 123, at 201.

<sup>156</sup> Halperin and Scheffer, *supra* n. 23, at 100.

According to Cassese, this case established, as an international standard, that any process of self-determination requires the State that rules over colonial peoples to assure the “free and genuine expression of the will of the people concerned”.<sup>157</sup> In that same context, Cassese also points out that the case of Western Sahara “proves, however, that it is precisely when the conflicting political interests of the various international actors are at stake that the principle of self-determination and the consequent freedom of choice of the population concerned (‘let the people decide’) could offer a solution.”<sup>158</sup> However, Musgrave argues that in this case, the Court held “that in those instances when the General Assembly has dispense with the requirement of consulting the inhabitants of the non-self-governing territory it has done so on the ground, *inter alia*, ‘that a certain population did not constitute a people entitled to self determination’.”<sup>159</sup> According to Musgrave, this expression means, “not all inhabitants of non-self-governing territories necessary constitute ‘peoples’.”<sup>160</sup> In his opinion, “[i]t is difficult to reconcile these two statements [made] by the Court”.<sup>161</sup>

#### D. Nicaragua

In 1986, the ICJ entered its judgment in the case of *Nicaragua v. United States*,<sup>162</sup> known as the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*. The proceedings began with the filing of an application by the State of Nicaragua, requesting an order to compel the United States to refrain from its military and paramilitary practices in Nicaragua.<sup>163</sup> The applicant State alleged that the United States engaged in the funding of military and paramilitary groups of the Nicaraguans *contras*<sup>164</sup> in an attempt to overthrow the Sandinista government.<sup>165</sup> Nicaragua also contended that the United States illegally attacked and over-flew Puerto Sandino, Corinto and San Juan, and mined Nicaraguan ports and waters.<sup>166</sup> Nicaragua alleged, that as a matter of law, “the United States violated Article 2 paragraph 4, of the United Nations Charter<sup>167</sup> and the customary international law

<sup>157</sup> Cassese, *supra* n. 22, at 188.

<sup>158</sup> *Id.*, at 218.

<sup>159</sup> Musgrave, *supra* n. 58, at 251-252.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Nicaragua v. United States*, ICJ Reports, 14 (1986).

<sup>163</sup> *Id.* at 18-19, 15.

<sup>164</sup> Term employed to describe those fighting against the Nicaraguan government. (*Id.* at 21, 20).

<sup>165</sup> *ICJ Reports 1986*, 21, 20; 45-46, 75.

<sup>166</sup> *Id.*, at 18-19, 15; *Id.*, at 45-46, 75.

<sup>167</sup> All members 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. UN CHARTER ART. Art. 2, 4.

obligation to refrain from the threat or use of force.”<sup>168</sup> Nicaragua also contended that United States’ actions “amount intervention in [its] internal affairs, in breach of the Charter of the Organization of American States and [...] customary international law forbidding intervention.”<sup>169</sup> Finally, Nicaragua argued that the United States’ actions violated Nicaragua’s sovereignty.<sup>170</sup> On that basis, Nicaragua demanded reparations up to \$370,200,000.00.<sup>171</sup> The United States, on the other hand, alleged that the controversy submitted by Nicaragua, being military in its nature, was not *justiciable* but of exclusive jurisdiction of the U.N. Security Council.<sup>172</sup> The country also alleged that its presence in Nicaragua’s territory and coasts was justified on its right to self-defense, due to the ongoing armed conflict with Nicaragua.<sup>173</sup>

The Court discussed this case on the merits and found that the United States mined the waters and several ports in Nicaraguan territory with no previous authorization or notice to the Nicaraguan government.<sup>174</sup> It was also proven that the mines detonated caused damages,<sup>175</sup> and that the United States engaged in funding and training activities, as well as in tactical and logistical support of military and paramilitary forces against Nicaragua.<sup>176</sup> The Court decided that the acts of the United States on Nicaraguan territory violated customary international law that prohibits interference of another state’s sovereignty and domestic affairs.<sup>177</sup> The Court dismissed the argument that United States was acting in “self-defense”, as lacking support.<sup>178</sup> It further decided that the right to self-defense can only be exercised when a state has been a victim of an “armed attack,” or has otherwise been requested to defend a third state under such circumstances.<sup>179</sup> In every respect, a proportionality test must be applied to implement defense measures that are strictly necessary to repeal the attack.<sup>180</sup>

In this decision, the Court pointed out at least three rules that must be respected by the international community under customary international law regarding intervention and the arbitrary use of force: (1) Sovereign states are entitled to freely decide its political orientation, economic model, social and cultural systems and

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<sup>168</sup> *ICJ Reports 1986*, 22, 23.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, at 20, 15.

<sup>172</sup> *Id.*, at 26, 32-33.

<sup>173</sup> *Id.*, at 27, 35.

<sup>174</sup> *Id.*, at 112, 215.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*, at 55-64; *Id.*, at 124, 231.

<sup>177</sup> *Id.*, at 108, 205; *Id.*, at 147, 292 (5).

<sup>178</sup> *Id.*, at 87, 165; *Id.*, at 88, 166; *Id.*, at 127, 248.

<sup>179</sup> *Id.*, at 110, 211; *Id.*, at 122, 237; *Id.*, at 123, 238.

<sup>180</sup> *Id.*, at 122, 237.

foreign policies.<sup>181</sup> Intervention in the affairs of a sovereign State is illegal under customary international law when motivated by the intervener's intolerance in such matters;<sup>182</sup> (2) The use of force against a sovereign state can never be legitimized on the grounds of ideology or the existing political system in the territory suffering intervention;<sup>183</sup> (3) The use of force by a third state against a sovereign State is never a legitimate way to ensure the protection and promotion of human rights.<sup>184</sup> In this same context, Musgrave assesses that "the right to freely chose a political, economic, social, and cultural system [is] applicable to independent, sovereign states as it was to non-self-governing territories."<sup>185</sup> On the other hand, Frowein argues that the rules enumerated by the Court were adopted on the basis of the following analysis:

[I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition.<sup>186</sup>

Frowein also asserts that, in the case of *Nicaragua*, "the Court stressed" that the acts of the United States "do not correspond to the present state of international law," and "that is so, even where the opposition can rightly claim a right to self determination."<sup>187</sup> According to Cassese, the case of *Nicaragua* is important to the development of the right to self-determination because of the Court's view that *opinio juris*<sup>188</sup> may, though with all due caution, be deduced from *inter alia*,...the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) [on Friendly Relations]. The implications of consenting to

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<sup>181</sup> *Id.*, at 108, 205; *Id.*, at 130, 258.

<sup>182</sup> *Id.*, at 124, 242.

<sup>183</sup> *Id.*, at 109, 209.

<sup>184</sup> *Id.*, at 134, 268.

<sup>185</sup> Musgrave, *supra* n. 58, at 87.

<sup>186</sup> Christian Tomuschat, *Modern law of self-determination*, 214 (Dordrecht; Boston: M. Nijhoff Publishers, 1993).

<sup>187</sup> *Id.*, at 214-215.

<sup>188</sup> It's a sense of legal obligation. For example, to form a customary rule, 'it must appear that the states follow the practice from a sense of legal obligation' (*opinio juris sive necessitatis*); hence a practice generally followed 'but which states feel legally free to disregard' cannot form a such a rule; *opinio juris* need not verbal or in some other way explicit, but may be inferred from acts or omissions [...] a state that is created after a practice has ripened into a rule of international law 'is bound by that rule'. Henry J. Steiner; Philip Alston; Ryan Goodman, *Human Rights in Context*, 73 (Oxford University Press, 2007).

the provisions of said resolutions cannot be understood merely as a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule, or set of rules, declared by the resolution themselves.<sup>189</sup>

### E. Burkina Faso and Mali

In 1986, the ICJ entered its opinion in the *Case Concerning the Frontier Dispute*,<sup>190</sup> between Burkina Faso<sup>191</sup> and Mali.<sup>192</sup> In this case, the ICJ was asked by both States to intervene in an armed conflict regarding the demarcation of the frontiers between them.<sup>193</sup> The states agreed to submit the controversy by means of a *Special Agreement* settled on September 16, 1983.<sup>194</sup> In it, the parties asked to the Court to determine and delimit the boundaries between both states in a disputed area described by them as "a band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Beli".<sup>195</sup>

The states involved in the controversy were former colonies of France. Burkina Faso was the former Upper Volta, and Mali the so-called French Sudan.<sup>196</sup> According to the Court, "[s]ince the two parties [...] expressly requested the Chamber to resolve their dispute on the basis, in particular, of the 'principle of intangibility of frontiers inherited from colonization', the Chamber cannot disregard the principle of *uti possidetis juris*."<sup>197</sup> Accordingly, the Court held that under the principle of *uti possidetis juris*, both countries were to keep as its territorial demarcation, the land within the boundaries that existed "at the moment they became independent."<sup>198</sup>

After identifying the principle of *uti possidetis juris* as the applicable law to the controversy, the Court recognized that "[a]t first sight this principle conflict outright with another one, the right of peoples to self-determination."<sup>199</sup> Nevertheless, the

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<sup>189</sup> Cassese, *supra* n. 22, at 69-70. (citing from *ICJ Reports 1986*, 99-100, 188).

<sup>190</sup> Burkina Faso / Republic of Mali, *International Court of Justice Reports 1986*, at 554.

<sup>191</sup> Since gaining independence from France in 1960, Burkina Faso [was] ruled by a series of military governments. Halperin and Scheffer, *supra* n. 23, at 123.

<sup>192</sup> In March 1991, after three months of pro-democracy marches and demonstrations brought the deaths of approximately 150 civilians, Mali's military ruler was overthrown by soldiers within his army. The military council established to govern the country dissolved itself within a week and turned power over to transitional government made up of military and civilian members. A multiparty conference in July 1991 developed a new constitution, which was approved in a national referendum in December 1991. *Id.*, at 127.

<sup>193</sup> *ICJ Reports 1968*, 557, 1.

<sup>194</sup> *Id.*, at 557, 2.

<sup>195</sup> *Id.* (citing from the text of the *Special Agreement* of 16 September 1983, Article I § 2).

<sup>196</sup> *Id.*, at 564, 19.

<sup>197</sup> *Id.*, at 565, 20.

<sup>198</sup> *Id.*, at 568, 29.

<sup>199</sup> *Id.*, at 567, 25.

Court also stated that this principle is capable of coexisting with that of self-determination, since it “is logically connected with the phenomenon of the obtaining of independence, whenever it occurs.” “It’s obvious purpose is to prevent the independence and stability of States endangered by fratricidal struggles provoked by the challenging of frontiers, following the withdrawal of the administering power.”<sup>200</sup>

According to Castellino, the case of *Burkina Faso* suggests that the *uti possidetis juris* principle “applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards.” It applies to the State “as it is *i.e.* to the photograph of the territorial situation then existing.”<sup>201</sup> Halperin and Scheffer state that Resolution 2625 (XXV)<sup>202</sup> provokes the interplay of the right to self-determination with the principle of “territorial integrity”.<sup>203</sup> According to them, the aforementioned *Resolution* provides that the “affirmation of the right to self-determination should 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.”<sup>204</sup> Although “the protection of territorial integrity applies to states possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>205</sup>

According to Cassese, the Opinion of the Court in this case includes a “less clear stand” of the ICJ as compared with other opinions that in a more explicit way “set out the correct view of the existing legal regulation of the right of colonial peoples to self-determination.”<sup>206</sup> Cassese points out that the Court diluted the discussion of the right to self-determination and its preeminence by focusing on the principle of *uti possidetis juris* as a necessary doctrine to preserve the territorial integrity of the State.<sup>207</sup>

The concept of “territory” no longer has “room” in international law; countries are not to “own” a piece of land and its people. In this case, the Court stated that the definition adopted by France to identify Burkina Faso and Mali as “overseas territories” was outside the scope of international law.

## F. El Salvador and Honduras

In 1992, the ICJ rendered an Advisory Opinion regarding the controversy with respect to the boundaries between El Salvador and Honduras, known as the *Land*,

<sup>200</sup> *Id.*, at 565, 20.

<sup>201</sup> Castellino, *supra* n. 21, at 137.

<sup>202</sup> *See, supra* n. 134.

<sup>203</sup> Halperin and Scheffer, *supra* n. 23, at 23.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Cassese, *supra* n. 22, at 89.

<sup>207</sup> *Id.* at 90.

*Island and Maritime Frontier Dispute*.<sup>208</sup> Both parties asked the Court to interpret Article 16 of the *General Treaty of Peace* signed by them on October 30, 1980.<sup>209</sup> To that end, the Court was asked to delimit the boundaries and delineate the frontier between both States; specifically in relation to the islands of El Tigre, Meanguera and Meanguerita of the Gulf of Fonseca and the waters surrounding them.<sup>210</sup>

El Salvador and Honduras were former colonies of the Spanish Crown that declared their independence on September 15, 1821, establishing with Costa Rica, Guatemala and Nicaragua, the Federal Republic of Central America.<sup>211</sup> Later, in 1839, they individually became States.<sup>212</sup> In order to delimit the boundaries between these States, the Court applied the *uti possidetis juris* principle as it previously had done so in the case of *Burkina Faso* in 1986.

### G. Libyan Arab Jamahiriya and Chad

In 1994, the ICJ entered its Advisory Opinion on the *Territorial Dispute* between Libyan Arab Jamahiriya and Chad.<sup>213</sup> The States parties to this case had entered an agreement to refer their controversies to the Court in the event of a their territorial dispute.<sup>214</sup> The States exhausted the remedies contemplated in their stipulations and on August 31, 1990, the Government of the Great Socialist People of Libyan Arab Jamahiriya introduced the agreement under the provisions of Article 40 (1) of the Statute of the International Court of Justice.<sup>215</sup> The agreement was titled: *Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territo-*

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<sup>208</sup> *Land, Island and Maritime Frontier Dispute* (El Salvador / Honduras, Nicaragua intervening), *International Court of Justice Reports* 1992, at 351.

<sup>209</sup> See United Nations, *Treaty Series*, vol. 1310, 213. (1310 U.N.T.S. 213).

The Treaty aims at affirming solid fraternity and permanent and constructive cooperation between the two Contracting Parties. [...] The El Salvador-Honduras Joint Frontier Commission, established on 1 May 1980, shall have the following functions: (a) to demarcate the frontier line as described in article 16 of the Treaty; (b) to delimit the frontier line in the areas not described in article 16; (c) to demarcate the frontier line in areas subject to controversy; (d) to determine the legal situation of islands and maritime areas. For the demarcation of the line the Commission shall construct permanent boundary markers, columns and structures, which shall make the line visible and shall prepare maps of the respective sections, which, once approved the Parties, shall become an integral part of the Treaty. The settlement of technical dispute is regulated in article 25. Any other dispute arising out of the Treaty shall be submitted to the International court of Justice upon agreement between the Parties concerned. [www.fao.org/fishery/shared/faolextrans.jspxp\\_ISIS\\_MFN=013787&xp\\_faoLexLang=S&xp\\_lang=es](http://www.fao.org/fishery/shared/faolextrans.jspxp_ISIS_MFN=013787&xp_faoLexLang=S&xp_lang=es) (last visited Nov. 20, 2009).

<sup>210</sup> *ICJ Reports* 1992, at 352.

<sup>211</sup> *Id.* at 380, 28-29.

<sup>212</sup> *Id.*

<sup>213</sup> *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), *International Court of Justice Reports* 1994, at 6.

<sup>214</sup> *Id.* at 9, 2.

<sup>215</sup> *Id.* at 8, 1.

*rial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad* (hereinafter the *Framework Agreement*).<sup>216</sup>

The Libyan State framed the question to be resolved by the Court as follows: "In further implementation of the Accord-Cadre, and taking into account the territorial dispute between the Parties, to decide upon the limits of their respective territories in accordance with the rules of international law applicable in the matter."<sup>217</sup> The Court notified the Republic of Chad of the filing made by Libya and on September 3, 1990, the Republic of Chad filed its own application confirming that the parties had exhausted their efforts to achieve a solution of the territorial dispute and that the Court was entitled under the *Framework Agreement* to enter in the specifics of the dispute between both States.<sup>218</sup> The Republic of Chad framed the as follows: "to determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the Parties".<sup>219</sup>

Both States in this case were colonies liberated in the post-war period. Libya was a colonial territory of Italy, administered by the Four Allied Forces (France, United Kingdom, United States and the Union of Soviet Socialist Republics) after World War II, and became a sovereign State on December 24, 1951 with the adoption of Resolution 289 (IV) of the General Assembly of November 21, 1949. Chad was a colony of France that became "part of the French Community" from 1958 to 1960 and gained its independence on August 11, 1960.<sup>220</sup>

The Court stated that the fixing of a frontier depends on the will of the sovereign States directly concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line was.<sup>221</sup>

## H. East Timor

In 1995 the ICJ entered its judgment in the case of East Timor,<sup>222</sup> presented

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<sup>216</sup> *Id.*

*Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territorial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad* Article 1 – The two Parties undertake to settle first their territorial dispute by all political means, including conciliation, within a period of approximately one year, unless the Heads of State otherwise decide. *Id.* at 9, 2.

<sup>217</sup> *Id.* at 10, 3.

<sup>218</sup> *Id.* at 10, 4-5.

<sup>219</sup> *Id.* at 11, 5.

<sup>220</sup> *Id.* at 17, 23.

<sup>221</sup> *Id.* at 28, 57.

<sup>222</sup> After ruling East Timor for 400 years, Portugal evacuated its final forces in August 1975. A civil war among pro-Portuguese, pro-independence, and pro-Indonesian forces ensued. The left -wing Revolutionary Front for an Independent East Timor (Fretilin), heavily armed with weapons left behind by Portugal, defeated its rivals and declared East Timor's independence on November 29, 1975. Six days

by Portugal against Australia.<sup>223</sup> In its application filed before the Court, Portugal sought remedies against Australia, stating that the latter was interfering with the right of the people of East Timor to self-determination<sup>224</sup> and the free exercise of Portugal's administering powers<sup>225</sup> over that country, among others.<sup>226</sup> According to the applicant's contentions, Australia incurred in violations to the rights of Portugal as the administering power, by legitimizing the presence (invasion) of Indonesia in East Timor through the negotiation and performance with said country of an agreement allowing the "exploring and exploiting of the subsoil of the sea of East Timor Gap on the basis of a plurilateral title to which Portugal is not a party."<sup>227</sup> Australia counter-claimed arguing that the application filed by Portugal was not justiciable in as much as the entering of a judgment on the merits would have unavoidably affected the "rights" of a third party (Indonesia) without its participation in the process.<sup>228</sup> Australia pointed out that the presence of Indonesia in East Timor was "legitimized" by a Treaty signed by both (Australia and Indonesia) in 1989<sup>229</sup> and that the judgment of the Court most necessarily scrutinizes the obligations of Indonesia under the Treaty.<sup>230</sup> Australia also contended that Portugal's real intention was to move the Court against a State (Indonesia) that had not recognized the jurisdiction of the Court.<sup>231</sup> On the face of those arguments, Portugal invoked the *erga omnes* right to self-determination as one of its legal grounds;<sup>232</sup> a norm enforceable, therefore, against any state incurring in violations by the petition of any other state.<sup>233</sup>

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later, Indonesian forces invaded and occupied the territory. A December 22 1975, resolution of the UN General Assembly called upon the government of Indonesia to withdraw from the territory [...]. In 1976 when a puppet local parliament voted for integration of East Timor with Indonesia, Indonesia annexed East Timor as its twenty-seventh province. Estimates of how many East Timorese died between 1975 and 1989 as Indonesia strove to crush resistance to its rule vary from 100,000 to 200,000. Halperin and Scheffer, *supra* n. 23, at 136.

<sup>223</sup> East Timor (*Portugal v. Australia*), *ICJ Reports* 1995, at 90.

<sup>224</sup> *Id.*, at 94.

<sup>225</sup> Portugal was the administering power of East Timor (a non-self-governing territory), under the provisions of Chapter XI of the United Nations Charter (*See, supra* n. 78).

<sup>226</sup> *ICJ Reports* 1995, 92, 1.

<sup>227</sup> *Id.* at 94.

<sup>228</sup> *Id.* at 98, 19; *Id.* at 99, 20; *Id.* at 100, 24.

<sup>229</sup> "The delimitation negotiations which began in February 1979 between Australia and Indonesia related to the Timor Gap; they did not come to fruition. Australia and Indonesia then turned to the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf. A Treaty to this effect was eventually concluded between them on 11 December 1989, whereby a 'Zone of Cooperation' was created 'in an area between the Indonesian province of East Timor and Northern Australia'. Australia enacted legislation in 1990 with a view to implementing the Treaty; this law came into force in 1991." *Id.* at 98, 18.

<sup>230</sup> *ICJ Reports* 1995, 99, 20.

<sup>231</sup> *Id.* at 99, 21.

<sup>232</sup> All States have the right to demand that a State depriving a people of the right to self-determination comply with the relevant international rules. Cassese, *supra* n. 22, at 152.

<sup>233</sup> *ICJ Reports* 1995, 102, 29.

The Court did not completely adopt Portugal's views to that end and concluded that, regardless of the nature of the norms invoked, a judgment could not be entered to affect the rights of a State that was not a party to the case.<sup>234</sup> The Court concluded that an indispensable party was absent in the case, and therefore dismissed Portugal's application, stating that a judgment could not be entered.<sup>235</sup> Regarding the merits and facts underlying this case, Beiner points out that the East Timorese "have been trampled on by their Indonesian captors, and have had to endure conditions that approach, or that actually constitute, systematic genocide."<sup>236</sup>

Although the Court did not enter into the merits of the case, due to the absence of an indispensable party, it found that Portugal's contentions were totally correct when stating that the right to self-determination enjoys an *erga omnes*<sup>237</sup> character. The Court stated that:

Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an *erga omnes* character is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and the jurisprudence of the Court [as] one of the essential principles of contemporary international law.<sup>238</sup>

The Court concluded by reminding both parties that East Timor was still under an illegal regime<sup>239</sup> contrary to the principles of self-governance<sup>240</sup> and in violation of the people's right to self-determination.<sup>241</sup>

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<sup>234</sup> *Id.* at 105, 35.

<sup>235</sup> *Id.*

<sup>236</sup> Ronald S. Beiner, *Self-Determination and Rights*, in Margaret Moore, *National self-determination and secession*, 166 (Oxford; New York: Oxford University Press, 1998).

<sup>237</sup> An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) *International Court of Justice Reports* 1970, 33-34.

<sup>238</sup> *ICJ Reports* 1995, 102, 29.

<sup>239</sup> Prior to the invasion of East Timor by Indonesia in 1975, Portugal had administered East Timor as a non-self-governing territory under Chapter XI of the UN Charter. In *East Timor*, Portugal brought proceedings against Australia over the 1989 Timor Gap Treaty between Australia and Indonesia. The Treaty established a provisional arrangement for the exploration and exploitation of the resources of the undelimited part of the continental shelf between Australia and East Timor, which was known as the 'Timor Gap'. Portugal maintained that by negotiating, concluding and implementing the treaty, Australia had infringed the rights of the people of East Timor to self-determination and permanent sovereignty over their natural resources, and the rights of Portugal as the administering power. Knop (2000), *supra* n. 123, at 191.

<sup>240</sup> *See*, UN CHARTER ART. 73, *supra* n. 78.

<sup>241</sup> *ICJ Reports* 1995, 105, 37.

According to Knop, the pronouncement of the Court in this case is important and relevant due to its recognition of the United Nations General Assembly's Resolutions regarding the right to self-determination "as a present source" for the enforcement of said right, and "the finding that a duty to consult" people subjected to colonial rules is always mandatory.<sup>242</sup> Cassese has a similar opinion and states:

The case of East Timor provides clear evidence of the rich potential of this realm of law [self-determination]. For although the UN political organs have so far failed to enforce respect for the right of the people of East Timor to self-determination, the...decision by Portugal to institute proceedings against Australia before the ICJ shows that States have many legal means at their disposal to ensure at least partial compliance with the lofty principles of the international community.<sup>243</sup>

Musgrave further underlines the efforts of the political organs of the United Nations in regards to the issue of East Timor:

"On December 12, 1975 the General Assembly condemned the invasion and affirmed the right of the people of East Timor to self-determination [GA Resolution 3485 (XXX)]" and "the Security Council adopted in April 1976 [SC Resolution 389 (1986)] [to] call upon Indonesia to withdraw its troops, and again emphasized the right to self-determination of the people of East Timor. The General Assembly adopted a resolution on East Timor on every year from 1976 to 1982, all of which condemned Indonesian's presence in East Timor and reaffirmed the right of self-determination to its people".<sup>244</sup>

## V. Conclusion

The right to self-determination has been characterized by the ICJ as a paramount and compelling norm of international law. The jurisprudence of the ICJ, along with the opinion of well known publicists of international law, reiterate that the right to self-determination was framed by the United Nations and its predecessor, the League of Nations, as one of the main reasons for the existence of said organizations. Both the League and the United Nations, since its very beginnings, dedicated considerable efforts and resources to disbar colonialism, in order to build a community of equals, a community of sovereign States.

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<sup>242</sup> Knop, *supra* n. 123, at 211.

<sup>243</sup> Cassese, *supra* n. 22, at 230.

<sup>244</sup> Musgrave, *supra* n. 58, at 90; 243.

The jurisprudence of the ICJ has emphasized that the exercise of the right to self-determination can only be identified when the colonizer or the euphemistically called “administering power” facilitates a genuine process in which the inhabitants of the territory under its “custody” are heard. The standard set forth by the ICJ puts the burden on the shoulders of the “administering power”. According to ICJ jurisprudence, States exercising custody over territories that have not yet attained independence are not only compelled to promote the exercise of the right to self-determination of the people in such territories, but also to enforce the enjoyment of the right.

The Court has been clear in stating what an “administering power” is obligated to do in order to comply with its duty before the international community and be relieved of its burden. The “administering power” in the first phase, is obligated to consult the people of the territory, in a context capable to permit the free expression of the people’s will in regards to what will be their international status, within the options validly recognized by the international community. In the second phase, the “administering power” is obligated to put the people of the territory in a position to freely choose and constitute their own government and elect their rulers. In the third phase, it is the duty of the “administering power” to withdraw from the former territory.

As one of the main ideals underlying the right to self-determination, both the League and the United Nations established the non-annexation principle, addressed by the ICJ specifically in the case of *Portugal v. India*, and in the advisory opinion concerning Namibia. In these pronouncements, the Court refused to recognize “statutory annexation” as a valid method to enforce the people’s right to self-determination, even when the “administering powers” in fact annexed the territories under their custody in order to allege that said territories were not any more under colonial rule, but rather, in the same sphere of sovereignty as their colonizer. The ICJ has disregarded this form of annexation and considered the territories annexed in such manner, as territories awaiting a genuine process of self-determination.

In the case of Namibia, the ICJ disregarded and moreover, “dismissed” the allegations of South Africa that it was under its rights as conquerors of the territory that an absolute proprietary right was legitimately exercised over Namibia. According to the Court, no State can claim any “title” or proprietorship over territories. In other words, world powers are forbidden from treating any land and their people as if they were their property, much less in order to justify their permanence in the territory.

Territories subjected to colonial rules are entitled to sovereignty, that is, to freely choose their political status and their economic, social and cultural models, as well as their foreign policies. Furthermore, the exercise of these freedoms cannot be threatened, nor scrutinized by third States. Sovereign States are protected by customary international law against intervention; in other words, against any attempt of an external force or entity seeking to overthrow or manipulate the exercise of the

aforementioned freedoms.

The ICJ has nonetheless addressed the principle of *uti possidetis juris* in a way that seems to be contradictory with the right to self-determination. However, the *uti possidetis juris* principle has been adopted and justified in connection with the right to self-determination on the basis of other interests identified by the Court. As discussed in the case of Burkina Faso and Mali, under the *uti possidetis juris* principle, the boundaries drawn by the colonizer in relation to a former territory, become international frontiers at the time when independence is obtained. In other words, under the *uti possidetis juris*, a colony's extension will be limited to the boundaries drawn by the power that illegally ruled over it. According to the Court and publicists' opinions, this principle is necessary to ensure the stability of the emerging States' frontiers. Even so, the ICJ has recognized that two or more neighbor States may consent and agree upon the demarcation of their respective boundaries in order to fix their own frontiers.

The right to self-determination is subjected only to one constraint, and that is the principle of "territorial integrity". Scholars maintain that "the exercise of the right to self-determination should 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."<sup>245</sup> In our opinion, as it derives from our analysis, the right to self-determination is only limited by the interests of the international community to preserve the stability of existing sovereign States. Moreover, the right to self-determination can never erode the fundamentals of statehood as generally recognized with regard to the admission of States to the United Nations. New States must have what existing sovereign States must preserve:

1. Defined territory;
2. Permanent population;
3. Control of its own government;
4. International Relations Capacity and;
5. Recognition by the international community of all the above.<sup>246</sup>

Nevertheless, there is a general agreement that the principle of territorial integrity only applies as a limitation to the right of self-determination when people are ruled by a government elected by their express will, and not in cases where people are subject to a colonial rule. Accordingly, the renowned legal writers whose opinions have been included in this paper, agree that the right to self-determination is part of customary international law and an arguably or debatable *jus cogens* norm of human rights, except in its interplay with the principle of "territorial integrity."

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<sup>245</sup> Halperin and Scheffer, *supra* n. 23, at 23.

<sup>246</sup> See, David Raič Raič, D, *Statehood and the law of Self-Determination*, 58-85 (The Hague; New York: Kluwer Law International, c.2002).

There seems to be a consensus between scholars stating that however, the right to self-determination of people subject to colonial rules must be considered a *jus cogens* norm.

The pronouncements of the ICJ and the opinion of recognized authorities discussed on previous pages, support the claim of the people of Puerto Rico to self-determination. Puerto Rico is subject to the plenary powers of Congress and its legislation is subordinated to all sources of law in force in the United States; despite the fact that the people of Puerto Rico do not elect United States lawmakers. The United States' executive branch acts on behalf of the people of Puerto Rico in all international affairs without their consent because they are not entitled to vote for the President. In fact, the people of Puerto Rico have not exercised their right to self-determination since they have never been free to choose the officials that serve in the political organs of the United States and that actually rules over them. The exercise of the United States' rule over Puerto Rico derives from the military conquest executed in 1898. In that year, the Island was ceded to the United States by the Spanish crown under the provisions of the Treaty of Paris that marked the end of the Spanish-Cuban-American War. To this day, the United States continues to exercise its powers over Puerto Rico in its character of conqueror; same argument raised by South Africa in the case of Namibia, disregarded and dismissed by the ICJ.

On November 6, 2012, the people of Puerto Rico expressly refused the current relation and status with the United States. After more than one hundred fourteen (114) years of colonialism, the people of Puerto Rico decided, by means of a plebiscite celebrated together with general elections, that Puerto Rico should not continue to have its present form of territorial status. In said context, it is unquestionable that, in light of the pronouncements of the ICJ, the U.S. (the so called "administering power") is obligated to enforce the decolonization of Puerto Rico. After the results of the plebiscite of November 6<sup>th</sup>, 2012, there should be absolutely no doubt with respect to the fact that U.S. is obligated to facilitate a genuine process of self-determination for the people of Puerto Rico and declare what are the options that Congress is able to uphold.

In my view, the U.S. is obligated to guarantee to the people of Puerto Rico a transition from an economically dependent arrangement to that of a status guaranteeing free access to international relations and commerce, without preconditions. The United States is in violation of international law of human rights and will indefinitely continue to do so, unless it decides to enforce, under the standards of the resolutions of the General Assembly, the pronouncements of the ICJ and the opinions of scholars, a genuine process of self-determination for the people of Puerto Rico.