

Reflections on the effectiveness of peremptory norms and *erga omnes* obligations before international tribunals, regarding the request for an advisory opinion from the International Court of Justice on the Chagos Islands

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By means of Resolution 71/292, of 22 June 2017, the United Nations General Assembly requested for an Advisory Opinion (AO) of the International Court of Justice (ICJ) on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.¹

At the current stage in the proceedings the discussion that takes precedence concerns whether or not the Court, in light of its earlier rulings on the degree of discretion it has to decline to issue an opinion such as the one sought, should agree to issue the AO. But the purpose of this paper is to highlight other comments in relation to the Chagos Islands. Essentially, it concerns two issues that I will also pose as questions.

The first question is this: *What are the consequences from a procedural standpoint arising from the fact that the ICJ has declared that the principle of the right of peoples to self-determination is a ius cogens norm that generates erga omnes rights?*

Traditionally the responsibility relationship has been conceived as a relationship between two States, the perpetrator of the unlawful act and the injured party or *injured State*. With the evolution of international law and the proliferation of rules aimed at protecting common interests, this idea has been extended in so far as it accepts that the responsibility relationship does not always have to be bilateral, in that some obliga-

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¹ UNGA Res 71/292 (22 June 2017).



tions of particular importance are *erga omnes* obligations. Such obligations are not governed by the logic of reciprocity and are taken on vis-à-vis the international community as a whole.²

Consequently, in the face of serious breaches of certain essential obligations towards the international community as a whole, several States can feel as if they are the injured party, irrespective of whether or not they are directly affected.³

According to the ICJ, the *erga omnes* obligations included (in 1970) ‘the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.⁴ And in the *East Timor* case (1995), the Court also mentions in this sense, the right of peoples to self-determination: ‘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’. This idea is reiterated in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁵

Moreover, according to the 1969 Vienna Convention on the Law of Treaties, a peremptory norm of general international law ‘is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ (Article 53). A treaty which conflicts with a peremptory norm of general international law is void (*ibid*) and an earlier treaty which conflicts with a new peremptory norm becomes void and terminates (Article 64).⁶ According to the International Law Commission (ILC): ‘Those peremptory norms that are clearly accepted and

² *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 para 33.

³ See International Law Commission, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) II(2) YB ILC 94 art 33.1; see also the comment to the article at 94-95.

⁴ *Barcelona Traction* (n 2) para 34.

⁵ *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90 para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 155.

⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.



recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.⁷

Although peremptory norms and *erga omnes* obligations are different concepts, the two are clearly linked.⁸ The right of peoples to self-determination qualifies as a peremptory norm that implies obligations of an *erga omnes* character for the international community as a whole. Among numerous other States that have made clear pronouncements on this point, the Netherlands has made the following statement in relation to the Chagos Islands case: 'The arguments above are based on the view of the Kingdom of the Netherlands that the right of self-determination of peoples is a permanent, continuing, universal and inalienable right with a peremptory character'.⁹ And, in another part it indicates that:

'the obligation of the administering State to respect and promote the right of self-determination of the inhabitants [...] is not only owed vis-à-vis the inhabitants of the colonial territory, but also vis-à-vis the international community as a whole. This obligation is an obligation *erga omnes*. As a result, a violation of the right of self-determination [...] does not only entail the international responsibility of the administering State in respect to the inhabitants of the colonial territory, but also in respect to third States'.¹⁰

⁷ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (n 3) 85, 112-113.

⁸ *ibid* 111-112: 'The examples which ICJ has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general International law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole'.

⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ, Request for an Advisory Opinion) Written Statement of the Kingdom of the Netherlands (27 February 2018) 4, para 2.5.

¹⁰ *ibid* 16, para 4.2; see also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ, Request for an Advisory Opinion) Written Statement of the African Union (1 March 2018) paras 69, 217; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ, Request for an Advisory Opinion), Written Statement submitted by the Government of the Republic of South Africa (1 March 2018) paras 6, 60, 63, 88.

And adds that:

‘the inhabitants of a colonial territory are not only entitled to respect for their right of self-determination vis-à-vis the administering State, but also vis-à-vis the international community as a whole. In turn, the members of the international community are under a corresponding obligation to respect the right of self-determination of the inhabitants of the colonial territory’.¹¹

The main difference about serious breaches¹² of a peremptory norm in terms of responsibility, is that in addition to reparation, further consequences are created in the form of obligations of third States, as stated in Article 41 of the Draft articles: ‘States shall cooperate in order to bring to an end, by lawful means, a serious breach’ and ‘no State shall recognise as lawful a situation created by a serious breach, nor render aid and assistance in maintaining that situation’.¹³

But what would the outcome be from a procedural standpoint?

According to the ILC, where *erga omnes* obligations are concerned, ‘all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole’.¹⁴

Article 42 of the Draft articles regulates those circumstances in which an injured State can invoke the responsibility of another State,¹⁵ whereas Article 48.1 provides for the possibility that a State which is not considered to be an injured State may invoke the responsibility of another State: ‘Any State other than an injured State is entitled to in-

¹¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ, Request for an Advisory Opinion), Written Statement of the Kingdom of the Netherlands (n 9) 17, paras 4.5 and 4.9.

¹² ‘A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation’. See ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (n 3) art 40.2.

¹³ *ibid*, art 41. See also UNSC Res 216 (1965) UN Doc S/RES/216 on Rhodesia; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 56, para 126; Written Statement of the Kingdom of the Netherlands (n 9) 19, para 4.10.

¹⁴ ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (n 3) 112.

¹⁵ *ibid* 117.



voke the responsibility of another State in accordance with paragraph 2 if: [...] (b) the obligation breached is owed to the international community as a whole'.¹⁶

In short, the responsibility relationship in cases of serious breaches of peremptory norms which establish *erga omnes* obligations change from bilateral to multilateral obligations. In the same way, when the matter under debate concerns the breach of peremptory norms that create *erga omnes* obligations, then the legal dispute itself takes on a multilateral character.

Nevertheless, bringing an action against one or more States before the ICJ for an alleged breach of *erga omnes* obligations is by no means an easy task, whether the party bringing the action is an injured State or a State that is not directly injured by said breach. Two significant obstacles are apparent.

i) The first is a legal obstacle relating to the principle whereby the jurisdiction of the Court is based on the consent of the parties in the case. This is one of the founding principles of both the Statute of the Permanent International Court of Justice and that of the ICJ at a time when the concepts of *erga omnes* obligations and peremptory norms were unknown.

The question we can ask ourselves is whether the consent principle can oppose the jurisdiction of the Court in cases involving judgment on possible breaches of obligations towards the international community as a whole, arising from peremptory norms?

The Court has been clear in issuing its positive response to this question on East Timor, a specific case that affected the right of peoples to self-determination and was the subject of an action brought by Portugal against Australia, albeit relating to Indonesia's conduct, which had not accepted the Court's jurisdiction.

'The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning Monetary Gold Removed from Rome in 1943 and confirmed in several of its subsequent decisions'.¹⁷

¹⁶ *ibid* 126.

¹⁷ *East Timor* (n 5) 90 para 26.

More specifically, in relation to the *erga omnes* obligations:

‘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 of 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*’.¹⁸

And, concerning *ius cogens* norms:

‘The same applies to the relationship between peremptory norms of general international law (*ius cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, [...] cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties’.¹⁹

The Court’s reasoning is similar to that adopted in other cases regarding norms which it classifies as procedural, such as those relating to personal or State immunity. Thus, in the dispute between the Democratic Republic of Congo and Belgium the Court affirmed that:

‘It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’.²⁰

In the same vein, in relation to the case relating to *Jurisdictional Immunities of the State*, it considered that:

‘[the] rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exer-

¹⁸ *ibid* para 29.

¹⁹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) Jurisdiction and Admissibility* (Judgment) [2006] ICJ Rep 6 para 64.

²⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 para 58.



cise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful'.²¹

According to the Court this criterion 'does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation'.²²

Despite the character of the *jus cogens* norms, the Court considers that:

'the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application'.²³

It seems, therefore, that, in the current state of evolution of international law, a peremptory norm is not sufficiently powerful to affect the right of a State not to give its consent to be judged by the ICJ. Naturally, this deprives each State and the entire international community of a fundamental legal way to claim that a norm, 'from which no derogation is permitted', be applied.

Only a highly unlikely reform of the ICJ's Statute could correct what appears to be a legal contradiction, in such a way that the jurisdiction of the ICJ would extend to scenarios in which determining the existence, interpretation or the application of a peremptory norm of international law is at stake, irrespective of the consent of the Parties in a specific case.

Notwithstanding this, it is a powerful reason why the principle of consent should not represent an obstacle to a non-binding AO being issued in such scenarios, even though this may impact on one or more specific bilateral legal dispute, as in the case of the Chagos Islands.

ii) The second obstacle relates to the classic idea of responsibility conveyed in the ICJ's Statute regarding its jurisdiction in contentious

²¹ *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* (Judgment) [2012] ICJ Rep 99 para 93.

²² *ibid*

²³ *ibid* para 95.

cases, whereby disputes are always understood to be bilateral²⁴. This applies both when the action is brought by several States against one defendant State, as in the case of the actions brought in 1973 by Australia and New Zealand against France relating to the French nuclear tests in the Pacific, or when the action is brought by a single State against several defendant States, as in the actions brought in 1999 by the Federal Republic of Yugoslavia (Serbia and Montenegro) against several member States of NATO.²⁵ The established system does not recognise group actions against the same defendant State. Nor does it recognise actions against several States who are joint defendants. The closest scenario to this is the request for intervention in proceedings made by a third State, provided for in the Statute and in the Rules of the ICJ,²⁶ subject to certain conditions and to the Court's own decision.

The logic regarding the bilateral nature of international obligations is certainly evident in the solution offered by the Court in 1950 to the issue of reservations to the Convention on Genocide. Although the Court recognises that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation',²⁷ it establishes a criterion of compatibility with the object and purpose of the Convention as a basis for resolving the issue regarding acceptability of the reservations.²⁸ But the Court concludes that it is up to each individual State to assess the compatibility of each reservation with the object and purpose

²⁴ See art 38.1 of the Rules of Court (adopted 14 April 1978, entered into force 1 July 1978; amendment entered into force 14 April 2005).

²⁵ In those cases, the question was also raised of a possible joinder of the proceedings. By the Registrar's letters of 23 December 2003, the Parties were informed that the Court had decided that the proceedings should not be joined.

²⁶ See arts 62 and 63 of the Statute and art 81 to 85 of the Rules. See also United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Annex VI; Statute of the International Tribunal for the Law of the Sea.

²⁷ *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23. It adds that: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention'. The Court reiterated this idea in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 para 68.

²⁸ *Reservations to the Convention on Genocide* (n 27) 24.



of the Convention.²⁹ It even accepts that assessments may vary and this will determine the scope of the obligations contained in the treaty in its bilateral relations with each reserving State.³⁰ However, for some judges who did not follow the majority, ‘the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance’.³¹

Several decades later, the Court does not appear to be predisposed to formulate a doctrine with a more open interpretation of the nature of the disputes that are brought before it when it is in a position to pronounce on *erga omnes* obligations. This is an appropriate point at which to cite recent cases raised in 2014 before the ICJ by the Republic of the Marshall Islands (RMI),³² against the nine Nuclear Weapon States for their alleged failure to comply with their obligations under Article VI of the Treaty on the Non-proliferation of Nuclear Weapons (NPT).³³

The three States which had accepted the Court’s jurisdiction³⁴ (United Kingdom, India and Pakistan) alleged many different reasons to oppose the jurisdiction of the Court in this particular case, but the only one that was examined by the Court was that no legal dispute between RMI and each of the three respondent States actually existed.³⁵

²⁹ *ibid* 26: ‘As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention’.

³⁰ *ibid* 27.

³¹ Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, available at <www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-01-EN.pdf>. For a different reasoning see also the Dissenting Opinion of Judge Alvarez, available at <<https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-02-EN.pdf>>.

³² On this case see A Pigrau Solé, ‘El caso de las Islas Marshall: colonialismo, armas nucleares y justicia ambiental’ (2018) 34 *Anuario Español de Derecho Internacional* 443-462.

³³ ‘Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control’. Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970) 729 UNTS 161.

³⁴ The Marshall Islands has based the Court’s jurisdiction on its own declaration of acceptance made on 24 April 2013, and those of the respondent States, made by Pakistan on 13 September 1960, India on 18 September 1974, and the United Kingdom on 5 July 2004.

³⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary



On 5 October 2016, the ICJ issued three judgments on jurisdiction matters.³⁶ In all of them admission was refused for the claims, the Court considering that no dispute existed between the Parties prior to the filing of the application.

Although it could be argued that Article VI of the NPT contains an *erga omnes* obligation,³⁷ this is in fact an *erga omnes partes* obligation, with the meaning given to it by the Court in the dispute between Belgium and Senegal relating to certain multilateral treaties that address common interests among the international community, such as the Convention on Genocide or the Convention against Torture. In *Questions relating to the Obligation to Prosecute or Extradite*, the Court dealt with the question of ‘whether being a party to the [Torture] Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument’.³⁸ And the Court stated: ‘These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case’.³⁹

Objections of the United Kingdom of Great Britain and Northern Ireland) 15 June 2015, para 6; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* Counter-Memorial of the Republic of India, 16 September 2015, para 5; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* Counter-Memorial of Pakistan (Jurisdiction and Admissibility) 1 December 2015, paras 42-48.

³⁶ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* (Jurisdiction and Admissibility, Judgment) 5 October 2016; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* (Jurisdiction and Admissibility, Judgment) 5 October 2016; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections, Judgment) 5 October 2016.

³⁷ ‘[T]here is in fact a twofold general obligation, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result’. *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) [1996] ICJ Rep 226, Declaration of President Bedjaoui, at 274; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Memorial of the Marshall Islands, 16 March 2015, paras 26, 28, 103.

³⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 27) para 67.

³⁹ *ibid* para 68. See also para 69.



The point I would like to make here is that in the case brought by the RMI, in declaring that no dispute existed between the Marshall Islands and each of the claimant States, the Court disregards any analysis of the importance of the case for the international community. Each of the claims has merely been dealt with as a bilateral matter, regardless of the historical context and the clearly multilateral nature of the deep dispute between the Nuclear Weapon States and the Non-Nuclear Weapon States regarding the compliance of the NPT.⁴⁰ And this is despite the considerations that the Court made more than 20 years ago in relation to the above-mentioned Article.⁴¹

By submitting its claims, RMI, a State that has been particularly adversely affected by nuclear weapons, can be considered as having represented the vast majority of the Non-Nuclear Weapon States.

As international law currently stands, the fact that the ICJ has declared the existence of *ius cogens* norms or *erga omnes* obligations does not have, until now, the effect of limiting the right of a State to withhold its consent to be judged by the ICJ or another international tribunal where contentious cases are involved.

However, in *Chagos*, the Court should not apply *Marshall Islands* logic to dispose of the case; rather it should reflect the transcendence of the case for the international community as a whole.

I will now move on to the second question that I would like to consider, namely: *Is a norm of the law of treaties which allows States to freely include any part of their territory in, or exclude it from, the provisions of the treaties they sign, in particular the colonial territories that fall under*

⁴⁰ It seems frankly disrespectful to the plaintiff, to blame it, in each of the three sentences, for not specifically mentioning India, Pakistan, or the United Kingdom, when alluding in the international fora to the lack of compliance by the NWS, when it is well-known that the RMI has referred to them all together, and because of that, has presented nine simultaneous claims before the Court in which they detail the arguments for potential non-compliance for each of the respondent parties.

⁴¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 99-100, 103.



their administration, compatible with the norms of international law relating to the protection of human rights?

The norm to which I am referring is Article 29 of the 1969 Vienna Convention on the law of treaties which regulates the territorial scope of treaties, which states as follows: ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’.

The text is essentially the same as the proposal made by the ILC,⁴² so it is appropriate to turn to the comments made by the Commission on this text. In its brief comment on this proposed provision, the ILC begins by stating that:

‘Certain types of treaty, by reason of their subject matter, are hardly susceptible of territorial application in the ordinary sense. Most treaties, however, have application to territory and a question may arise as to what is their precise scope territorially. In some cases the provisions of the treaty expressly relate to a particular territory or area, [...] On the other hand, many treaties which are applicable territorially contain no indication of any restriction of their territorial scope’.⁴³

This reasoning is particularly applicable to bilateral treaties. If we consider general treaties to protect human rights, such as the International Covenant on Civil and Political Rights of 1966, or specific treaties, such as the Convention against torture and other cruel, inhuman or degrading treatment or punishment, of 1984, clearly, they are not cases where territorial application may be impossible, or in which the provisions of the treaty refer to specific parts of territories.

The ILC considered that ‘the territorial scope of a treaty depends on the intention of the parties’ and that the general rule ‘which should apply in the absence of any specific provision or indication in the treaty as to its territorial application’ is ‘that a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty’.⁴⁴ In

⁴² ‘Article 25. Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party’ (1966) II YB ILC Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, UN Doc A/CN.4/SER.A/1966/Add. 1, 169, 213.

⁴³ Ibid.

⁴⁴ Ibid.



any event, the ILC considers that colonial territories are included given it expressly rejects the expression ‘all the territory or territories for which the parties are internationally responsible’.⁴⁵

In an article published in 2009,⁴⁶ Professor Sand mentions several international treaties on the protection of human rights, such as the 1950 European Convention on Human Rights, the UN Human Rights Covenants of 1966, the UN Convention Against Torture of 1984, the European Convention for the Prevention of Torture of 1987 and the Statute of the International Criminal Court of 1998.

Of these treaties, only those conventions drawn up within the framework of the Council of Europe contain provisions relating to the possibility of restricting territorial application: Article 56.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, of 1950,⁴⁷ and Article 20.1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁴⁸

The remaining treaties referred to do not contain any similar provisions. Article 2.1 of the International Covenant on Civil and Political Rights provides that:

‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁴⁹

⁴⁵ *ibid.*

⁴⁶ PH Sand, ‘Diego Garcia: British-American Legal Black Hole in the Indian Ocean?’ (2009) 21 *J Environmental L* 113-137, at 116-117.

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

⁴⁸ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS No 126.

⁴⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). However, when the ICCPR was ratified, the UK included several reservations relating to the fact that some articles did not apply to some colonial territories, or that various provisions applied separately ‘to each of the territories comprising the United Kingdom and its dependencies’. The UK’s stance is that ‘when, in 1976, the United Kingdom ratified the Covenant in respect of itself and certain of its Overseas Territories, it did not ratify it in respect of BIOT’, and therefore ‘the Covenant does not apply, and never has applied, to BIOT’. See Comments by the Government of the United Kingdom of Great Britain and

In a similar vein Article 2.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.⁵⁰

Among the *erga omnes* obligations already mentioned in the excerpt cited from the judgment on *Barcelona Traction, Light and Power Company*, the ICJ included 'the principles and rules concerning the basic rights of the human person'.⁵¹ Shortly after, commenting on the situation in Namibia, it stated that racial discrimination constituted a 'flagrant violation of the purposes and principles' of the United Nations Charter.⁵² The duty not only to respect, but also to protect human rights, in particular in the face of serious violations of those rights, is, today, undoubtedly a peremptory norm of international law that creates *erga omnes* obligations.

One could ask, therefore, what is the purpose of allowing a State party to conventions that protect human rights to exclude part of its territory from the application of such conventions, in particular, parts of its territory in respect of which, according to international law, it has a conventional obligation under the United Nations Charter to protect human rights and respect the right of peoples to self-determination, because such territories are colonial territories.

In fact, in relation to Non-Self-Governing Territories, Article 73 of the United Nations Charter and, in relation to the International Trusteeship System, Article 76 establishes the relevant obligations of the colonial power with regard to the people subject to it. Given these obligations,

Northern Ireland on the reports of the United Kingdom (UN Doc CCPR/CO/73/UK) and the Overseas Territories (UN Doc CCPR/CO/73/UKOT) 7 November 2002; UN Doc CCPR/CO/73/UK/Add.2; CCPR/CO/73/UKOT/Add.2, 4 December 2002, para 88. Against this opinion, see Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland, UN Docs CCPR/CO/73/UK/Add.2; CCPR/CO/73/UKOT/Add.2, 4 December 2002, para 38; Concluding observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/6, 30 July 2008, para 22.

⁵⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁵¹ *Barcelona Traction* (n 2) para 34.

⁵² *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 13) para 131.



firstly, the fact that a territory is excluded from the scope of the application of the main conventions on human rights, as in the case of the Chagos Islands, is directly incompatible with the obligations established in the United Nations Charter.⁵³ Particularly if the scenarios envisaged in the Charter as being transitional stages towards the exercise of peoples' self-determination become a permanent state of upholding colonial rule.

Secondly, such exclusion seems to directly oppose the purpose and aim of these treaties that are intended to protect human beings as such and seek to eliminate areas of impunity vis-à-vis their most serious breaches. Consequently, reservations such as those that exclude certain territories from their application should not be generally accepted other than in certain temporary circumstances which may justify this course of action in specific cases.

Thirdly, the very nature of peremptory norms which protect human rights against serious violation, together with the *erga omnes* character of the corresponding obligations, should mean that it is unacceptable for a State to be able to exclude an entire population from its protection indefinitely.

One may certainly disagree with the reasoning which, on the one hand, in so far as States are not obliged to be a Party to such treaties, argues that it is better that they accept to be party to them, albeit with restrictions, and on the other hand, that when it is a matter of serious violations of human rights against the people affected, this would qualify as a violation of an international obligation, irrespective of the State's restrictive position with regard to conventional obligations.

But this brings us back to the question about procedure and the central role of consent in international law, which is, how is it possible to enforce the possible responsibility of a State that excludes the whole population of a territory from the scope of the application of treaties on human rights?

As far as the second question is concerned, a norm of the law of treaties that allows States to freely include a part of their territory within, or exclude it from, the scope of the treaties they sign, in particular colonial territories that are under their administration, does not seem compatible with either the content or the purpose of the norms of international law relating to the protection of human rights. However, States do not appear

⁵³ See art 103 on the priority of the UN Charter.

to question this practice, and any possible assessment by an international tribunal in the context of contentious cases would again be subject to the consent of the State that imposed such restriction. All this, without prejudice to the fact that, in this case, it can be argued that the treaties that were applicable to Mauritius are also applicable to the Chagos Islands.⁵⁴

I will conclude these tentative considerations by stating the serious limitations which some fundamental points of international law impose on the effectiveness of concepts such as *erga omnes* obligations and *jus cogens* norms. Such obstacles have nothing to do with the formal recognition of certain obligations and norms as such, but rather relate to the crucial role of consent in the full or partial acceptance of conventional norms and in the acceptance of the legal means for resolving disputes. The limitations also relate to the huge difficulty the system has in understanding that some norms of international law which promote common interests of the international community as a whole, such as the protection of human rights, cannot be effective in a conceptual scenario which still adheres to voluntarist ideas that are reflected in a haze of bilateral relations between a given State and each of the other States.

⁵⁴ See the statements of the Human Rights Committee (n 49).

