

## The International Court of Justice and Peoples

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### Abstract

The article examines how the International Court of Justice (ICJ) has dealt with the concept of peoples and peoples' rights in its jurisprudence. Most prominent has been the Court's role with respect to the right of self-determination and it is this issue that forms the core of the article. A second important question dealt with is the role of indigenous peoples in ICJ case practice, as the struggle by those peoples to gain collective rights is a recent development in international law. Drawing on this analysis, the discussion proceeds to consider the role that the ICJ has played in the development of the rights of peoples in general and what its future role might be in this sphere of international law. The article also examines the way in which the Court has allowed peoples to participate in its proceedings and whether and how its treatment of peoples' rights has strengthened the general foundations of international law.

### Keywords

collective rights; indigenous peoples; self-determination

The judicial arm of the United Nations, the international Court of Justice (ICJ), confronts an inevitable problem when dealing with the concept of peoples. The Charter of the UN – the very instrument that established the ICJ – specifies peoples as the organisation's constituency but accepts only states as its members.<sup>1</sup> The UN system is built on the international community of states, not peoples; so, too, is international law, the body of law that the ICJ is supposed to apply. There is of course no difficulty where a people has achieved the status of a state, but where this is not the case the UN system, including its judicial body, faces a dilemma.

The article examines how the ICJ has dealt with the concept of peoples and peoples' rights in its jurisprudence. Most prominent has been the Court's role with respect to the right of self-determination of peoples, and thus it will be useful to start from the jurisprudence on this issue. A second important issue to be

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<sup>1</sup> As is well known, the UN Charter begins: 'We the peoples of the United Nations...'. Article 1 (2) reads: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. Article 55 starts 'With a view to 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 of peoples, the United Nations shall promote...'.

taken up is the role of indigenous peoples in ICJ case practice, as the struggle by those peoples to gain collective rights is currently a challenge to international law. Drawing on this discussion, the article concludes with observations on the general role played by the ICJ in regard to the rights of peoples. First, however, a brief introduction to the concept of peoples' rights is in order, with some concrete examples of such rights in international legal instruments.

Particularly during the 1970s and 1980s it became increasingly usual in human rights law discourse to refer to a new – third – generation of human rights, peoples' rights, which comprised a series of more specific rights.<sup>2</sup> The proponents of these rights argued that the new rights differ from the first (civil and political) and second (economic, social and cultural) generation rights in that their beneficiaries were peoples, not individual human beings. They were also presented as the natural third stage development of human rights law. In the first phase, an outcome of the American and French revolutions, states were required to secure the civil and political rights whereas in the second – induced by the Russian Revolution and the development of the welfare state – states needed to promote factual equality between their citizens. According to the proponents of peoples' rights, the next stage of human rights was to respond to the challenges of global interdependence by focusing on international co-operation among all peoples rather than remaining within the confines of the state paradigm as the two first generations of human rights had done.<sup>3</sup> Indeed, in contrast to the human rights of individuals, which could be fitted well within the prevailing paradigm of international law, peoples' rights arguably pose a challenge to a system of law where collectives have rights and duties only to the extent that they are states.

Given the regular textbook explanation that international law is law between states, it is apt to pose the question whether people can even possess rights and obligations in international law. Peoples in existing states can possess rights, but these rights inhere in statehood, not in the status of being a people. Yet, one can cite certain manifestations of rights in international legal instruments that may reliably be seen as belonging to peoples.

The most significant of the rights of peoples', the right to self-determination, is enshrined in Common Article 1 to the 1966 Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the

<sup>2</sup> See Stephen Marks, 'Emerging Human Rights: a New Generation for the 1980's' in *Rutgers Law Review* Vol. 33 (1981), pp. 435–452.

<sup>3</sup> Karel Vasak, 'A Thirty Year Struggle – the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' *UNESCO Courier* (November 1977), 29.

principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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

The Article, as interpreted via normal rules of treaty interpretation, makes it clear that all peoples, including decolonised peoples (paragraph 3), are entitled to full self-determination. Peoples, not states, are also accorded the right to freely dispose of their natural wealth and resources.<sup>4</sup> The problematic aspect of defining the legal consequences flowing from this seemingly revolutionary article is that there is no accepted definition of what a people is, i.e., who are the ones to exercise the rights.<sup>5</sup> Article 20 of the 1981 African Charter of Human and Peoples' Rights formulates self-determination as an unquestionable and inalienable right of all peoples.<sup>6</sup> The most recent development in regard to self-determination is the adoption by the newly established Human Rights Council the Declaration on the Rights of Indigenous Peoples, which states in its Article 3 that 'Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

The African Charter on Human and Peoples' Rights formulates most clearly the right to development in its Article 22:

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<sup>4</sup> This right of peoples conflicts with the similar right of states as enshrined in what is known as the no-harm principle, articulated in both the 1972 Stockholm and Rio 1992 UN conferences as follows 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction'.

<sup>5</sup> There are some working definitions available, for instance the so-called Kirby definition, which was used by the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27–30, 1989. According to the Kirby definition, a people is: '1. a group of individual human beings who enjoy some or all of the following common features: a. a common historical tradition; b. racial or ethnic identity; c. cultural homogeneity; linguistic unity; e. religious or ideological affinity; f. territorial connection; g. common economic life. 2. the group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State; 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, through sharing the foregoing characteristics, may not have that will or consciousness; and possibly; 4. the group must have institutions or other means of expressing its common characteristics and will for identity'.

<sup>6</sup> The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM (1982) 59. The African Charter contains a number of peoples' rights in addition to the ones discussed here, e.g., right to existence (Article 20), right to freely dispose of their wealth and natural resources (Article 21), right to their economic, social and cultural development (Article 22), right to national and international peace and security (Article 23).

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Even though confined to Africa, the Charter is clearly formulated on the basis that the right to development is a universal right of all peoples and that the duty of ensuring it lies with states. This right was later defined in more detail in the 1986 Declaration on the Right to Development<sup>7</sup> and reaffirmed as universal and inalienable and an integral part of fundamental human rights by the 1993 World Conference on Human Rights.<sup>8</sup>

The right to a decent environment was expressed in rather ambiguous terms in the 1972 Stockholm Declaration on Human Environment:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>9</sup>

It is not clear from the wording of the Declaration whether the principle in fact enunciates a right to a decent environment, even though it clearly links human rights and environmental protection. Moreover, it remains unclear who the beneficiaries of this ‘right’ are, as the Principle seems to suggest that the subject is the whole of humankind. The right to a decent environment is also enshrined in two international treaties – the 1988 San Salvador Protocol to the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights<sup>10</sup> – of which only the latter proclaims the right as a right of peoples. According to Article 24 of the Charter, ‘All peoples shall have the right to a general satisfactory environment favourable to their development’.

<sup>7</sup> Declaration on the Right to Development, adopted by the UNGA 4 December 1986, Res. 41/128 (Annex), UN GAOR 41st Sess., Supp. No. 53, at 186. UN Doc. A/41/53 (1987).

<sup>8</sup> Article 10, Vienna Declaration and Programme of Action, UN Doc. A/Conf.157/24 (Part I), at 20–46 (1993), reprinted in 32 ILM (1993) 1661.

<sup>9</sup> Principle 1 of the Declaration of the UN Conference on the Human Environment. The follow-up conference to the Stockholm Conference, the 1992 Rio Conference on Environment and Development, no longer retained the link between human rights and environmental protection in its Principle 1 ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’.

<sup>10</sup> Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of economic, Social and Cultural Rights is titled ‘Right to a Healthy Environment’ and reads: ‘1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.’ The Protocol can be found at <<http://www.oas.org/juridico/English/Treaties/a-52.html>> (30.10.2006). According to Churchill, the African Charter cannot easily be used for protecting the environment. Robin Churchill, ‘Environmental Rights in the Existing Human Rights Treaties’ in *Human Rights Approaches to Environmental Protection* (eds. Boyle A. and Anderson M.) pp. 89–108. Clarendon Press 1996.

## 1. Self-Determination of Peoples

The principle of self-determination of peoples gradually developed into a full-blown right after the establishment of the UN. The process culminated in the two United Nations General Assembly (UNGA) resolutions in 1960 according to the right mainly to peoples in Africa and Asia who had been colonised by European powers.<sup>11</sup> This right was extended to peoples in the Third World who had been under international administrative arrangements, e.g., the mandate system of the League of Nations or the trusteeship and non-self-governing arrangement of the UN, but who could not realise their right to self-determination because of foreign occupation. After all, these peoples, e.g. the East Timorese and the Palestinians, had also been protected by the international administrative arrangements and were thus included in the same protection scheme as the typical overseas colonies of European powers. Yet, from the outset, the right to self-determination was restricted: a criterion was developed whereby self-determination applied only to certain colonised peoples, not, for example, to indigenous peoples. The main engine of this legal development was clearly the UNGA: UN membership was growing in the 1950s and 1960s as former colonies became states in their own right and continued to enjoy support from the Soviet bloc.

The ICJ also contributed to this legal development. Throughout the rapid legal development seen in this field in the 1950s and 1960s, the ICJ dealt mainly with how South West Africa (Namibia from 1970 onwards) should be governed. The area was one of the German overseas colonies placed under the mandate system of the League of Nations after World War I to be managed by the Union of South Africa. After World War II, South Africa sought to annex the territory, a move that was challenged by the UNGA. In 1949, the UNGA requested an advisory opinion from the ICJ as to whether South Africa's mandate had survived the termination of the League of Nations and if it had, how it should be managed and whether it should be transferred to the trusteeship system.<sup>12</sup>

The ICJ answered the first question in the affirmative; that is, it stated that the mandate had indeed survived the termination of the mandate system. However, it did not opine that the area should be placed under the trusteeship system but, rather, recommended that it continue to be governed by rules similar to those of the mandate system. Importantly, the ICJ stated explicitly that South Africa could not annex the territory of South West Africa without the consent of the UNGA.<sup>13</sup> This opinion was significant symbolically because it made it clear that South Africa could not annex the territory and that the people of South West Africa enjoyed international supervision. Even though the ICJ took the view that the

<sup>11</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, UNGA 1514 (XV) and Declaration Regarding Non-Self-Governing Territories: UNGA 1541 (XV).

<sup>12</sup> *International Status of South West Africa*, 1949 I.C.J. 270.

<sup>13</sup> *International Status of South West Africa*, 1950 I.C.J. 128.

mandate could not be transferred to the trusteeship system without the consent of South Africa, its opinion nevertheless meant that the values and objectives of the new UN international protection schemes now dominated the discussion of the status of South West Africa.

The question of South West Africa came up before the ICJ five times after this opinion. The first two advisory opinions that the Court issued were related to the implications of its first opinion. The UNGA asked the Court what kind of voting procedure should be applied to decisions related to South West Africa<sup>14</sup> and what kind of body would be entitled to make decisions concerning the territory, including the receipt of petitions from the inhabitants thereof.<sup>15</sup> A decade later, the situation remained much the same: South Africa still considered South West Africa to be part of its territory. Two African states (Liberia and Ethiopia) instituted proceedings against South Africa (contentious proceedings), applications that the Court considered as being in the same interest, whereby it joined the related proceedings.<sup>16</sup> As the Court had stated in its first advisory opinion, the system of international supervision was still in force and it was modelled on mandate system of the League of Nations, thus allowing any member of the League to take a dispute between itself and a mandatory power to the Permanent Court of International Justice, now the ICJ. In the first phase of the proceedings, the Court decided that it had jurisdiction over the dispute, specifically providing that the other members of the League (now members of the UN) had a legal right or interest in observance by the mandatory of its obligations towards the inhabitants of South West Africa as well as the League of Nations and its members.<sup>17</sup>

In the second phase of the proceedings, the Court reversed its position, however, arguing that what it had said in the first phase was only for determining its jurisdiction; with regard to the applicants' entitlement to bring claims against South Africa was concerned, that is, the issue of standing, the dispute had to be studied anew. The Court did not accept that the two former League members could bring disputes over the "conduct" of the mandatory before it – essentially the apartheid policy practised by South Africa in South West Africa. In its view, such matters were reserved mainly for the Council of the Assembly – now the UNGA – and it decided that the case was inadmissible.<sup>18</sup> In answer to the appli-

<sup>14</sup> *Voting procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, 1954 I.C.J. 113 (Request for Advisory Opinion), 1955 I.C.J. 67.

<sup>15</sup> *Admissibility of Hearings by the Committee on South West Africa*, 1955 I.C.J. 131 (Request for Advisory Opinion). *Admissibility of Hearings by Petitioners to the Committee on South West Africa*, 1956 I.C.J. 23.

<sup>16</sup> *South West Africa (Ethiopia v. Union of South Africa)*, 1961 I.C.J. 3. *South West Africa (Liberia v. Union of South Africa)*, 1961 I.C.J. 6. *South West Africa (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa)*, 1961 I.C.J. 13.

<sup>17</sup> *South West Africa (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa)*, 1962 I.C.J. 319.

<sup>18</sup> *South West Africa (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa)* 1966 I.C.J. 6.

cants' argument that they were compelled to have recourse to judicial protection, the Court noted that international law does not contain an *actio popularis*, a right resident in any member of a community to take legal action in vindication of a public interest.<sup>19</sup>

Even though the Court stated in 1966 in very clear terms that no *actio popularis* exists in international law, in 1970 it took a very different course, largely because of its new composition. In *Barcelona Traction* (second phase) – a case dealing with the diplomatic protection of companies and having nothing to do with self-determination – the Court felt a need to explain that there indeed exist rules that protect community interests, that these rules by their very nature are “the concern of all States” and that “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.<sup>20</sup>

The ICJ issued its final advisory opinion on the status of South West Africa in 1971, when the international situation had changed considerably. In 1966, the very same year when the Court had found the application by Ethiopia and Liberia against South Africa inadmissible, the UNGA adopted Resolution 2145 (XXI) stating that the mandate was terminated and that South Africa had no right to administer South West Africa. This was a direct consequence of the 1966 ICJ decision that the misconduct of the mandatory had to be addressed by the UNGA rather than by other states through contentious proceedings. The Security Council followed suit and adopted various resolutions, including Resolution 276 (1970) declaring the continued presence of South Africa in Namibia illegal, and asked the Court for an advisory opinion on the question, “What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?”.<sup>21</sup>

In its ensuing opinion, the Court set out the various obligations of member (and non-member) states of the UN in clear terms. Member states were first and foremost under an obligation to recognise the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa due to its occupation of Namibia. The Court obliged the member states not to engage in treaty or economic relations with South Africa when it tried to act on behalf of Namibia and not to send diplomatic missions to the territory of Namibia.<sup>22</sup> The Court also stated that the

<sup>19</sup> *Ibid.*, 80–88, especially 88.

<sup>20</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (New Application 1962) (Belgium v. Spain), 1970 I.C.J. 3, 33–34. Interestingly, the Court mentioned grave breaches of human rights and of self-determination although the case dealt with neither issue.

<sup>21</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1970 I.C.J. 359 (Request for Advisory Opinion).

<sup>22</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 133.

“termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law”.<sup>23</sup> For non-members, the Court emphasised that neither the UN nor its members would recognise as valid the effects of relations between non-members and South Africa concerning Namibia.<sup>24</sup>

Significantly, the Court also clarified the status of the goal of the mandate and UN protection schemes. In its view, the developments of the past half century had proven that the ultimate objective of the sacred trust of the mandate system was self-determination and independence and 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 those territories.<sup>25</sup> All in all, after this pronouncement it was clear that whatever League or UN protection scheme had applied to a non-self-governing unit, that unit enjoyed the right to self-determination.

The ICJ was consistent in its treatment of South West Africa (Namibia) up to the second phase of the South West Africa cases. That judgment marked a clear departure from the supportive treatment by the Court of the protection of the rights of the people of South West Africa. It also prompted the UN to amend its rules as to the composition of the Court<sup>26</sup> and the UNGA to terminate the mandate of South Africa by resolution 2145 (XXI). The ICJ then returned to its former position in its *Namibia* advisory opinion, which gave important guidance as to who has the right to self-determination and what legal consequences the protection of that right has for other states and UN organs as an *erga omnes* obligation.

Self-determination was also debated in the Northern Cameroons case, although it never proceeded to the merits phase. Cameroons had been a German colony transferred to the mandate system after World War I and divided into two units, administered by the United Kingdom and France, respectively. The UK divided its territory into the Northern Cameroons, which was administered as part of Nigeria, and the Southern Cameroons, which was managed as a separate province of Nigeria. After the creation of the United Nations, the mandate territories of the Cameroons were placed under the international trusteeship system by trusteeship agreements approved by the UNGA on 13 December 1946. The French trust came to an end with the independence of the Republic of Cameroon in 1960, and the UNGA recommended to the UK that it organise plebiscites in order to terminate its trusteeship. The UK organised plebiscites in its two territo-

<sup>23</sup> *Ibid.*, 126.

<sup>24</sup> *Ibid.*, 117–133.

<sup>25</sup> *Ibid.*, 53–54.

<sup>26</sup> Rosenne’s *The World Court: What it is and How it Works* (Sixth Completely Revised Edition by Terry D. Gill), pp. 45–47. Martinus Nijhoff Publishers 2003.



ries, following which the Southern Cameroons decided to join the Republic of Cameroon and Northern Cameroons Nigeria.

The UNGA endorsed the outcome of the plebiscites and decided that the trusteeship agreement should be terminated, a decision that was opposed by the Republic of Cameroon, which had reservations as to how the plebiscites had been organised by the UK and Nigeria in Northern Cameroons. It claimed that the people of Northern Cameroons had not been able to express their will freely due to the way the UK and Nigeria had organised the plebiscites and in effect questioned whether the people had properly exercised their right to self-determination. The Republic of Cameroon took the UK to the ICJ, requesting it to declare that the United Kingdom had failed, with regard to the Northern Cameroons, to respect certain obligations flowing from the Trusteeship Agreement – an application to which the UK raised preliminary objections.<sup>27</sup> The Court had an easy task to deem the case inadmissible, because the UNGA had already terminated the trusteeship agreements upon which Cameroon built its case.

### 1.1. *Self-Determination in the Developing World*

The struggles for self-determination of the peoples of Western Sahara, East Timor and Palestine are similar in the sense that the territory of these peoples has been illegally occupied by a state, i.e., Morocco, Indonesia and Israel, respectively. Another similarity is that these cases are not typical instances of decolonisation, that is, a struggle for self-determination vis-à-vis a European colonial power abroad but, rather, involve conquests by a neighbouring state. Hence, the response by the international community of states, and the UN organs in particular, was far more tentative than was typically the case with decolonisation, especially with regard to the right of self-determination of the East-Timorese.

Western Sahara became a Spanish colony in 1884. Even though the area did not come under the mandate system of the League or the protection schemes of the UN, the international pressure on Spain and Portugal to give up their overseas colonies increased following the adoption of the Independence Declaration (resolution 1514) in 1960, after which Spain started to submit information on local conditions in Western Sahara to the UNGA. Morocco (independent as of 1956) and Mauritania (independent as of 1960) had begun to lay claim to the territory. Facing this pressure, Spain announced that it wanted to decolonise the territory but on the basis of the right to self-determination of the colony's population – a position that was accepted by both Morocco and Mauritania, although each still considered West Sahara to be part of its respective territory. Spain argued that a referendum should be organised in the territory, whereas Morocco took the view that the case should be brought before the ICJ as between itself and Spain, an approach that Spain rejected.

<sup>27</sup> *Case Concerning the Northern Cameroons (Cameroons v. United Kingdom)*, 63 I.C.J. 15.

Yet, despite Spain's opposition, the UNGA eventually requested an advisory opinion from the ICJ as to whether the Western Sahara had been a *terra nullius* at the time of Spanish colonisation and whether there were legal ties between Western Sahara and Morocco or Mauritania. The Court first opined that the area was not *terra nullius* when Spain occupied it – an issue that will be examined below – and that even though the indigenous peoples of the colony had legal ties with both Morocco and Mauritania, these did not amount to territorial sovereignty. As the Court stated:

Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination *through the free and genuine expression of the will of the peoples of the territory*.<sup>28</sup> (emphasis mine)

What was required according to the ICJ was what Spain had proposed at the outset of the dispute: some form of referendum that would determine what the people of Western Sahara wanted. On a more general level, the case provided some guidance as to how peoples might properly realise their right to self-determination, although the particulars of that procedure remained undefined.

East Timor was a Portuguese colony that was placed under the trusteeship of Portugal on the basis of Chapter XI of the Charter. After the colonial power withdrew in 1975, Indonesia invaded the territory, an act which was criticised by the UN organs, albeit mildly. The case came to the ICJ in an atypical way. Portugal, the former trustee of East Timor, filed a petition against Australia, which had concluded an agreement with Indonesia on the boundary of the continental shelf with Indonesia, including the waters adjacent to East Timor. Portugal argued that Australia was obligated to respect the boundaries of East Timor as a trustee territory and Portugal as the territory's continuing administrative authority and that hence Australia was prevented from concluding agreements with Indonesia regarding East Timor's continental shelf.<sup>29</sup>

The Court did not deal with the merits of the dispute, because it had established a clear rule in its case-law (Monetary Gold principle) that in order for it to adjudicate a dispute between two states that had a direct bearing on the rights of a third state, it was necessary to have the third state's consent to the proceedings – a consent that Indonesia would never grant. Portugal tried to circumvent this rule by arguing that as the right of self-determination was a right *erga omnes*, all states, including Australia, were obliged by it; after all, as the Court had stated in the Barcelona Traction case, in view of the importance of the rights involved all states could be viewed as having a legal interest in protecting them. Thus, according to Portugal, the Court could examine whether Australia had breached this

<sup>28</sup>) *Western Sahara*, 1975 I.C.J. 12, 162.

<sup>29</sup>) *Case Concerning East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 10.

rule by concluding agreements regarding the East Timor continental shelf with Indonesia, an entity that was breaching the rule of self-determination by acting illegally on behalf of the East Timorese. The Court could not accept this argument and stated that the two issues had to be kept separate:

However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation on the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.<sup>30</sup>

Yet, the Court went on to ensure that its position on the right to self-determination would not be misunderstood:

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Charter and in the jurisprudence of the Court... it is one of the essential principles of contemporary international law.<sup>31</sup>

The Court also found it necessary to point out that the territory of East Timor remained a non-self-governing territory and that its people had the right to self-determination.<sup>32</sup>

The struggle for self-determination by the Palestinian people has been a protracted one. After the mandatory – Great Britain – withdrew from its colony in 1948, there was a concerted effort by the international community to establish two states, one Jewish and one Arab, in the former colony. However, a conflict broke out between the Jewish and the Arab sides, which was eventually settled by a peace treaty with the help of the UN, with an armistice border established between the two parties. The border, which came to be known as the Green Line, was challenged during the Six Day War in 1967, when Israel invaded many areas beyond the Green Line, one of which was the West Bank. The international community and the UN in particular took a clear stance on the occupation of these areas: they were illegally occupied and Israel should withdraw from them. In 1974, the UNGA invited the Palestine Liberation Organization (PLO) to participate in the sessions and the work of the UNGA in the capacity of observer, a status that was later challenged by the US in an action that, in effect, prompted the UNGA to request an advisory opinion from the ICJ.<sup>33</sup>

<sup>30</sup> *Ibid.*, 29.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 37.

<sup>33</sup> A 1987 US Act of Congress requiring the closing of all offices of the PLO in the United States was interpreted by the UN Secretary-General as violating the Headquarters Agreement between the US and the UN. In 1988, the UNGA requested an advisory opinion from the ICJ on the question of whether the

Thirty five years after these events, Israel still occupied the territories it had illegally seized in Gaza and the West Bank, and had established settlements within them. In 2002, the Israeli Cabinet decided to begin construction of a wall that, in its view, would enable Israel to protect itself from terrorist attacks from Palestine. The UNGA requested an advisory opinion from the ICJ as an answer in effect to the question, “What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”<sup>34</sup>

The Court opined that the construction of the wall is a breach of various rules and principles of international law, including self-determination, which it reiterated in rather extensive terms with reference to Article 1 of the two 1966 covenants:

The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625(XXV) cited above, pursuant to which “Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.<sup>35</sup>

The Court then repeated what it had stated in its Namibia opinion, that the eventual goal in the case of non-self-governing territories was self-determination. The Court also found that the wall was in breach of the right to self-determination of the Palestinian people, whom it regarded as clearly recognised by the international community as a people.<sup>36</sup> Hence, according to the Court the ‘construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right’.<sup>37</sup>

The Court proceeded to discuss the legal consequences of its opinion, first for Israel, then for other states and the international community, in particular UN organs. Israel was:

US was under an obligation, in accordance with Article 21 of the Headquarters Agreement, to enter into arbitration with the UN. The Court answered unanimously in the affirmative. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion), 1988 I.C.J. 12.

<sup>34</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Request for Advisory Opinion), 2003 I.C.J. 428.

<sup>35</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 2004 I.C.J. 136, 88.

<sup>36</sup> *Ibid.*, 118.

<sup>37</sup> *Ibid.*, 122.

to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory... Consequently, *Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination* and its obligations under international humanitarian law and international human rights law.<sup>38</sup> (emphasis mine)

The Court considered that other states have a bundle of obligations that follow from the advisory opinion. First, it reaffirmed the *erga omnes* character of the obligations violated by Israel, a position which it had already stated in *Barcelona Traction* and *East Timor* and which led it to pronounce: “The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law”.<sup>39</sup>

The obligations falling upon other states were also many:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.<sup>40</sup>

This judgment also reaffirmed the *erga omnes* character of the right to self-determination, and clarified what consequences it entailed for the international community of states. Of particular interest was the fact that the Court, for the first time, referred to Common Article 1 of the covenants, which reaffirms the right of all peoples to self-determination.

This opinion marked the first time that the Court afforded the representatives of a people the opportunity to participate in the advisory opinion proceedings. Palestine was granted an opportunity to submit a written statement because, according to the Court, it had been accepted by the UNGA as an observer and it had co-sponsored the drawing up of the draft resolution by which the UNGA had requested the advisory opinion.<sup>41</sup> Palestine was also granted the right to participate in the oral hearings.<sup>42</sup> It exercised both privileges during the proceedings.<sup>43</sup>

<sup>38</sup>) *Ibid.*, 149.

<sup>39</sup>) *Ibid.*, 155.

<sup>40</sup>) *Ibid.*, 159.

<sup>41</sup>) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Request for Advisory Opinion), 2003 I.C.J. 428, 2.

<sup>42</sup>) *Ibid.*, 4.

<sup>43</sup>) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 2004 I.C.J. 136, 9–11.

## 2. The Rights of Indigenous Peoples

Indigenous peoples, many of whom had their land occupied long before the colonised peoples of Africa and Asia did, have started to demand their right to self-determination, in a trend that has intensified since the 1980s. The logic of decolonisation, which led to a right to self-determination for the colonised states, clearly applies to most of indigenous peoples, as they, too, have been colonised at various times. The only – and most important – difference is that most of them are located in the home territory of their occupier. The process of decolonisation – although it opened the way to self-determination for all peoples – was curtailed at the outset by stipulating physical distance from the home territory of the occupying power (the salt-water criterion) as the standard for defining the peoples that enjoy the right to self-determination.

Like the concepts of people and minority, the notion of indigenous peoples is far from a straightforward one. The main international treaty on indigenous peoples, the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169), does contain a definition but only for the purposes of the Convention; moreover the Convention has been ratified by rather few states.<sup>44</sup> The Universal Declaration on the Rights of Indigenous Peoples, recently adopted by the Human Rights Council, does not define ‘indigenous people’ either. However, there does exist a very widely used working definition of indigenous people, introduced by Martínez Cobo, Rapporteur to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>45</sup>

<sup>44</sup> Article 1 of the Convention reads: ‘1. This Convention applies to: (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law’. The Convention has been ratified by 17 states.

<sup>45</sup> See Study of the Problem of Discrimination against Indigenous populations, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para.379. The Cobo Definition continues: “This historical continuity may consist of the continuation, for an extended

The Cobo definition of ‘indigenous peoples’ does not differ much from the working definitions of ‘minority’.<sup>46</sup> The main difference is that only those groups that have a connection to the territory before its colonisation can be regarded as indigenous peoples.<sup>47</sup>

The movement for indigenous peoples’ rights won its first victory when in 1989 the International Labour Organisation (ILO) concluded the above-mentioned Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169). This instrument replaced its largely assimilationist predecessor, the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. Although not granting the indigenous peoples self-determination, the 1989 Convention guarantees them many rights related to political participation, land, etc., and is built on the idea of the importance of indigenous cultures.<sup>48</sup> The aim of

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period reaching into the present of one or more of the following factors: a. Occupation of ancestral lands, or at least of part of them; b. Common ancestry with the original occupants of these lands; c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e. Residence on certain parts of the country, or in certain regions of the world; f. Other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference’.

<sup>46</sup> There are two such definitions available. Special Rapporteur Francesco Capotorti suggested the following: ‘A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language’. Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, Sub-Commission on the Promotion and Protection of human Right, UN Doc. E/CN.4/ Sub.2/384/Rev.1 (1979). Another definition is that provided by Jules Deschenes, Special Rapporteur to the Commission on Human Rights (Resolution 1984/62): ‘A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one other, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law’. Proposal Concerning a Definition of the Term ‘Minority’, Sub-Commission on the Promotion and Protection of human Right, UN Doc. E/CN4./Sub.2/985/31 (1985). For a general treatment, see Eyassu Gayim, ‘*The Concept of Minority in International Law: A Critical Study of the Vital Elements*’, 27 *Juridica Lapponica* (2001) 14.

<sup>47</sup> Indeed, indigenous peoples enjoy both the protection afforded to them by minority law and the law relating to indigenous peoples. In general, the rights of indigenous peoples are more collective in nature than minority rights since these are meant to preserve the historical connection between the indigenous peoples and their traditional areas. The rights of minorities are – in the final analysis – individual rights vis-à-vis the state they are living in, even though many of their rights can only be exercised together with the other members of the minority.

<sup>48</sup> The 1957 Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries and the 1989 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Both conventions can be found on the ILO homepage at <<http://www.ilo.org/ilolex/index.htm>> (25.8.2006).

having the UNGA issue a declaration on the rights of indigenous peoples derived from a more ambitious goal – securing a guarantee of the right to self-determination in all its forms.<sup>49</sup> The declaration was recently adopted by the newly established Human Rights Council of the UN and awaits now the adoption by the UNGA.<sup>50</sup>

By far the most important normative guidance that the ICJ has given with regard to the rights of indigenous peoples is the Western Sahara advisory opinion, examined above. The status of Western Sahara raises issues related not only to decolonisation but also to the rights of indigenous peoples in general. The first question which the UNGA put to the Court was “Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?”. The Court answered this question unanimously in the negative and provided some important arguments to support its view:

For the purposes of the Advisory Opinion, the “time of colonization by Spain” may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, “occupation” was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid “occupation” that the territory should be *terra nullius*. According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (a) that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terrae nullius*: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.<sup>51</sup>

The implications of this part of the advisory opinion are important. According to the Court, at least from 1884 onwards international law considered occupation of land to be valid only if that land was vacant, i.e., *terra nullius*, which is not the case if there existed in the area “tribes or peoples having a social and political organization”. This criterion would apply to almost any indigenous people, as they all certainly had a social and political organisation at the time of colonisation. The Court left many questions unanswered, yet understandably so, for here it was dealing with the particulars of this case only. What if an indigenous people’s traditional area was occupied long before 1884? The Court only referred to inter-

<sup>49</sup> There are also regional efforts in the Organisation of American States to produce a declaration on the rights of indigenous peoples; for a recent update, see <<http://www.narf.org/cases/oas.html>> (25.8.2006).

<sup>50</sup> See the Report to the General Assembly on the First Session of the Human Rights Council (A/HRC/1/L.10, 30 June 2006), pp. 56–73. It was adopted by a recorded vote of 30 to 2, with 12 abstentions.

<sup>51</sup> *Western Sahara* 1975 I.C.J. 12, 75–83 (Summary of these paragraphs from the website of the ICJ, at <<http://www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm>> (25.8.2006).



national law as it stood in 1884. What is the level of social and political organisation required of indigenous peoples? The Court referred to the peoples of Western Sahara as having a social and political organisation operating under chiefs competent to represent them. What if Spain had proceeded to establish sovereignty over the area rather than establishing it as its protectorate? Would this have made the occupation of the area valid? It is also unclear whether the Court required agreements between the coloniser and the indigenous peoples as a condition for a territory to remain *terra nullius*.

Reisman criticises the Court's views on the concept of sovereignty in its opinion. In his estimation, although the Court took the view that there existed indigenous social and political organisation in the area, it would not accord international status to the peoples but instead viewed the issue in terms of the European concept of how sovereignty is obtained.<sup>52</sup> Indeed, while the Court opined that there were legal ties between the indigenous peoples and both Morocco and Mauritania and that the nomadic indigenous peoples clearly had some land rights, it still did not regard these governance systems as examples of sovereign states. Then again, the ICJ is a court that applies international law – a body of law that at the relevant time was being developed by European powers in their mutual relations.<sup>53</sup>

Yet, the opinions of the World Court may well affect national legal systems – the crucial arena for indigenous peoples in as much as they are governed by these systems and mostly aim to establish internal self-determination with no secessionist ambitions. Developments in international law can induce changes in national law and *vice versa*. The best example of this is the landmark decision by the High Court of Australia in the *Mabo* case, which explicitly relied on the *Western Sahara* advisory opinion. In the *Mabo* case, the High Court had to determine whether the indigenous peoples of Torres Strait Islands had lost their rights when Britain occupied their land via legislation and established the area as a colony in 1788 because it was deemed *terra nullius*. Although no agreements had been entered into between the UK and the islanders and the case considerably predated *Western Sahara*, the High Court based its position explicitly on the *dicta* of the ICJ in that case. It stated that Australian common law had to be developed hand in hand with international law as reflected in the *dicta*.<sup>54</sup>

<sup>52</sup> W. Michael Reisman, 'Protecting Indigenous Rights in International Adjudication' in *American Journal of International Law*, Vol. 89, No.2 (April 1995), pp. 350–362. For a comprehensive and positive reading of the opinion, see Karen C. Knop, *Diversity and Self-determination in International Law*, pp. 110–167; criticism of Reisman's view, pp. 374–381. Cambridge University Press 2002.

<sup>53</sup> As Knop points out (pp. 110–167), the Court was able to appreciate the complex legal situation of the past (finding legal ties between Western Saharan people and Morocco and Mauritania, respectively, but not one amounting to sovereignty) in view of the developing law of self-determination, the result being that the people of Western Saharan were guaranteed the right to exercise their 'self-determination through the free and genuine expression of the will of the peoples of the territory'.

<sup>54</sup> *Mabo and others v. Queensland*, (No. 2) (1992) 175 CLR 1 F.C. 92/014, High Court of Australia, 3 June 1992, 41–42. For an analysis, see Willen Van Genugten and Camilo Perez-Bustillo, "The Emerging

Two other cases decided by the ICJ in territorial disputes between newly independent states did not accord weight to indigenous peoples, even though the peoples were living in the territories on which the states' dispute turned. In the dispute between Libya and Chad, Libya put forward an argument that although agreements existed between the former colonial powers regarding the border between the two countries, the Court should attach weight to the fact that the previous occupants of one of the disputed areas had been indigenous peoples who were essentially under Libyan dominance. The Court did not consider this issue but rather based its decision on the old agreements between the former colonial powers.<sup>55</sup> In the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, El Salvador argued that the *uti possidetis* boundaries should not be drawn based on those of the Spanish provinces but on those of earlier Indian settlements, or *poblaciones*.<sup>56</sup> The Court also refused to use indigenous boundaries as the basis for delimiting the inter-state boundary and based its decision on the boundaries of Spanish colonial administrative units.<sup>57</sup>

From the perspective of indigenous peoples, it has been of crucial importance that the ICJ has consistently articulated the right to self-determination as a right of all peoples, even though the law and politics of self-determination seemingly fell by the wayside after decolonisation. In the recent *Wall* Opinion, the ICJ again took up the Common Article 1 to both 1966 covenants as confirming the universal applicability of the right to self-determination of all peoples. Article 1 has prompted a very interesting development in the Human Rights Committee (HRC), which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), in that in its concluding observations the HRC has started to request from states parties explanations of how they have treated their indigenous peoples, who are protected as peoples under Article 1.<sup>58</sup>

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International Architecture of Indigenous Rights: the Interaction Between Global, Regional and National Dimensions", in *International Journal on Minority and Group Rights* 11, pp. 379–409 (2004), 390–396; and S. Scott, "Australian High Court's Use of the Western Sahara Case in Mabo" in *International and Comparative Law Quarterly* 1996, 45 (4), pp. 923–927.

<sup>55</sup> *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J. 6.

<sup>56</sup> *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, 1992 I.C.J. 351, 49–50.

<sup>57</sup> *Ibid.*, 50. See also *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. 1045, 98–99.

<sup>58</sup> See the following concluding observations by the HRC where explicit references to either the concept of self-determination of peoples or Article 1 can be found: Canada (UN doc. CCPR/C/79/Add.105 (1999)); Mexico (UN Doc. CCPR/C/79/Add.109 (1999)); Norway (UN Doc. CCPR/c/79/Add.112 (1999)); Australia (UN Doc. CCPR/CO/69/AUS (2000)); Denmark (UN Doc. CCPR/CO/70/DNK (2000)); Sweden (UN Doc. CCPR/CO/74/SWE (2002)). The recent concluding observations on Finland (UN Doc. CCPR/CO/82/FIN (2004)) leave no room for doubt: "The Committee regrets that it has not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant (paragraph 17, first sentence). USA (CCPR/C/USA/Q/3/CRP4 (2006)). For an analysis, see Martin Scheinin, "The Right to Self-determination under the CCPR" in P. Aikio and M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to*

### 3. Concluding Remarks

It seems that the primary contribution of the ICJ to the rights of peoples has been to promote the right to self-determination, which, while doubtless the most important of the rights concerned, is not the only one. The so-called third generation rights of peoples – the right to development, the right to a decent environment and the right to peace – have not been dealt with by the ICJ at all. This seems to correspond to the general development in international law; with the possible exception of the rights of indigenous peoples, collective rights have not really succeeded in inducing a great deal of normative development and have in fact been in decline since the end of the Cold War.<sup>59</sup> As these rights belong to peoples, not to states, it is hard to see how such rights could be litigated before a court that has jurisdiction primarily over disputes between states. The ICJ may of course promote some of these rights in its advisory opinions and even via *dicta* in contentious proceedings. A more likely development, however, is that these rights will be taken up in other international forums and particularly by international legal scholars rather than by the ICJ. From the perspective of indigenous peoples, the use of human rights courts and quasi-judicial proceedings is a viable option; they have in fact made use of these proceedings.<sup>60</sup>

Where the right of self-determination of peoples is concerned, the Court has arguably followed rather than pioneered the legal developments in international law. Its approach to the right has been rather consistent, especially in abstract terms. From the time the ICJ confirmed in *Barcelona Traction* that the right of self-determination is a principle of international law, and one that is *erga omnes* in

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*Self-Determination*, pp. 179–199, pp. 186–192. Institute for Human Rights, Åbo Akademi University Turku/Åbo 2000; and Martin Scheinin, “Indigenous Peoples’ Rights under the International Covenant on Civil and Political Rights” in Joshua Castellino and Niamh Walsh, eds., *International Law and Indigenous Peoples*, pp. 3–15. Leiden 2005: Martinus Nijhoff Publishers.

<sup>59</sup> See P. Alston, “Peoples’ Rights: Their Rise and Fall” in P. Alston, ed., *Peoples Rights*, pp. 259–253. The case between Bosnia-Herzegovina vs. Serbia-Montenegro has manifested another accepted right of peoples, right to their physical existence guaranteed by the Genocide Convention. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1996 I.C.J. 595 (Preliminary Objections). The Court concluded its public hearings in the case on 9 May 2006; see the press release at <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>> (25.8.2006). Croatia instituted proceedings on a similar basis in 1999 against Yugoslavia, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, 1999 I.C.J. 1015.

<sup>60</sup> This applies especially to the Human Rights Committee on the global level and the Inter-American Human Rights Bodies (the Commission and the Court) on the regional level. See the following cases decided by the Human Rights Committee: *Lubicon Lake Band v. Canada*, No. 167/1984, I. Länsman et al. v. Suomi, No. 511/1992, J. Länsman et al. v. Finland, No. 671/1995, J. ja E. Länsman v. Finland No. 1023/2001, *Apirana Mahuika et al. v. New Zealand*, No. 547/1993. Two examples from the Inter-American human rights system are *Yanomami Indians v. Brazil*, Case 7615. Inter-Am. CHR 1984–1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev.1 (1985) and the *Case of the Mayagne (Sumo) Awas Tingni Community vs. Nicaragua*, Judgment of August 31, 2001, Inter-Am. C.t.H.R. Ser. C, No. 79, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf) (23.10.2006).

nature, it has consistently upheld the right as a universally applicable one. The Court uses the terms ‘principle’ and ‘right’ synonymously in that context.<sup>61</sup> That this is the Court’s position can be clearly seen in the Western Sahara advisory opinion, the East Timor case and the advisory opinion on the Israeli Wall. While the Court has been consistent in treating the right to self-determination as universally applicable, it has not been able to determine who are the beneficiaries of this right. Here, the Court is not alone, for determining who is a people is politically as sensitive an issue as can be.

The role of the ICJ has been crucial in another respect, however. From the Namibia Advisory Opinion onwards, the Court has affirmed that the right to self-determination is a right of all peoples, and one of *erga omnes* character. As the law of self-determination essentially ceased operating after decolonisation, the ICJ has consistently treated the right as universal in application, sustaining an approach which in itself constitutes an important contribution on the part of the Court.

The most concrete contribution that the Court has made is its decisions regarding the right to self-determination of peoples who had been subject to the League and UN protection schemes. The actual number of cases of self-determination that the Court has dealt with is five: South West Africa (Namibia), Northern Cameroons, Western Sahara, East Timor and Palestine. What these areas have in common is that they were all colonised at different stages by European powers,<sup>62</sup> and were all governed under the mandate system of the League of Nations or the protection schemes of the UN.<sup>63</sup> An important consideration here is that the ICJ did not see much difference in whether the peoples in question had been placed under the mandate or the UN system: the ultimate goal for the mandatory or the trustee was that peoples could realise their right to self-determination and that their areas could not be annexed to those of the mandatory or the trustee.

The decisions by the ICJ related to South West Africa (Namibia) had enormous symbolic significance for the era of decolonisation, especially with respect to African colonies. A white minority regime that was openly racist in its own territory wanted to annex the peoples of South West Africa and place them under

<sup>61</sup> One could, of course, in theoretical terms draw a distinction between these concepts, as a principle would be something that does not necessarily imply a right for the peoples but would have to be reconciled with other principles of international law. The concept of right is associated more clearly with something that cannot be compromised but must be guaranteed. As noted, the ICJ nevertheless uses the two terms interchangeably.

<sup>62</sup> Northern Cameroons and Palestine were British colonies after World War I, whereas Western Sahara and East Timor were colonised by Spain and the Netherlands, respectively. South Africa was a British colony that in 1934 became a sovereign territory within the British Empire (and a Republic in 1961).

<sup>63</sup> Northern Cameroons and Palestine were British mandates after World War I. Resolution 1542 of the UNGA of 1960 stated that there were differences in the views regarding the status of some of Portugal’s and Spain’s overseas territories and that East Timor was on a list of non-self-governing territories. With the increasing pressure towards decolonisation, Spain started to provide information to the UNGA in 1961 about Western Sahara. South West Africa was a mandate territory of South Africa at the time.

its system of governance, an approach doomed to failure in the era of decolonisation. The Court used some creative – some would say dubious – legal thinking in finding that the mandate of South Africa over the South West Africa had survived even after the explicit termination of the League of Nations and its mandate system. Offsetting this creativity was the Court's decision in 1966 that the petition by Ethiopia and Liberia was inadmissible, which rested on arguments clearly indicating that the Court viewed its role solely as a body that applies existing law.<sup>64</sup> The Court's decision caused quite an uproar in the period of decolonisation and was heavily criticised. The *Namibia* Advisory Opinion marked a new era, however, as the international political activities by the UN political bodies had provided clear guidance on how the question of Namibia should be dealt with, and the Court had a new composition that was more sensitive to the trend towards decolonisation.

Of these five struggles for self-determination, three have been resolved: those of Namibia and East Timor, which became independent in 1989 and 2002, respectively; and Northern Cameroons, which decided to join Nigeria.<sup>65</sup> Palestine has assumed some form of independence but confronts difficulties in realising full self-determination. The situation of Western Sahara is still pending. The ICJ has arguably been helpful in resolving some of these cases of self-determination. Its contribution can be seen most clearly in its decisions regarding Namibia and Northern Cameroons but is also evident in its more recent advisory opinion advocating Palestinian self-determination. It made a contribution in *Western Sahara* as well to the extent that it clarified that the territory does not belong to any of its neighbours despite the occupation of the area by Morocco in the face of UN mediation efforts. Here, the importance of the Court's pronouncements in the case continues to be that the international community will not accept the occupation by Morocco of Western Sahara in observance of the Court's determination that the territory belongs to the peoples living there.

All of the cases which the Court has dealt with have one thing in common: they relate to the decolonisation process in one way or another. After the emergence of these colonised entities as states – or peoples already recognised as having the right to self-determination but still waiting to be states – international law has seen two major developments. First, the external aspects of self-determination, in particular the prospect of a group seceding from an existing state, are seen as a

<sup>64</sup> *South West Africa (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa)* 1966 I.C.J. 6, 89–91. It must be remembered that the Court was deadlocked over the issue, the vote being 7 – 7, with the President casting the deciding vote.

<sup>65</sup> As stated above, the Republic of Cameroon had reservations as to whether the people of Northern Cameroons had actually exercised their right to self-determination. The case came back to the Court in later years, when Cameroon instituted proceedings in the ICJ to determine the boundary areas between itself and Nigeria. See the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, 2002 I.C.J. 303.

matter that international law delegates to national legal systems except in the case of grave human rights abuses.<sup>66</sup> International law thus does not grant a right to secede for any groups within the existing states but leaves it for the national politico-legal process. If the domestic system deems that a group within the state has the right to self-determination, then that group is entitled to exercise it.<sup>67</sup> The ICJ is not likely to face cases where groups from existing states press their claims for self-determination in order to secede from their home state. One reason is that international law only grants them such a right in exceptional situations; another is the obvious procedural obstacle that a state or group of states would have to bring their case before the ICJ either in the form of a contentious case or an advisory opinion. On the other hand, it must be kept in mind that the ICJ itself has treated the right to self-determination of peoples as a universally applicable right, not something granted exclusively to the colonised peoples of Africa and Asia.

This same logic applies to the rights of indigenous peoples. The growing recognition that indigenous peoples have a right to self-determination together with some other collective rights cannot really be adjudicated within the ICJ, for rights concerned are realised within the existing nation-states. This is due to the fact that the right to self-determination of indigenous peoples is not seen as entitling them to secede from existing nation-states, a state of affairs in international law that should not prevent them from exercising their self-determination on the international plane by other inventive means.<sup>68</sup> Hence, the rights of indigenous peoples are likely to be developed in parallel at different levels of law, e.g., through the adoption of the UN declaration on indigenous peoples, developments within the existing universal and regional human rights bodies, and progress in national legal systems.<sup>69</sup>

In dealing with the issue of the self-determination of peoples, the ICJ has made an important contribution to the foundations of international law, for it has addressed an issue that could well yield a means by which states and their organi-

<sup>66</sup> J. Crawford, "The Right of Self-Determination in International Law: its Development and Future", in P. Alston, ed., *Peoples' Rights*, pp. 7–67, more specifically at pp. 47–67.

<sup>67</sup> The other side of the coin is that international law does not prohibit a state repressing a sub-unit trying to gain independence but allows it to the extent that human rights law and humanitarian law are observed. The state of international law is well manifested in the opinion of the Canadian Supreme Court on Quebec Secession. *Reference re Succession of Quebec from Canada* [1998] 2 SCR 217.

<sup>68</sup> A good example is the recent proposal for a Nordic Saami Convention prepared by a group of persons nominated by the three Nordic states (Norway, Finland and Sweden) and the representatives from the Saami parliaments of those states. Article 19 provides that "The Saami parliaments will represent the Saami people in inter-state affairs. The states are obliged to promote the representation of Saami in international institutions and advance their participation in international conferences". (Author's own translation of the proposed Nordic Saami Convention.) See also A. Tahvanainen, "The Treaty-Making Capacity of Indigenous Peoples" in *International Journal on Minority and Group Rights* 12, pp. 397–419 (2005) and T. Koivurova and L. Heinämäki, "The Participation of Indigenous Peoples in International Norm-Making in the Arctic", in *Polar Record* April 2006, pp. 101–109.

<sup>69</sup> Genugten and Perez-Bustillo, *op. cit.* 54.

sations may promote important community values in international society. The question of who has a legal interest and, eventually, legal standing in international judicial procedures when a community's interests are to be protected, arose in the *South West Africa* cases (second phase). As was mentioned above, the Court as it was composed during those proceedings was a conservative one, a fact seen in its stating explicitly that international law knows no right resident in any member of a community to take legal action in vindication of a public interest (*actio popularis*). As was explained above, this decision caused a shock in the UN system, which led to a quick change in the way the seats of the Court were distributed and to a new composition. Already four years later the Court sought to redress the error of its predecessor and stated that 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection (*erga omnes*)'. As shown above, the concept of *erga omnes* has played an important role in the way the Court has evaluated the obligations for other states and international society – mainly the UN – that derive from the right to self-determination of peoples. The *erga omnes* character of the right to self-determination also led to a serious attempt by a state to take legal action in the ICJ in the vindication of a public interest – the case of *East Timor*. Although this was not accepted by the Court, a different kind of legal strategy might have enabled the enforcement of *erga omnes* concept in the case,<sup>70</sup> whereby not too much should be read into the judgment with respect to the enforcement of *erga omnes* norms.<sup>71</sup> With the ever-increasing pace at which global problems advance, the time may be close when *erga omnes* will be enforced by the ICJ as well.<sup>72</sup>

<sup>70</sup> Crawford suggests that another legal strategy might have worked better for Portugal. Portugal built its case on the premise that it was still the lawful administering power on East Timor and that Indonesia thus could not conclude treaties on East Timor's behalf. This line of argument, according to Crawford, compelled the Court to apply the Monetary Gold principle because in order to examine whether Australia had breached its obligations by concluding a treaty with Indonesia, the Court was required to examine the prior question of whether it was lawful for Indonesia to conclude treaties on behalf of East Timor. Crawford suggests that had Portugal relied on the obligation on states not to recognise a change of territorial sovereignty gained by the use of force, it could have invoked the legal responsibility of Australia to recognise that sovereignty. According to Crawford, the Monetary Gold principle precludes the Court examining a case when a third state's rights and obligations are involved and that state has not consented to the jurisdiction of the Court. If Portugal had relied on Australia's illegal recognition, the Court would not have had to examine whether the occupation was illegal or not, because it was commonly accepted that it was. The case would then have involved a determination of facts, not of rights and obligations, a procedure the Monetary Gold principle prevents, as in this case. J. Crawford, *op. cit.* note 66, pp. 35–36.

<sup>71</sup> As pointed out by Tams, 'By subjecting the *erga omnes* concept to the indispensable third party rule, the Court therefore did not restrict the enforcement of *erga omnes* obligations as such, but merely clarified that enforcement action could not be taken against States condoning another State's *erga omnes* breaches'. In his view, *erga omnes* enforcement via the ICJ might well be possible if the legal action is directed against a state that has allegedly breached an *erga omnes* principle (and there are no jurisdictional obstacles), which was not the case in *East Timor*. See Christian J. Tams, 'Enforcing Obligations *Erga Omnes* in International Law', p. 186. Cambridge University Press 2005.

<sup>72</sup> Tams (pp. 310–311) concludes: 'With respect to judicial enforcement of obligations, all States have standing to institute ICJ proceedings in response to *erga omnes* breaches. While not unequivocal, the

From the perspective of peoples' rights, it seems hard to maintain that the ICJ could in general have contributed much more than it did to the decolonisation process – a process where it found a firm political will that was translated into an international legal right for overseas colonised peoples or certain peoples under alien domination. With states as its constituency, the Court is more likely to contribute to a state-centric view of international law than to any alternative vision of international law, e.g., one based on peoples' rights. The ICJ, although sometimes called the World Court, is a Court for states; only states can be parties in contentious proceedings. Even though advisory opinion proceedings are more relaxed in terms of who can take part in them, the ultimate participants are primarily states and their organisations. There has only been one case in the ICJ where a people has been allowed to take part in advisory proceedings, that of the *Wall* Advisory Opinion.<sup>73</sup> It is mainly through the existing states and their organisations that peoples' rights can be taken up in the ICJ's proceedings, as has happened when third states or inter-governmental organisations<sup>74</sup> have taken the rights of peoples to the Court in contentious proceedings or via the UN bodies to the advisory proceedings. However, the importance of the ICJ's role is that the Court has consistently treated the right to self-determination as a universal right, not a right confined to certain peoples.

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*Barcelona Traction* dictum on balance strongly supports this view... Jurisprudence since 1970 suggests that the Court would admit *erga omnes* claims brought in defence of general interests of the international community. On the other hand, proceedings could only be brought against States that have accepted the Court's jurisdiction to entertain claims based on breaches of customary international law'. Ibid.

<sup>73</sup> See *op. cit.* notes 40–42.

<sup>74</sup> For instance, the Organisation of African Unity was allowed to participate in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (1970), 1971 I.C.J. 16, 12.