LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

(REQUEST FOR ADVISORY OPINION)

ORDER OF 14 JULY 2017

ORDER OF 17 JANUARY 2018

WRITTEN STATEMENT OF

THE AFRICAN UNION

1 March 2018

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PART I

PRELIMINARY REMARKS

I. Introduction

1. It is with great honour that, for the first time since its creation, the African Union provides information to the International Court of Justice (the "**Court**") and expresses its views in respect of a request for an advisory opinion. In this Written Statement, the African Union sets out its preliminary observations on, and initial submissions in respect of, the questions submitted to the Court *concerning the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, pursuant to Resolution A/RES/71/292 of the General Assembly of the United Nations (the "**General Assembly**").

2. The African Union was one of the driving forces behind Resolution A/RES/71/292. It fully supported the efforts of the Government of the Republic of Mauritius ("**Mauritius**") in having the General Assembly adopt it. This support is, *inter alia*, reflected in Resolution AU/Res. 1 (XXVIII) dated 30-31 January 2017 of the Assembly of the African Union on the Chagos Archipelago, which resolved:

> "to fully support the action initiated by the Government of the Republic of Mauritius at the level of the United Nations General Assembly with a view to ensuring the completion of the decolonization of the Republic of Mauritius and enabling the Republic of Mauritius to effectively exercise its sovereignty over the Chagos Archipelago, including Diego Garcia."[1]

[1] **Exhibit AU-12**, Resolution Assembly/AU/Res.1(XXVIII), Resolution on Chagos Archipelago, January 2017, para. 6. References to "**Exhibit-AU**" in this Written Statement are references to exhibits submitted by the African Union together with this Written Statement. References to "**Dossier No.**" are references to the documents that have provided to the Court by the Secretariat of the United Nations in these proceedings.

3. The tragic fate of the Chagossians was sealed in 1965, when the archipelago they inhabited was dismembered from Mauritius by the then administering power of Mauritius, the United Kingdom of Great Britain and Northern Ireland (the "**United Kingdom**"). Three years later, in 1968, Mauritius had gained its independence, but the Chagos Archipelago remained a British colonial territory, and its inhabitants remained British.

4. This situation, which remains the same to date, is contrary to international law.

5. The United Kingdom has never taken any steps to remedy this state of affairs, in spite of the repeated calls of the international community for it to comply with international law and to put an end to what may be described as a human tragedy.

6. Over a period of fifty years, the General Assembly, the African Union and its predecessor, the Organisation of the African Unity (the "**OAU**"), have adopted a number of resolutions and decisions calling on the United Kingdom to comply with international law and to put an end to the continued colonisation of the Chagos Archipelago, including Diego Garcia.

7. On 22 June 2017, the General Assembly decided to take a further step and adopted Resolution A/RES/71/292, requesting the Court to render an advisory opinion on the following questions:

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

   (b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain

and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

8. In its Order No. 169 dated 17 January 2018, the Court decided that the African Union is likely to be able to furnish information on these questions and that it may do so within the time-limits fixed by the Court.

9. This Written Statement represents the views of the African Union, whose membership considers that the resolution of the questions asked to the Court constitute a matter of systemic importance in international law.

II. The Interest of the African Union in the Advisory Proceedings Before the Court

10. The African Union, established on 11 July 2000, by virtue of the adoption of its Constitutive Act, signed in Lomé, Togo (the "**Constitutive Act**"), is a regional agency within the meaning of Article 52 of Chapter VIII of the Charter of the United Nations (the "**Charter**"). The Union has a membership of fifty-five African States, including Mauritius.

11. The African Union has a direct interest in these advisory proceedings, as the situation in the Chagos Archipelago has a direct and detrimental impact on one of the Member States of the Union, namely Mauritius.

12. Furthermore, one of the primary objectives of the Union is the complete decolonisation of the African Continent.

13. According to Article 3 of its Constitutive Act, "[t]he objectives of the Union shall be to: … defend the sovereignty, territorial integrity and independence of its Member States."[2]

[2] **Exhibit AU-1**, Constitutive Act of the African Union, dated 11 July 2000, Article 3.

14. The African Union, at the celebration of the OAU's fiftieth anniversary, reiterated its continued commitment to the "completion of the decolonization process in Africa; to protect[ing] the right to self-determination of African peoples still under colonial rule."[3]

15. In this respect, the African Union is pursuing the same objective as its predecessor, the OAU, as recalled in the Preamble of its Constitutive Act, which provides that "the Organization of African Unity has played a determining and invaluable role in the liberation of the continent [and] the affirmation of a common identity".[4]

16. The OAU was established on 25 May 1963, in Addis Ababa. The Preamble of the Charter of the OAU emphasised the need "to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms".[5]

17. At Article II (c) and (d), it specifically confirmed that among its "purposes" was:

> "…
>
> (c) To defend [African States'] sovereignty, their territorial integrity and independence;
>
> (d) To eradicate all forms of colonialism from Africa …"[6]

18. From 1963 to 2000, the OAU placed decolonisation, independence and self-determination at the forefront of its agenda.

19. During the First Conference of Independent African Heads of State and Government, held in Addis Ababa from 22 to 25 May 1963, decolonisation was the first substantive item on the OAU's Agenda. The OAU reaffirmed "that it is

[3] **Exhibit AU-10**, Declaration Assembly/AU/Decl.3(XXI), Solemn Declaration on the 50th Anniversary of the OAU/AU, May 2013, para. B(i).
[4] **Exhibit AU-1**, Constitutive Act of the African Union, *op. cit.*, preamble para. 4.
[5] **Exhibit AU-2**, OAU Charter, dated 25 May 1963, preamble para. 6.
[6] **Exhibit AU-2**, OAU Charter, *op. cit.*, Article II(c) and Article II(d).

the duty of all African Independent States to support dependent peoples in Africa in their struggle for freedom and independence".[7] It also declared "that the forcible imposition by the colonial powers of the settlers to control the governments and administrations of the dependent territories is a flagrant violation of the inalienable rights of the legitimate inhabitants of the territories concerned".[8]

20. Eighteen years later, under the aegis of the OAU, the African Charter on Human and Peoples Rights (the "**ACHPR**"), adopted in Nairobi on 27 June 1981, undertook to eliminate colonialism. Its Preamble confirmed that African nations were "[c]onscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism [and] neo-colonialism."[9]

21. Furthermore, Article 20 of the ACHPR underscored the African peoples' "unquestionable and inalienable right to self-determination" and their right to "freely determine their political status and … pursue their economic and social development according to the policy they have freely chosen".[10] It provided that "[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community".[11] Most importantly, it recognized that "[a]ll peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."[12] By representing its constituency in these proceedings, this is exactly what the African Union is doing.

22. The objective of decolonisation remains as true today, in 2018, for the AU, as it was in 1963 for the OAU.

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[7] **Exhibit AU-4**, Resolution CIAS/Plen.2/Rev.2, Resolution on Decolonization, May 1963 preamble para. 3.
[8] **Exhibit AU-4**, Resolution CIAS/Plen.2/Rev.2, *op. cit*., para. 1.
[9] **Exhibit AU-3**, African Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. èCAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) (hereinafter "**ACHPR**"), preamble para. 8.
[10] **Exhibit AU-3**, ACHPR, *op. cit.*, Article 20(1).
[11] **Exhibit AU-3**, ACHPR, *op. cit.*, Article 20(2).
[12] **Exhibit AU-3,** ACHPR, *op. cit*., Article 20(3).

23. The African Union has further *specifically* demonstrated the importance, for the Union, of the legal issues raised by the status of the Chagos Archipelago through a number of resolutions and decisions.

24. For instance, in the Solemn Declaration issued on the fiftieth Anniversary of the OAU/AU, the African Union reaffirmed "[its] call to end expeditiously the unlawful occupation of the Chagos Archipelago."[13]

25. Likewise, Resolution Assembly/AU/Res.1(XXVIII) condemned the continued unlawful occupation of the Chagos Archipelago by the United Kingdom. It denounced "the unlawful excision of the Chagos Archipelago, including Diego Garcia, from the territory of Mauritius by the United Kingdom, the former colonial power, prior to the independence of Mauritius, in violation of international law and UN Resolutions".[14]

26. At the latest Session of the Assembly of the African Union, on 28-29 January 2018, Decision Assembly/AU/Dec.684(XXX) deplored "the continued unlawful occupation by the United Kingdom of the Chagos Archipelago, which forms an integral part of the territory of the Republic of Mauritius and over which the Republic of Mauritius is unable to effectively exercise its sovereignty."[15]

27. The Assembly also called upon the United Kingdom "to expeditiously put an end to its unlawful occupation of the Chagos Archipelago, in accordance with well-established principles of international law and the relevant decisions of OAU/AU and pertinent decisions of the United Nations."[16]

28. In the same Decision, the Assembly of the African Union took note of the resounding success, at the General Assembly, of Resolution A/RES/71/292

[13] **Exhibit AU-10**, Declaration Assembly/AU/Decl.3(XXI), *op. cit.*, para. B(ii).
[14] **Exhibit AU-12**, Resolution Assembly/AU/Res.1(XXVIII), Resolution on Chagos Archipelago, January 2017, preamble para. 2.
[15] **Exhibit AU-13**, Decision Assembly/AU/Dec.684(XXX), Decision on Chagos Archipelago, January 2018, para. 2.
[16] **Exhibit AU-13**, Decision Assembly/AU/Dec.684(XXX), *op. cit.*, para. 9.

requesting the advisory opinion of this Court.[17]

29. In submitting this Written Statement, the African Union aspires to assist the Court in determining and interpreting the rules of international law related to decolonisation and self-determination and, accordingly, in the resolution of the two interrelated questions put before it.

III. The Scope of the Request

30. The subject of the General Assembly's request, set out in Resolution 71/292, is to obtain from the Court an opinion, which the Assembly deems of assistance to it for the proper exercise of its functions.

31. The advisory opinion is requested on questions which are of particular concern to the United Nations, and which belong to a broader frame of reference than a simple bilateral dispute.[18]

32. The Court is asked to answer two questions: first, to opine on whether or not the decolonisation of Mauritius was lawfully completed in light of the dismemberment of the Chagos Archipelago; and secondly to opine on the consequences, under international law, flowing from that dismemberment.

33. As such, the questions posed by the General Assembly are intricately related. They are interdependent, complementary and form a whole.

34. The Court has previously responded to similarly interrelated points. For instance, in the *Wall* advisory opinion, whilst it responded to a single question, the Court made it clear that it had to assess *first* whether the construction of the wall was a breach of international law *before* it could determine the legal consequences arising from the construction of the wall. It said:

[17] **Exhibit AU-13**, Decision Assembly/AU/Dec.684(XXX), *op. cit.*, para. 5.
[18] *Cf.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I.C.J. Reports 2004, p. 136 (hereinafter "***Wall Advisory Opinion***"), pp.157-9, paras. 47-49.

> "In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route."[19]

35. In the present case, the Court is invited to perform a similar exercise. It is invited to determine, first, whether the process of decolonisation of Mauritius was lawfully completed, before it determines the legal consequences of the continued administration of Mauritius by the United Kingdom. To an extent, the task of the Court has been facilitated by the manner in which the General Assembly has posed the questions.

36. The African Union respectfully submits that the conditions for the Court to answer the questions *in casu* are fully met.

37. As will be shown, once the Court has established its jurisdiction, it will only exercise its discretion not to render an advisory opinion where there are "compelling reasons" not to.[20] To date, the Court has never exercised that discretion.[21]

38. The African Union respectfully submits that the same high threshold should apply in the context of the present advisory proceedings.

39. The African Union wishes that the Chagossian question be settled in all its aspects through a comprehensive, just and lasting resolution in accordance with international law.

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[19] *Wall Advisory Opinion*, *op. cit.*, p. 154, para. 39.
[20] *Wall Advisory Opinion*, *op. cit.*, p. 156, para. 44; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports, p. 226 (hereinafter "***Nuclear Weapons Advisory Opinion***"), pp. 234-235, para. 14. *See* para. 53 below.
[21] *Wall Advisory Opinion*, *loc. cit.*; *Nuclear Weapons Advisory Opinion*, *loc. cit*. The one instance of the Court refusing to provide an Advisory Opinion turned on the fact that the Court did not consider it had the requisite jurisdiction – see *loc. cit*.

40. In this Written Statement, the African Union will submit that the Court has jurisdiction to issue the opinion requested by the General Assembly (**PART II**); it will further show that the process of decolonisation of Mauritius was unlawfully completed under international law **(PART III**); finally, it will stress the legal consequences arising from such an unlawful situation under general international law (**PART IV**).

PART II

THE COURT HAS JURISDICTION TO GIVE THE ADVISORY OPINION REQUESTED

I. Introduction

41. The Court's jurisdiction to give advisory opinions is governed by Article 65 of its Statute, which reads:

> "The Court may give an advisory opinion on any *legal* question at the request of whatever *body may be authorized* by or in accordance with the Charter of the United Nations to make such a request."[22] (emphasis added)

42. In its application of this provision, the Court has indicated that:

> "It is … a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ."[23]

43. There is no doubt that the two relevant prerequisites for the giving of an advisory opinion, namely that the request be made by a duly authorised organ and that the question put to the Court be a legal one, are both fulfilled in the present request, as detailed below.

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[22] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 65.
[23] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1982, p.325, pp. 333-334, para. 21.

II. The General Assembly is Authorised to Request the Advisory Opinion

44. According to Article 96(1) of the Charter, the General Assembly (like the Security Council), "may request the International Court of Justice to give an advisory opinion on *any legal question*" (emphasis added).[24] The broad scope of this article reflects the very broad competence of the General Assembly, under UN Charter Articles 10, 11 and 13, and hence, the almost complete liberty of the Assembly in requesting an opinion of the Court. The Court would also observe that Article 10 of the Charter has conferred upon the Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, specifically, provides it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and to make recommendations under certain conditions fixed by those Articles.[25]

45. All this has been confirmed by the Court itself, in the oft quoted *Nuclear Weapons Advisory Opinion*.[26] The Court has also clearly reiterated in position in its seminal *Wall Advisory Opinion*.[27]

46. Thus, there is no doubt that the General Assembly is authorised to request the present advisory opinion. The Chagos case had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court. An objection that the General Assembly would go beyond the scope of its competence in requesting an advisory opinion in this case would be unfounded.

III. The Qualification of the Questions as "Legal" Ones

47. The General Assembly is requesting an advisory opinion from the Court on *legal* questions. These questions seek to clarify whether the decolonisation of Mauritius

[24] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 96(1).
[25] UN Charter, *op. cit.*, Article 10 and Article 11(2).
[26] *Nuclear Weapons Advisory Opinion*, *op. cit.*, p. 232, para. 11.
[27] *Wall Advisory Opinion*, *op. cit*., p. 144, para. 14.

was lawfully completed, having regard to international law, and to declare the legal consequences, under international law arising out of the continued administration by the United Kingdom of the Chagos Archipelago.

48. These are, necessarily, and by definition, *legal questions* in the meaning of Charter, the Statute and the Court's own *dicta*. They concern the *international legal* aspects of a set of facts, namely, the question of the compatibility of a decolonisation process with international law, including the Charter of the United Nations, the relevant United Nations resolutions, and OAU and AU resolutions. Furthermore, the Court is requested to advise on the legal consequences, under international law, of a continued administration by a UN member State of the territories of another.

49. These questions also involve the *interpretation* of international norms, which is essentially a judicial task. The questions submitted by the General Assembly have been, to use the very words of the Court "*framed in terms of law and raise problems of international law …* [they are by their] *very nature susceptible of a reply based on law*", hence they are squarely questions of a legal character.[28]

50. That the Court may be called upon to ascertain specific facts in order to assess their legal significance, is part of its traditional judicial function and does not undermine the fact that a request concerns a legal question.[29]

51. In sum, the General Assembly's request for an advisory opinion satisfies the conditions of Article 65 of the Statute of the Court and Article 96(1) of the Charter both *ratione personae* (the General Assembly being a duly authorised organ) and *ratione materiae* (the request being on a legal question). And, accordingly, the Court is invited to render the advisory opinions required.

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[28] *Western Sahara, Advisory Opinion*, I.C.J Reports 1975, p. 12 (hereinafter "***Western Sahara Advisory Opinion***"), p. 18, para. 15; and *Wall Advisory Opinion*, *op. cit*., at p. 153, para. 37.

[29] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16 (hereinafter "***Namibia Advisory Opinion***"), p. 27, para. 40; *Western Sahara Advisory Opinion*, *op. cit.*, p.19, paras. 16-17.

IV. The Duty of the Court to Give the Requested Opinion

52. The Court is "the principal judicial organ of the United Nations".[30] Therefore, its main contribution to, and form of participation in, the work of the United Nations is to give advisory opinions.

53. The purpose of advisory opinions is to assist the organs or agencies of the UN in their mandates and to provide them with the principles and rules of international law necessary for their action. The Court has indeed always been mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused".[31] By that, the Court meant that "only compelling reasons should lead the Court to refuse its" opinion in response to a request falling within its jurisdiction.[32]

54. Furthermore, in determining whether such compelling reasons exist, the Court will not have regard to the background of the question. As the Court put it in its *Nuclear Weapons Advisory Opinion*,

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution."[33]

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[30] UN Charter, *op. cit.*, Article 92.
[31] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (first phase), Advisory Opinion*, I.C.J. Reports 1950, p. 65, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, I.C.J. Reports 1999, p. 62, pp. 78-79, para. 29; *Wall Advisory Opinion*, *op. cit.*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* I.C.J. Reports 2010, p. 403 (hereinafter "***Kosovo Advisory Opinion***"), p. 416 para. 30.
[32] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, I.C.J. Reports 1956, p. 77, p. 86; *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, I.C.J. Reports 1962, p. 151, p. 155; *Wall Advisory Opinion*, *op. cit.*, p. 156, para. 44; *Nuclear Weapons Advisory Opinion*, *op. cit.*, p. 235, para. 14.
[33] *Nuclear Weapons Advisory Opinion*, *op. cit.*, p. 237, para. 16.

55. The advisory activity of the Court is an integral part of its judicial function. The difference between a *faculty* and a function is that faculty is a power, which can be exercised or not, kept or abandoned; while a *function* conjugates a power with a *charge or an obligation to exercise* it in the pursuit of a specific purpose. This description applies as much to the advisory function as it does to the contentious function of the Court; it is not the preserve of the advisory function. If the Court's function is to pronounce itself on the law (and it is), it has only two means to express itself; by rendering a judgement, or giving its advisory opinion.[34] Once it has consented to the request for its advisory opinion, the Court must deliver its opinion inasmuch as it must deliver its judgment.

56. The Court has further unambiguously affirmed that, whatever its political aspects, it cannot refuse to respond to the legal elements of a question, which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law.[35]

57. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request, or the political implications which its opinion might have.[36]

58. The purpose of the Court's advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court, which will assist them in the future exercise of their functions.

59. Finally, the Court cannot determine, or even concern itself with, what steps the General Assembly may wish to take after receiving the Court's opinion, or what effect that opinion may have in relation to those steps.[37] The Court should not

[34] Manley Hudson said: "… the Court itself has conceived of its advisory jurisdiction as a judicial function, and in its exercise of this jurisdiction it has kept within the limits which characterize judicial action". Hudson M, *The Permanent Court of International Justice, 1920-1942: A Treatise*. (New York: The Macmillan Company, 1943), p. 511.
[35] *Kosovo Advisory Opinion*, *op. cit.*, p. 415, para. 27.
[36] *Loc. cit*.
[37] *Cf.*, *Kosovo Advisory Opinion*, *op. cit.*, p. 421, para. 44.

second guess the requesting organ's course of action, subsequent to the rendering of its opinion, if that organ has correctly requested its opinion.

60. The Court explained its *modus operandi* in earlier advisory opinions, when it said it "will simply address the issues arising in al1 their aspects by applying the legal rules relevant to the situation."[38]

61. This is exactly what the Court is asked to do in the present case, where there are no compelling circumstances for the Court to decline giving its opinion to the Assembly.

62. There is no doubt that the General Assembly has a legitimate interest in the answers to its questions.

63. Once satisfied that the request for an advisory opinion comes from an organ or agency having competence to make it, *ratione personae*, and that it was made within the competence of such organ or agency *ratione materiae*, the Court shall give the opinion requested.

64. The Court has been instrumental in asserting the rights arising out of decolonisation, sovereignty, territorial integrity and self-determination. Therefore, in the unlikely event that it were to refuse to answer both questions, put to it in Resolution A/RES/71/292, thus not heeding its well-known positions, the Court would carve a new status *sui generis* for Mauritius, whereby the latter will be condemned forever to enjoy its rights only in a qualified manner, where subjects of international law are subjected to general rule.

[38] *Nuclear Weapons Advisory Opinion*, *op. cit.*, p. 237, para. 15.

PART III

THE DECOLONISATION OF MAURITIUS WAS NOT LAWFULLY COMPLETED WHEN MAURITIUS WAS GRANTED INDEPENDENCE IN 1968

I. Introduction

65. The first question on which the General Assembly has requested an advisory opinion of the Court is the following:

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

66. The African Union submits that this question should be answered in the negative. The process of decolonisation was incomplete and thus not lawfully completed under international law. The dismemberment of Mauritius by the United Kingdom was a breach of international law, in that it violated the right to self-determination of the people of Mauritius, including the Chagossians. That right continues to be violated to date by the United Kingdom's continued administration of the Chagos Archipelago.

II. The Right to Self-Determination was Part of Customary International Law at the Time of the Separation of the Chagos Archipelago from Mauritius

67. The analysis of the evolution of the principle of self-determination of colonial peoples and territories from 1945 until the adoption of Resolution 1514 (XV) in 1960 ("**Resolution 1514 (XV)**" or "**Resolution 1514**"), suggests that there existed, under general international law, a right to self-determination at the time of the adoption of the Resolution. This legal right gave rise to a corresponding obligation on administering powers to give effect to such right.

68. The rules of international law applicable to the process of decolonisation were developed within the context of the formulation and implementation of the right to self-determination. Self-determination is international law's response to colonialism. Wherever "decolonisation" is mentioned, "self-determination" is recalled concomitantly; be it by international organisations, and especially the United Nations, the findings of the Court, or in the works of international law scholars.

69. It is no longer a matter of dispute in international law, that the right of peoples to self-determination –first expressed in the nineteenth century– is a cardinal principle in modern international law, regarded as *jus cogens*. This *erga omnes* character means that the right to self-determination entails a corresponding duty on the part of all States and international organisations to enforce this right.

70. The key issue, in this case, is whether the right to self-determination was applicable to Mauritius *during the process leading up to its independence*, in particular, at the time when the United Kingdom separated the Chagos Archipelago from Mauritius in 1965. In other words, was the right to self-determination *part of* customary international law *at the critical date*?

71. The General Assembly has, in fact, already answered this question. The formulation of its own first question to the Court makes it clear that the General Assembly considers that a right to self-determination and corresponding obligations to give

effect to that right existed, in customary international law, during the decolonisation process of Mauritius between 1965 and 1968.

72. As further explained below, the five resolutions referred to in the first question – which were all adopted during the relevant period – asserted the existence of that right and its applicability to the decolonisation process of Mauritius.

73. The African Union, therefore, invites the Court to confirm that the General Assembly is correct and that a right to self-determination existed at the critical date and was, accordingly, applicable to the decolonisation process in Mauritius.

A. Customary international law

74. Customary international law arises from a general and consistent practice of States, accepted as law, as provided for by Article 38(1)(b) of the Statute of the Court.

75. A series of resolutions may show the evolution of *opinio juris* towards the creation of a rule of customary international law. This was confirmed by this Court in the *Nuclear Weapons Advisory Opinion*, where it noted that:

> "… General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[39] (emphasis original)

76. It is also well established that a General Assembly resolution can create customary international law by itself. In order for this to happen, the resolution has to evidence

[39] *Nuclear Weapons Advisory Opinion*, *op. cit.*, pp. 254-255, para. 70.

a clear intention that the General Assembly meant to establish a customary international law principle and also needs to secure the unanimous (or near unanimous) support of the Member States of the United Nations. [40]

B. General Assembly resolutions

77. The analysis of the relevant General Assembly resolutions demonstrates that an enforceable right to self-determination *existed in customary international law* at the time when Resolution 1514 was adopted, in 1960. This Resolution reflected the state of international law at the time of its adoption.

78. While self-determination was articulated as a legal right by the General Assembly during the 1950s, it was already referred to in the Charter of the United Nations in 1945.

79. Article 1(2) of the Charter provided that one of the purposes of the Organisation was the development of friendly relations amongst nations "based on respect for the principle of equal rights and self-determination of peoples".[41]

80. This was echoed in Article 55 of the Charter, which referred to the promotion of certain objectives in the field of international economic and social cooperation "[w]ith 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,".[42]

81. It is noteworthy that Article 1(2) of the French version of the Charter, even referred to a *right* to self-determination of peoples, "le *droit* des peuples à disposer d'eux-mêmes" (emphasis added). It read as follows:

[40] International Law Association, London Conference, 2000, Final Report of Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000), pp. 61-65.
[41] UN Charter, *op. cit.*, Article 1(2).
[42] UN Charter, *op. cit.*, Article 55.

> "Développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité de droits des peuples et de leur *droit* à disposer d'eux-mêmes, et prendre toutes autres mesures propres à consolider la paix du monde;" (emphasis added)

82. In 1950, by its Resolution 421(V), the General Assembly explicitly referred to the *right* of peoples and nations to self-determination.[43]

83. In February 1952, it adopted Resolution 545(VI), by 42 votes in favour, 7 against and 5 abstentions, whereby it noted that the right of peoples and nations to self-determination *had already been recognised* as a fundamental right.[44]

84. Later that year, the General Assembly adopted Resolution 637(VII), which called upon the Member States of the United Nations to recognise and promote the realisation of the right to self-determination of colonial peoples and territories, in mandatory terms:

> "the States Members of the United Nations *shall* recognize and promote the realization of *the right of self-determination of peoples of Non-Self-Governing* and Trust Territories who are under their administration."[45] (emphasis added)

85. Similar resolutions were adopted in 1953 (Resolution 738(VIII)) and 1954 (Resolution 833 (IX)).

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[43] General Assembly Resolution 421 (V) "*Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights*" (A/RES/421 (V) of 4 December 1950).

[44] General Assembly Resolution 545 (VI), '*Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination*' (A/RES/545 (VI) of 5 February 1952.

[45] General Assembly Resolution 637 (VII), '*The right of people and nations to self-determination*' (A/RES/637 (VII) of 16 December 1952), para. 2.

86. For instance, Resolution 738(VIII) of 28 November 1953 asked the Commission on Human Rights to give priority to recommendations regarding international respect for the right to self-determination.[46]

87. Similarly, in the context of Resolution 833 (IX) of 4 December 1954, the General Assembly had before it the draft International Covenants on Human Rights transmitted by the Economic and Social Council.[47] It was suggested that both International Covenants have an identical first article[48] explicitly referring to the right to self-determination and to the corresponding obligation of States parties to the Covenants to promote the right to self-determination in Non-Self-Governing and Trust territories.[49] Common Article 1 of the drafts (which was maintained almost identically in the final version of the Covenants) read as follows:

> "1. All peoples have the right to self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> …
>
> 3. The States parties to the Covenant having responsibility for the administration of Non-Self-Governing and Trust Territories shall promote the realization of the right of self-determination on such Territories in conformity with the provisions of the UN Charter."[50] (footnotes omitted)

88. In 1955, the United Nations Secretariat, in a working paper relating to the negotiations of the Covenants, made it clear that the General Assembly had *already* recognised the right to self-determination of peoples and nations and was now to

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[46] General Assembly Resolution 738 (VIII), '*The right of peoples and nations to self-determination*' (A/RES/738 (VIII) of 28 November 1953), para. 3.
[47] General Assembly Resolution 833 (IX), '*Draft International Covenants on Human Rights*' (A/RES/833 (IX) of 4 December 1954); Commission on Human Rights, Report of 10th Session, ECOSOC OR 18th Session, suppl. 7 (E/2573; E/CN.4/705 of April 1954), annexes I, II, III; Economic and Social Council Official Records: Eighteenth Session, Resolutions, Supplement No. 1 (E/2654 of 15 August 1954), p. 8, Resolution 545B.
[48] Commission on Human Rights, Report of 10th Session, *op. cit*., pp. 62, 65 and 66.
[49] United Nations General Assembly, *Draft International Covenants on Human Rights – Report of the Third Committee* (A/3077 of 8 December 1955).
[50] United Nations General Assembly, *Report of the Third Committee*, *op. cit*., p. 20 (footnotes omitted).

formulate an obligation for States to promote and respect this right. The relevant abstract of the working paper read as follows:

> "the General Assembly, the highest organ in the international community had already recognized the right of peoples and nations to self-determination; the next step was to formulate an appropriate article by which States would undertake a solemn obligation to promote and respect that right."[51]

89. Resolution 1188 (XII) adopted two years later, in 1957, by 54 votes to none and 13 abstentions made it clear, using mandatory language, that colonial powers had an obligation to promote and facilitate the exercise of the right to self-determination by colonial peoples. Its first operative paragraph read:

> "[Those Member States bearing responsibility] for the administration of Non-Self-Governing Territories *shall* promote the realization and facilitate the exercise of [the] right [to self-determination] by the people of such Territories."[52] (emphasis added)

90. This paved the way for Resolution 1514(XV), where the General Assembly adopted with 89 votes in favour, none against and 9 abstentions, the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Resolution proclaimed the right to self-determination of colonial peoples in unequivocal terms, declaring that:

> "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[53]

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[51] U.N Secretary-General, Annotation on the Text of the Draft International Covenants on Human Rights, 55, U.N. Doc. A/2929 (July 1,1955), Annex 15.
[52] General Assembly Resolution 1188 (XII), '*Recommendations concerning international respect for the right of peoples and nations to self-determination*' (A/RES/1188 (XII) of 11 December 1957), para. 1(b).
[53] **Dossier No. 55**, General Assembly Resolution 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples" (A/RES/1514 (XV) of 14 December 1960) (hereinafter "**Resolution 1514 (XV)**"), para. 2.

91. The Resolution denounced colonisation as a breach of the fundamental rights of colonial peoples. Its first paragraph read as follows:

> "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the *Charter of the United Nations* and is an impediment to the promotion of world peace and co-operation."[54] (emphasis added)

92. It stipulated that colonial powers had an obligation to give effect to the right to self-determination, declaring, in Paragraph 5, that:

> "Immediate steps *shall* be taken in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."[55] (emphasis added)

93. Since then, virtually all General Assembly resolutions, proclaiming the right to self-determination, refer explicitly to Resolution 1514,[56] strengthening the view that it reflects customary international law, as far as the right to self-determination is concerned.

C. OAU practice in relation to Resolution 1514

94. Being an entity intensely involved in decolonisation, the OAU itself recognised the normative value under general international law of Resolution 1514 (XV) through a succession of its own resolutions.

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[54] **Dossier No. 55**, Resolution 1514 (XV), *op. cit.*, para. 1.
[55] **Dossier No. 55**, Resolution 1514 (XV), *op. cit.*, para. 5.
[56] For example, Resolutions 1064 (XI), 1568 (XV), 1579 (XV), 1596 (XV), 1065 (XV), 1626 (XVI), 1650 (XVI), 1724 (XVI), 1742 (XVI), 1746 (XVI), 1747 (XVI), 1807 (XVII), 1819 (XVII), 1897 (XVIII), 1913 (XVIII), 1949 (XVIII), 1954 (XVIII), 2063 (XX), 2107 (XX), 2184 (XX), 2183 (XXI), 2185 (XXI), 2226 (XXI), 2354 (XXII), 2379 (XXIII), 2383 (XXIII), 2428 (XXIII), 2983 (XXVII), 3162 (XXVIII), and 3292 (XXIX).

95. In one of the first resolutions adopted during the First OAU Conference, the OAU made express reference thereto by stipulating that "*the transfer of power to settler minorities would amount to the provision of United Nations resolution 1514(XV) on violations of Independence*".[57]

D. State practice during the 1950s and after the adoption of Resolution 1514

96. The actions taken by administering powers, in respect of Non-Self-Governing and Trust territories during the 1950s and shortly after the adoption of Resolution 1514, show that they considered the right to self-determination to be an enforceable right under customary international.

97. Between 1950 and 1960, prior to the adoption of Resolution 1514 on 14 December 1960, some thirty Non-Self-governing and Trust territories achieved independence, namely Benin, Burkina Faso, Burma, Cambodia, Cameroon, Chad, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Gabon, Ghana, Guinea, India, Indonesia, Laos, Libya, Madagascar, Malaysia, Mali, Mauritania, Morocco, Niger, Nigeria, Philippines, Senegal, Somalia, Sri Lanka, Sudan, Togo and Tunisia.[58]

98. Also, between 1960 and 1965, in the five years immediately following the adoption of Resolution 1514, nineteen countries followed suit, namely Algeria, Burundi, Central African Republic, Cyprus, Jamaica, Kenya, Kuwait, Malawi, Maldives, Malta, Rwanda, Samoa, Sierra Leone, Singapore, The Gambia, Trinidad and Tobago, Uganda, Tanzania and Zambia.[59]

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[57] Organisation of African Unity, Resolutions Adopted by the First Conference of Independent African Heads of State and Government Held in Addis Ababa, Ethiopia, from 22 to 25 May 1963, p. 2, CIAS/Plen.2/Rev.2, para 3. Paragraphs 1 and 2 of the provision read as follows: "*Have agreed unanimously to concert and co-ordinate their efforts and actions in this field, and to this end have decided on the following measures: 1. DECLARES that the forcible imposition by the colonial powers of the settlers to control the governments and administrations of the dependent territories is a flagrant violation of the inalienable rights of the legitimate inhabitants of the territories concerned; 2. INVITES the colonial powers to take the necessary measures for the immediate application of the declaration of the Granting of Independence to Colonial Countries and Peoples; and INSISTS that their determination to maintain colonies or semi-colonies in Africa constitutes a menace to the peace of the continent*." (capital letters in original version).

[58] *See* The United Nations and Decolonisation, *Trust and Non-Self-Governing Territories* (1945-1999), available at http://www.un.org/en/decolonization/nonselfgov.shtml (last accessed 10 February 2018).

[59] *Loc. cit*.

99. Likewise, the fact that Member States to the United Nations agreed that an enforcement mechanism be put in place to give effect to Resolution 1514 further demonstrates that they considered the right to self-determination to be an enforceable right under international law.

100. In particular, less than a year after the adoption of Resolution 1514, Resolution 1654 (XVI), which was unanimously adopted (with 97 votes to none and 4 abstentions), created the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[60] This Committee, which became widely known as "C24", was given significant powers to oversee the implementation of Resolution 1514, including the power to organise visiting missions to Non-Self-Governing territories and to receive information and petitions from individuals or groups in such territories. It was further given the ability to adopt resolutions for consideration by the General Assembly's Fourth Committee, and ultimately the General Assembly itself.[61]

101. Similarly, a number of Resolutions were adopted by the General Assembly[62] and the Security Council,[63] in the years following the adoption of Resolution 1514, calling for compliance with its terms and condemning failures of administering powers to comply.

102. Of particular note, is the adoption by the General Assembly of Resolution 1803 (XVII) of 14 December 1962 on "Permanent sovereignty over natural resources".

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[60] General Assembly Resolution 1654 (XVI), "*The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples*" (A/RES/1654 (XVI) of 27 November 1961).

[61] Resolution 1654 (XVI), *op. cit.*, paras. 4-6.

[62] *See*, for example, General Assembly Resolution 1810 (XVII), "*The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples*" (A/RES/1810 (XVII) of 17 December 1962), para. 4; General Assembly Resolution 1956 (XVIII), "*The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples*" (A/RES/1956 (XVIII) of 11 December 1963), preamble para. 5 and para. 7; General Assembly Resolution 1979 (XVIII), "*Question of South West Africa*" (A/RES/1979 (XVIII) of 17 December 1963), para. 1.

[63] United Nations Security Council Resolution 163, "*Question Relating to Angola*" (UN Doc S/4835, 9 June 1961); United Nations Security Council Resolution 180, "*Question Relating to Territories Under Portuguese Administration*" (UN Doc S/5380, 31 July 1963); United Nations Security Council Resolution 183, "*Question relating to territories under Portuguese Administration*" (UN Doc S/5380, 31 July 1963), para. 3.

The Preamble of this Resolution refers explicitly to permanent sovereignty over natural wealth and resources as "a basic constituent of the right to self-determination".[64] The fact that this Resolution used this language is further evidence of that there existed *already* at the time of adoption of Resolution 1514 a consolidated *opinio juris* that the right to self-determination formed part of customary international law.

103. In this context, it was not surprising that Resolution 2625 (XXV) which was 'debated' between 1962 and 1970 and entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", simply codified long-standing and long-existing customary international law when it referred to the principle of equal rights and self-determination of peoples. The Resolution made it clear that:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the *Charter of the United Nations*, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[65] (emphasis original)

104. And it further declared:

> "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."[66]

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[64] General Assembly Resolution 1803 (XVII), "*Permanent sovereignty over natural resources*" (A/RES/1803 (XVII) of 14 December 1962), preamble para. 2.
[65] General Assembly Resolution 2625 (XXV), "*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*" (A/RES/2625 (XXV) of 24 October 1970) (hereinafter "**Resolution 2625 (XXV)**"), Annex, para. 1, principle 5, para. 1.
[66] Resolution 2625 (XXV), *op. cit.*, Annex, para. 1, principle 5, para. 6.

105. The final part of Resolution 2625 (XXV) confirms that the fundamental nature of the right to self-determination. Indeed, in its relevant part, Resolution 2625 stated:

> "The principles of the Charter which are embodied in this Declaration constitute *basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles*."[67] (emphasis added)

106. The fact that the right to self-determination form an intrinsic part of State practice in the 1960s is illustrated by Lowe who points out that "the idea that colonies were entitled to independence had been widely accepted by the 1960s, particularly in the United Kingdom … In 1960 General Assembly Resolution 1514 (XV) had declared the subjection of peoples to alien subjugation, domination and exploitation a fundamental denial of human rights, and affirmed the right of all peoples to self-determination."[68]

E. Decisions of the Court

107. The Court has endorsed the principle and right of self-determination, as formulated in Resolution 1514.

108. In the 1971 *Namibia Advisory Opinion*, the Court had already specifically referred to the Resolution as "an important stage" in the development of international law regarding Non-Self-Governing territories.[69]

109. By 1975, in the *Western Sahara Advisory Opinion*, the Court relied on the right to self-determination of colonial people. It referred to Resolution 1514 as the basis for the process of decolonisation.[70] It also observed that:

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[67] Resolution 2625 (XXV), *op. cit.*, Annex, para. 3.
[68] Lowe V, *International Law* (Oxford University Press, 2007), Chapter 3, p. 57.
[69] *Namibia Advisory Opinion*, *op. cit.*, p. 31, para. 52.
[70] *Western Sahara Advisory Opinion*, *op. cit.*, p. 32, para. 57.

> "The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV)."[71]

110. Again, in the *Western Sahara Advisory Opinion*, the Court alluded to the correlative obligation of administering powers to give effect to the right of self-determination. It stated that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" and that the "validity of the principle of self-determination" could be "defined as the need to pay regard to the freely expressed will of peoples".[72]

111. In its Judgment of 30 June 1995 in the *East Timor* case, the Court stated that:

> "The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court …; *it is one of the essential principles of contemporary international law*."[73] (emphasis added)

> "… 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."[74] (emphasis original)

112. Further, in the *Wall Advisory Opinion*, the Court noted that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV), pursuant to which "[e]very State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] … of their right to self-determination."[75]

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[71] *Western Sahara Advisory Opinion*, *op. cit.*, p. 31, para. 55.
[72] *Western Sahara Advisory Opinion, op. cit.*, pp 31 and 33, paras 55 and 59.
[73] *East Timor (Portugal v. Australia), Judgement*, I.C.J. Reports 1995, p. 90, p. 102, para. 29.
[74] *Loc. cit*.
[75] *Wall Advisory Opinion*, *op. cit.*, pp. 171-172, para. 88.

F. Decisions of the Court of Justice of the European Union

113. In at least two of its judgments, the Court of Justice of the European Union (CJEU) has recognized that the principle of self-determination was part of customary international law.

114. In *Council v Front Polisario*, the CJEU, referring to the jurisprudence of the Court, had clearly established the customary nature of the self-determination principle when it stated:

> "In that regard, it should be noted, first of all, that the customary principle of self determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, *a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence. It is, moreover, a legally enforceable right erga omnes and one of the essential principles of international law*." [76] (emphasis added)

115. More recently, in its Judgment of 27 February 2018, the CJEU reaffirmed that the principle of self-determination, as stated in Article 1 of the Charter of the United Nations, is among the "rules of general international law".[77]

G. Scholarly consensus

116. A majority of scholars, including those writing in the early 1960s, consider that an enforceable right to self-determination formed part of general international law when Resolution 1514 was adopted.

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[76] European Court of Justice, Judgment of 21 December 2016, *Council v Front Polisario*, C-104/16 P, EU:C:2016:973, para. 88.

[77] European Court of Justice, Judgment of February 27th 2018, *The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, C-266/16, para. 63.

117. Judge Higgins, writing in 1963, noted that the Declaration must be taken to represent the wishes and beliefs of the full membership of the United Nations. She stressed that the right to self-determination is regarded as a legal right enforceable here and now.[78]

118. Other sources from the same period refer to the right to self-determination as expressed in the Declaration as an enforceable right.

119. For instance, Abi-Saab wrote in 1962 that:

> "The attitude of the newly independent states can be very unconventional in this respect. For them, the principle of self-determination reigns supreme. *It is pre-eminent among other rules and technicalities of international law*. They have successfully used it in the United Nations, in spite of heavy resistance and the invocation of the domestic jurisdiction clause by the colonial powers." [79] (emphasis added)

120. Similarly, Castañeda referred to Resolution 1514 as the "modern interpretation of the principle of self-determination rendered by the most representative organ of the international community, on the basis of political trends and events since the Charter was signed". He stressed that Resolution 1514 "not only reflects the change that has been wrought; it also symbolises and concretises a new politico-juridical conception: the definite repudiation and end of colonialism".[80]

[78] Higgins R, *The Development of International Law Through the Political Organs of the UN* (Oxford University Press (1963)), p. 100-101.
[79] Abi-Saab G, *The Newly Independent States and the Rules of International Law: An Outline*, (1962) 8 Howard L.J. (2) 95, p. 112.
[80] Castañeda J, *Legal Effects of United Nations Resolutions* (New York, Columbia University Press, (1969)), p. 105.

121. Lachs also stated that the Resolution bridged the gap regarding self-determination between the state of affairs at the time of the adoption of the Charter and the situation at the time of the Declaration.[81]

122. Furthermore, in 1963, certain members of the International Law Commission referred to the right to self-determination as a rule of *jus cogens*.[82]

123. This view was also taken by scholars many years after the issuance of Resolution 1514.

124. Abi-Saab, in 1977, noted that Resolution 1514 "clearly reveal[ed] the legal conviction of the international community as a whole on the different components of the principle of self-determination".[83]

125. Crawford explained that it had achieved a quasi-constitutional status in international law, which was comparable to the Universal Declaration of Human Rights and the Charter itself.[84]

126. Shaw, writing in 1986, situated the development of the right of self-determination in a series of incremental general initiatives pursued by the General Assembly from the early 1950s onwards, which were reinforced by the application of the right in specific situations.[85]

127. Thus, there existed by 1960, and in any case in 1965, when the United Kingdom separated the Chagos Archipelago from Mauritius, an enforceable right to self-

[81] Lachs M, "*The right of self-determination (169)*", in: Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law (Brill, Boston (1980), First published online 1980).
[82] *Yearbook of the International Law Commission (1963), Volume I, Summary records of the fifteenth session (6 May-12 July 1963)*, UN Doc A/CN.4/SER.A/1963, p 155.
[83] Abi-Saab G., *Wars of National Liberation and the Development of Humanitarian Law*, in Akkerman, Van Krieken and Pannenborg (eds), Declarations on principles, A Quest for Universal Peace (Liber Röling) (Sijthoff, Leyden, (1977)), p. 372.
[84] Crawford J, *The Creation of States in International law* (2nd ed. Clarendon Press (2006)), p. 604 (referring to Resolution 1514 (XV) as having achieved a quasi-constitutional status).
[85] Shaw M, *Title to territory in Africa: international legal issues* (Clarendon Press (1986)), pp. 88-89. *See also* Cassese A, *Self-Determination of Peoples* (Cambridge University Press (1995)), p. 70; Crawford J, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press (2012)), p. 646; Daillier P and Pellet A, *Droit international public* (7th ed., LGDJ (2002)), pp. 519-520.

determination of colonised peoples and territories and a correlated obligation of administering powers to give effect to that right, as part of customary international law.

128. There is no doubt that Mauritius was a Non-Self-Governing territory to which the right applied, and accordingly that the United Kingdom had an obligation to give effect to such right, as the international law regime of decolonisation applies *a fortiori* to a territory whose people have not achieved self-determination.

III. The Right to Self-Determination was Breached During the Decolonisation Process of Mauritius

129. The excision of the Chagos Archipelago from Mauritius prior to its independence constituted a breach of the right to self-determination of the people of Mauritius, including the Chagossians.

130. The right to self-determination is a right vested in peoples. It entails the right of peoples to determine their internal political status and their external status. It is intrinsically linked to the notion of territorial integrity, in that it can only be exercised by peoples within specific territorial units.

131. This, in turn, means that the territorial unit cannot be dismembered prior to the exercise of the right to self-determination by the people of that territory.

132. This principle was reiterated in multiple resolutions and decisions, discussed below, of the General Assembly, the OAU and the African Union, including resolutions and decisions specifically addressing the situation in the Chagos Archipelago. The resolutions and decisions made it clear that the separation of the Chagos Archipelago from Mauritius during the decolonisation process of Mauritius, shortly prior to its independence, constituted a breach of the right to self-determination.

133. In its first question to this Court, the General Assembly specifically refers to these resolutions, in particular Resolution 2066 (XX). It is thus implicit from the first

question that the General Assembly considers the separation of the Chagos Archipelago from Mauritius prior to its independence to be a breach of the right to self-determination of the people of Mauritius.

134. The African Union invites the Court to confirm that the General Assembly has been and is correct in saying that the separation of the Chagos Archipelago from Mauritius prior to the independence of Mauritius was contrary to international law, in that it was a breach of the right to self-determination of the people of Mauritius, including the Chagossians.

A. The scope of the right to self-determination

135. The essential feature of the right to self-determination is the principle that its application requires free and genuine expression of the peoples concerned.

136. This principle was established in Paragraph 2 of Resolution 1514, which provided that, by virtue of the right to self-determination, people "freely determine their political status and freely pursue their economic, social and cultural development" and was confirmed by the Court in the *Western Sahara Advisory Opinion*.[86]

137. It further means that peoples must have a free choice as to whether to become an independent State, freely to associate with a pre-existing independent State, or to integrate into a pre-existing State.[87]

138. In the context of decolonisation, the right to self-determination was vested in peoples from all territories of colonial type.

139. Paragraph 2 of Resolution 1514 referred to the right of all people to self-determination and paragraph 5 alluded to the obligation to take immediate steps "in

[86] *Western Sahara Advisory Opinion*, *op. cit.*, p. 32, para. 55.
[87] **Dossier No. 78,** General Assembly Resolution 1541 (XV) "*Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*" (A/RES/1541 (XV) of 15 December 1960) (hereinafter "**Resolution 1541 (XV)**"), Annex, Principle VI; **Dossier No. 42**, General Assembly Resolution 742 (VIII) "*Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government*" (A/RES/742 (VIII) of 27 November 1953), para 6.

Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."[88] (emphasis added)

140. Resolution 1541 (XV) defined "Non-Self-Governing Territory", in Principle IV, as a "territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it".[89] This principle is supplemented by Principle V, which adds that where a *prima facie* case of geographical and ethnical and cultural distinctiveness has been established, other elements pertaining to "political subordination" must be taken into consideration.[90]

141. The fact that the right to self-determination applied to all territories of colonial type was confirmed by the ICJ in the *Namibia Advisory Opinion* where the Court held 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 al1 of them. The concept of the sacred trust was confirmed and expanded to al1 "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus, it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces al1 peoples and territories which "have not yet attained independence"."[91]

[88] **Dossier No. 55**, Resolution 1514 (XV), *op. cit*., para. 2.
[89] **Dossier No. 78**, Resolution 1541 (XV), *op. cit.*, Principle IV.
[90] **Dossier No. 78**, Resolution 1541 (XV), *op. cit.*, Principle V.
[91] *Namibia Advisory Opinion*, *op. cit.*, p. 31, para. 52.

142. Furthermore, the right to self-determination was applicable to all inhabitants of a colonial territory within that territorial unit.

143. That the right to self-determination was applied within specific territorial units was based on the principle of territorial integrity. This principle was affirmed in the Preamble of Resolution 1514 in the following terms:

> *"Convinced* that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory …"[92] (emphasis added)

144. It was repeated in Paragraph 6 of the Resolution:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[93]

145. Dugard, acting at the time as a Special Rapporteur of the Human Rights Commission on the situation of human rights in the Palestinian territories occupied by Israel, more recently restated the law as follows:

> "The right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory."[94]

146. This was reiterated by a number of public international law scholars, including Crawford who explained that the principle of self-determination "is not a right applicable just to any group of people desiring political independence or self-

[92] **Dossier No. 55**, Resolution 1514 (XV), *op. cit.*, para. 11.
[93] **Dossier No. 55**, Resolution 1514 (XV), *op. cit.*, para. 6.
[94] Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2A, 8 September 2003, E/CN.4/2004/6, para. 15.

government. ... It applies as a matter of right only after the unit of self-determination has been determined".[95]

147. Finally, the fact the right to self-determination was exercised by peoples within a colonial unit meant that the relevant colonial unit could not be dismembered prior independence.

148. The prohibition of the dismemberment of colonial units by the administering power prior to independence arose from paragraph 6 of the Resolution 1514. Indeed, paragraph 6 of Resolution 1514 read as follows:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[96]

149. During the discussions in respect of the drafting of paragraph 6, many delegates made it clear that they construed paragraph 6 as a prohibition against the dismemberment of Non-Self-Governing territories prior to their independence.

150. For example, Ireland, after reciting, amongst others, paragraph 6, stated that "[i]n these paragraphs definite and clear-cut principles are asserted *without limitation of time* or geography…"[97] (emphasis added). Cyprus stated that paragraph 6 was "essential in order to counter the consequences of 'divide and rule', which often is the sad legacy of colonialism and carries its evil effects further into the future".[98] Similar views were expressed by Iran, the United Arab Republic, Bolivia, Nepal and Indonesia.[99]

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[95] Crawford J, *The Creation of States*, *op. cit*., p. 127.
[96] **Dossier No. 55**, Resolution 1514 (XV), *op. cit.*, para. 6.
[97] **Dossier No. 66**, General Assembly, verbatim record, 15th Session, 935th Plenary Meeting, Monday, 5 December 1960, 3:00 p.m. (A/PV.935), para. 104.
[98] **Dossier No. 72**, General Assembly, verbatim record, 15th Session, 945th Plenary Meeting, Tuesday, 13 December 1960, 3:00 p.m. (A/PV.945), paras. 92-93.
[99] **Dossier No. 57**, General Assembly, verbatim record, 15th Session, 926th Plenary Meeting, Monday, 28 November 1960, 3:00 p.m. (A/PV.926), paras. 52, 71 (Iranian representative); **Dossier No. 60**, General Assembly, verbatim record, 15th Session, 929th Plenary Meeting, Wednesday, 30 November 1960, 3:00 p.m. (A/PV.929), paras. 178-179 (UAR representative); **Dossier No. 64**, General Assembly, verbatim record, 15th Session, 933rd Plenary Meeting, Friday, 2 December 1960, 3:00 p.m. (A/PV.933), para. 169-172 (Bolivian representative); **Dossier No. 66**, General Assembly, verbatim record, 15th

151. Even the United Kingdom recognised "the importance to the future peace and prosperity of Africa that the countries of that continent should retain their *integrity"*.[100] (emphasis added)

152. The rationale for the prohibition was that the right to self-determination must be exercised within a territorial unit. This means that it cannot operate properly if the relevant unit has been dismembered prior to independence.[101]

153. Some delegates during the discussions regarding paragraph 6 also appeared to consider that the prohibition would prevent a part of the Non-Self-Governing territory, in particular the wealthiest part, from negotiating a separate agreement with the former colonial power.[102]

154. This prohibition to dismember colonial units prior to their independence was endorsed repeatedly by a series of UN Resolutions, adopted at a large majority, after the adoption of Resolution 1514.

155. For example, shortly after the adoption of the Resolution 1514, the General Assembly recognised the imperative "need for adequate and effective guarantees to ensure the successful and just implementation of the right of self-determination on the basis of respect for the unity and territorial integrity of Algeria."[103]

156. In 1961, the General Assembly expressed its deep concern in Resolution 1654 (XVI) that, contrary to paragraph 6 of the Resolution 1514, acts aimed at the partial

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Session, 935th Plenary Meeting, Monday, 5 December 1960, 3:00 p.m. (A/PV.935), paras. 72-74 (Nepalese representative); **Dossier No. 67**, General Assembly, verbatim record, 15th Session, 936th Plenary Meeting, Monday, 5 December 1960, 8:30 p.m. (A/PV.936), para. 55 (Indonesian representative).

[100] **Dossier No. 56**, General Assembly, verbatim record, 15th Session, 925th Plenary Meeting, Monday, 28 November 1960, 10:30 a.m. (A/PV.925), para. 47.

[101] Raic D, *Statehood and the law of self-determination* (Kluwer Law International Law (2002)), p. 304.

[102] Clark R, *The decolonization of East Timor and the United Nations Norms on self-determination and aggression*, 7 Yale J. World PUB. ORD. 2. 30 (1980), p. 30.

[103] General Assembly Resolution 1573 (XV), "*Question of Algeria*" (A/RES/1573 (XV) of 19 December 1960), para 2. *See also* General Assembly Resolution 1724 (XVI), "*Question of Algeria*" (A/RES/ 1724 (XVI) of 20 December 1961).

or total disruption of national unity and territorial integrity were being carried out in the process of decolonisation.[104]

157. For the purposes of the exercise of the right to self-determination, the people of Mauritius was the people within the relevant colonial unit. However, the colonial unit was dismembered prior to the exercise of the right to self-determination by this people, in breach of the right to self-determination.

B. Resolutions of the General Assembly issued during the decolonisation process of Mauritius

158. Between 1965 and 1968, after the separation of the Chagos Archipelago from Mauritius but before the independence of Mauritius, the General Assembly reiterated, in a number of resolutions, adopted with large majorities and no vote against them, the prohibition of dismemberment of colonial units prior to independence. Several resolutions specifically declared the separation of the Chagos Archipelago from Mauritius as illegal under international law.

159. The Court has considered, in the context of Resolution 2145 (XXI), which related to the illegality of the mandate for South Africa that General Assembly resolutions may make determinations about the legality of a situation and that the Assembly may adopt resolutions which have an operative design. This was formulated by the Court as follows:

> "This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design." [105]

[104] **Dossier No. 101**, General Assembly Resolution 1654 (XVI), "*The situation with regard to the implementation of the 'Declaration on the granting of independence to colonial countries and peoples'*" (A/RES/1654 (XVI) of 27 November 1961) (hereinafter "**Resolution 1654 (XVI)**"), preamble para. 6.
[105] *Namibia Advisory Opinion*, *op. cit.*, p. 50, para. 105.

160. On 16 December 1965, the General Assembly adopted Resolution 2066 (XX) with 89 votes to none with 18 abstentions.[106]

161. That resolution specifically addressed the situation in Mauritius "and other islands composing the Territory of Mauritius". It condemned any step taken by the United Kingdom "to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base" as a violation of Resolution 1514 (XV), in particular paragraph 6, and, *ipso facto,* as an act against the United Nations' objectives and purposes.[107] The resolution further confirmed that "the [United Kingdom] ha[d] not fully implemented Resolution 1514", invited the United Kingdom "to take effective measures with a view to the immediate and full implementation of the Resolution 1514" and called on it "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".[108]

162. During the process leading up to the adoption of this Resolution, a number of States before the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the "**Special Committee**") [109] and the Fourth Committee of the UN General Assembly (the "**Fourth Committee**"), considered that *the separation* of the Chagos Islands from Mauritius would be *a breach of international law*.

163. Several States called upon the Special Committee to denounce the UK plans to establish a joint military base with the United States on the island of Diego Garcia.[110]

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[106] **Dossier No. 148**, General Assembly, verbatim record, 20th Session, 1398th Plenary Meeting, Thursday, 16 December 1965, 3:00 p.m. (A/PV.1398), p. 9.
[107] **Dossier No. 146**, General Assembly Resolution 2066 (XX) "*Question of Mauritius*" (A/RES/2066 (XX) of 16 December 1965) (hereinafter "**Resolution 2066 (XX)**"), preamble para.5.
[108] **Dossier No. 146**, General Assembly Resolution 2066 (XX), *op. cit.*, preamble para. 4 and paras 3 and 4.
[109] The Special Committee was tasked *inter alia* with examining the application of Resolution 1514: **Dossier No. 101**, Resolution 1654 (XVI), *op. cit*.
[110] **Dossier No. 251**, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Nineteenth Session, 1964-1965 (A/5800/Rev.1), pp. 349-350 (USSR representative), p. 351 (Polish representative) and p. 351 (Syrian representative).

164. For example, Tanzania characterised the United Kingdom's actions as "establish[ing] a new colony" and condemned them as contrary not only to Resolution 1514, but also general principles of international law.[111] Similar concerns were raised by Cuba, India, Argentina, Bulgaria and Venezuela.[112] 17 OAU member States acted as sponsors for General Assembly Resolution 2066 (XX).[113]

165. Following the adoption of the Resolution, the Special Committee stressed the United Kingdom's failure to comply with Resolutions 1514 and 2066, in particular, in relation to the respect of territorial integrity of Mauritius.

166. Resolution 2232 (XXI), which was adopted with a large majority and no vote against it,[114] on 20 December 1966, recalled Resolutions 1514 (XV) and 2066 (XX) and reiterated "[the General Assembly's] declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".[115]

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[111] **Dossier No. 151**, Fourth Committee, summary record, 1557th Meeting, Tuesday, 16 November 1965, 10:55 a.m. (A/C.4/SR.1557), paras. 49-50. *See also* **Dossier No. 153**, Fourth Committee, summary record, 1566th Meeting, Wednesday, 24 November 1965, 11:00 a.m. (A/C.4/SR.1566), para. 2.

[112] **Dossier No. 152**, Fourth Committee, summary record, 1558th Meeting, Tuesday, 16 November 1965, 3:00 p.m. (A/C.4/SR.1558), para. 4 (Cuban representative); **Dossier No. 153**, Fourth Committee, summary record, 1566th Meeting, Wednesday, 24 November 1965, 11:00 a.m. (A/C.4/SR.1566), paras. 5-6 (Indian representative); **Dossier No. 154**, Fourth Committee, summary record, 1570th Meeting, Friday, 26 November 1965, 3:20 p.m. (A/C.4/SR.1570), para. 2 (Argentinian representative), para. 27 (Bulgarian representative) and para. 36 (Venezuelan representative).

[113] **Dossier No. 149**, Report of the Fourth Committee, "*Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Reports of the Special Committee of the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples – Chapters Concerning Territories Not Considered Separately*" (A/6160 of 13 December 1965), p. 6.

[114] Resolution 2232 (XXI) was adopted with 94 votes for, 0 against and 24 abstentions – **Dossier No. 172**, General Assembly, verbatim record, 21st Session, 1500th Plenary Meeting, Tuesday, 20 December 1966, 10:30 a.m. (A/PV.1500), p. 12.

[115] **Dossier No. 171**, General Assembly Resolution 2232 (XXI) "*Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Filbert And Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Turks And Caicos Islands And The United States Virgin Islands*" (A/RES/2232(XXI) of 20 December 1966) (hereinafter "**Resolution 2232 (XXI)**"), preamble paras. 1-3 and paras. 2-4.

167. It reaffirmed "the inalienable right of the people of these Territories to self-determination and independence" and called upon "the administering Powers to implement without delay the relevant resolutions of the General Assembly".[116]

168. When making the aforementioned declaration and reaffirmation, the Resolution made reference to, and declared its approval of, the chapter of the Special Committee's Fifth Report relating to Mauritius.[117]

169. The United Kingdom did not abide by Resolution 2232 (XXI). Ten days after the General Assembly had passed the Resolution, on 30 December 1966, the United Kingdom concluded a bilateral agreement with the United States, by exchange of notes, on the Availability for Defence Purposes of the British Indian Ocean Territory.[118]

170. This fact did not escape the attention of the Special Committee. On 5 December 1967, the Special Committee transmitted its Sixth Report, which explicitly stated that it had once again called on the United Kingdom "to return to Mauritius … the islands detached from [it] in violation of [its] territorial integrity and to desist from establishing military installations therein".[119]

171. Moreover, a number of representatives explicitly condemned the United Kingdom's failure to comply with its obligations under Resolution 2066[120] with the Indian representative stating explicitly that the dismemberment of the Chagos Islands from Mauritius constituted a "clear violation of General Assembly resolution 2066 (XX)".[121]

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[116] **Dossier No. 171**, Resolution 2232 (XXI), *op. cit.*, preamble paras. 1-3 and paras. 2-4.
[117] **Dossier No. 171**, Resolution 2232 (XXI), *op. cit.*, preamble para. 2 and para. 1.
[118] "*Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the British Indian Ocean Territory*" (signed an entered into force 30 December 1966) Treaty Series No. 15 (1967).
[119] **Dossier No. 254**, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Twenty-Second Session, 1967 (A/6700/Rev.1 (Part III), p. 37.
[120] **Dossier No. 254**, Report of the Special Committee, Twenty-Second Session, *op. cit*., p. 48 (Polish representative) and p. 49 (Bulgarian representative).
[121] **Dossier No. 254**, Report of the Special Committee, Twenty-Second Session, *op. cit*., p. 48.

172. Shortly after the Special Committee transmitted its Sixth Report, the Fourth Committee of the UN General Assembly met again to discuss the implementation of Resolution 1514 (XV).[122] During those discussions, a number of representatives condemned the United Kingdom's course of action in respect of Mauritius and the Chagos Islands.[123] At the conclusion of its meetings, the Fourth Committee adopted draft resolution A/C.4/L.899 and subsequently recommended it to the General Assembly.[124] The text of that resolution reflected what would become General Assembly Resolution 2357.

173. Resolution 2357 (XXII), adopted at a large majority and with no vote against,[125] on 19 December 1967, recalled *inter alia*, Resolutions 1514 (XV), 2066 (XX) and 2232 (XXI), and referred to the Special Committee's Sixth Report, including the chapter on Mauritius. In this Resolution, the General Assembly expressed its deep concern "at the information contained in the report of the Special Committee on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories and at the creation by the administering Powers of military bases and installations in contravention of the relevant General Assembly resolutions".

174. It reaffirmed "the inalienable right of the people of these Territories to self-determination and independence".

175. Furthermore, it called "upon the administering Powers to implement without delay the relevant resolutions of the General Assembly"; and reiterated "[the General

[122] **Dossier No. 201**, Fourth Committee, summary record, 1741st Meeting, Thursday, 7 December 1967, 11:00 a.m. (A/C.4/SR.1741); **Dossier No. 202**, Fourth Committee, summary record, 1750th Meeting, Thursday, 14 December 1967, 4:05 p.m. (A/C.4/SR.1750); **Dossier No. 203**, Fourth Committee, summary record, 1751st Meeting, Friday, 15 December 1967, 11:00 a.m. (A/C.4/SR.1751); **Dossier No. 204**, Fourth Committee, summary record, 1752nd Meeting, Friday, 15 December 1967, 3:25 p.m. (A/C.4/SR.1752); **Dossier No. 205**, Fourth Committee, summary record, 1755th Meeting, Saturday, 16 December 1967, 3:30 p.m. (A/C.4/SR.1755).

[123] **Dossier No. 204**, Fourth Committee, 1752nd Meeting, *op. cit*., paras. 3 (Indian representative) and 82-84 (Polish representative).

[124] **Dossier No. 205**, Fourth Committee, 1755th Meeting, *op. cit.*, p. 562; **Dossier No. 200**, Report of the Fourth Committee, "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples – Territories not Considered Separately" (A/7013 of 18 December 1967), pp. 15 and 22-24.

[125] Resolution 2357 (XXII) was adopted with 86 votes for, 0 against and 27 abstentions – see **Dossier No. 199**, General Assembly, verbatim record, 22nd Session, 1641st Plenary Meeting, Tuesday, 19 December 1967, 3:00 p.m. (A/PV.1641), p. 14.

Assembly's] declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".[126]

C. Resolutions and Decisions of the OAU/African Union on the decolonisation of Mauritius

176. As early as 1980, the Assembly of Heads of State and Government of the OAU adopted a resolution on Diego Garcia, in which it stressed the fact that Diego Garcia "has always been an integral part of Mauritius" and demanded that it "be unconditionally returned to Mauritius."[127]

177. In 2000 – the very last year of its existence before it was replaced by the African Union – the OAU adopted Decision AHG/Dec.159 (XXXVI) ('Decision of Chagos Archipelago') expressing concern "that the Chagos Archipelago was unilaterally and illegally excised by the colonial power from Mauritius prior to its independence in violation of UN Resolution 1514."[128]

178. Subsequent decisions of the Assembly of the African Union went further, and constantly emphasized the fact that the excision of the Chagos Archipelago from Mauritius in 1965 was contrary to international law and to the relevant resolutions of the General Assembly, including Resolution 1514.

179. In 2010, Decision Assembly/AU/Dec.331 (XV) reaffirmed that "the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of Mauritius in violation of UN Resolutions 1514

[126] **Dossier No. 198**, General Assembly Resolution 2357 (XXII) "*Question Of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert And Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Swaziland, Tokelau Islands, Turks And Caicos Islands And The United States Virgin Islands*" (A/RES/2357(XXII) of 19 December 1967) (hereinafter "**Resolution 2357 (XXII)**"), preamble para. 1, 2 and 5, and paras. 2-4.
[127] **Exhibit AU-5**, Resolution AHG/Res.99 (XVII), Resolution on the Diego Garcia, July 1980, preamble paras. 1 and 3.
[128] **Exhibit AU-6**, Decision AHG/Dec.159 (XXXVI), Decision on Chagos Archipelago, July 2000, para. 1.

(XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence, forms an integral part of the territory of the Republic of Mauritius …".[129]

180. In 2011, the Assembly of the African Union, at its 16th Ordinary Session, held in Addis Ababa, adopted Resolution Assembly/AU/Res.1 (XVI) ('Decision on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago') recalling that "the Chagos Archipelago, including Diego Garcia, was unlawfully excised by the United Kingdom, the former colonial power, from the territory of Mauritius prior to independence of Mauritius, in violation of UN Resolution 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence."[130]

181. In 2015, the Assembly of the African Union, adopted Resolution Assembly/AU/Res.1 (XXV) ('Resolution on Chagos Archipelago') in which, it recalled again "the unlawful excision of the Chagos Archipelago, including Diego Garcia, from the territory of Mauritius by the United Kingdom, the former colonial power, prior to the independence of Mauritius, in violation of international law and UN Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence, as well as UN Resolutions 2232 (XXI) of 20 December 1966 and 2357(XXII) of 19 December 1967."[131]

182. The same Resolution made a *renvoi* to the Malabo Declaration adopted by the Third Africa-South America Summit in 2013.[132] The Malabo Declaration stated that:

> "the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of the Republic of

[129] **Exhibit AU-7**, Decision Assembly/AU/Dec.331 (XV), Decision on the Sovereignty of the Republic of Mauritius Over the Chagos Archipelago, July 2010, para. 1.
[130] **Exhibit AU-8**, Resolution Assembly/AU/Res.1(XVI), Resolution on Chagos Archipelago, January 2011, preamble para. 1
[131] **Exhibit AU-11**, Resolution Assembly/AU/Res.1(XXV), Resolution on Chagos Archipelago, June 2015, preamble para. 1.
[132] **Exhibit AU-11**, Resolution on Chagos Archipelago, *op. cit.*, preamble para. 4(ii).

Mauritius in violation of international law and UN Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965, forms an integral part of the territory of the Republic of Mauritius. In this regard, we note with grave concern that despite the strong opposition of the Republic of Mauritius, the United Kingdom purported to establish a 'marine protected area' around the Chagos Archipelago which contravenes international law and further impedes the exercise by the Republic of Mauritius of its sovereignty over the Archipelago and of the right of return of Mauritian citizens who were forcibly removed from the Archipelago by the United Kingdom …"[133]

183. Finally, during its latest Session in January 2018, the Assembly of the African Union adopted Decision Assembly/AU/Dec.684 (XXX), which recalled "United Nations (UN) Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 in relation to the continued unlawful occupation by the United Kingdom of the Chagos Archipelago, which forms an integral part of the territory of the Republic of Mauritius and over which the Republic of Mauritius is unable to effectively exercise its sovereignty."[134]

IV. The Decolonisation Process of Mauritius was Unlawful and Incomplete under International Law

184. The United Kingdom dismembered the territory of Mauritius prior to its independence by separating the Chagos Island from the territory of Mauritius. This was contrary to customary international law as enshrined, in particular, in Resolution 1514.

185. The right to self-determination of the people of Mauritius, including the Chagossians, was not exercised within the relevant territorial unit. As highlighted by the General Assembly during the decolonisation process of Mauritius, this constituted a blatant breach of the right to self-determination, of the people of Mauritius, including the Chagossians under international law.

[133] **Exhibit AU-9**, Third Africa-South America Summit, Malabo Declaration, February 2013, para. 28.
[134] **Exhibit AU-13**, Decision Assembly/AU/Dec.684(XXX), *op. cit.*, preamble para. 2.

186. There is, thus, no doubt that the decolonisation process of Mauritius was incomplete and thus unlawful under international law.

187. This incomplete decolonisation process has also led to the violation of Mauritius' *territorial integrity* in total disregard for the fundamental rules and principles that are enshrined in the Charter of the United Nations.

188. The same OAU and African Union resolutions and decisions, that were referred to above, have constantly emphasized the fact that the excision of the Chagos Archipelago in 1965 did not only constitute a violation of the right of self-determination of the people of Mauritius, including the Chagossians, but also a violation of the territorial integrity of Mauritius.

189. For instance, referring explicitly to one of the fundamental principles of the OAU, which is the "respect for the sovereignty and territorial integrity of each state", the Assembly of Heads of State and Government of the OAU, in 1980, denounced the "militarization of Diego Garcia" and recognized that "Diego Garcia was not ceded to Britain".[135] The Assembly declared that Diego Garcia "has always been an integral part of Mauritius".

190. The violation of the territorial integrity of Mauritius prevents the latter from exercising its sovereignty over the Chagos Archipelago, which forms an integral part of Mauritius. In 2010, the Assembly of the African Union, by Decision Assembly/AU/Dec.331 (XV), expressly called upon the United Kingdom "to expeditiously put an end to its continued unlawful occupation of the Chagos Archipelago with a view to enabling Mauritius to *effectively exercise its sovereignty* over the Archipelago."[136] (emphasis added)

[135] **Exhibit AU-5**, Resolution AHG/Res.99 (XVII), Resolution on the Diego Garcia, July 1980, preamble paras. 2, 4 and 5.
[136] **Exhibit AU-7**, Decision Assembly/AU/Dec.331 (XV), Decision on the Sovereignty of the Republic of Mauritius Over the Chagos Archipelago, July 2010, para. 1.

191. Therefore, the incomplete decolonisation process of Mauritius is contrary to the right to self-determination as well as the principle of respect for State sovereignty[137] and, its corollary, the principle of respect for territorial integrity.[138] Some African Union Assembly decisions have stressed this inextricable link between the right to self-determination, the principle of state sovereignty and the principle of territorial integrity. As an example, Resolution Assembly/AU/Res.1(XXVIII) affirmed that "the Chagos Archipelago, including Diego Garcia, forms an integral part of the territory of the Republic of Mauritius and that the decolonization of the Republic of Mauritius *will not be complete until it is able to exercise its full sovereignty* over the Chagos Archipelago."[139] (emphasis added)

192. During the last Summit in January 2018, the Assembly adopted Decision Assembly/AU/Dec.684 (XXX) in which it recalled that the situation of the Chagos Archipelago would also have to be assessed in light of UN General Assembly's Resolution 2232 (XXI) of 20 December 1966 and Resolution 2357 (XXII) of 19 December 1967. Those two Resolutions reiterated "that any disruption of the territorial integrity of colonial territories in the decolonization process would be contrary to the UN Charter."[140]

193. In light of the above, it is, therefore, not surprising that the Assembly of the African Union has continuously deplored "the continued unlawful occupation by the United Kingdom of the Chagos Archipelago, thereby denying the Republic of Mauritius the exercise of its sovereignty over the Archipelago and *making the decolonization of Africa incomplete*."[141] (emphasis added)

194. It is not only Africa as a whole that is affected by the unlawful occupation by the United Kingdom of the Chagos Archipelago; this unfortunate situation that disregards the right to self-determination of the people of Mauritius, also has some

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[137] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, I.C.J. Reports 1986, p. 14 (hereinafter ***"Nicaragua***"), p. 111, para. 212.
[138] *Nicaragua*, *op. cit.*, p. 128, para. 251.
[139] **Exhibit AU-12**, Resolution Assembly/AU/Res.1(XXVIII), Resolution on Chagos Archipelago, January 2017, preamble para. 3.
[140] **Dossier No. 171**, Resolution 2232 (XXI), *op. cit*.; **Dossier No. 198**, Resolution 2357 (XXII), *op. cit*.
[141] **Exhibit AU-11**, Resolution Assembly/AU/Res.1(XXV), Resolution on Chagos Archipelago, June 2015, preamble para. 3.

negative impact on the enjoyment by the Chagossians of their fundamental rights under international law.

195. Resolution 2625 (XXV) of the General Assembly made it already clear that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle (of equal rights and self-determination of peoples), as well as *a denial of fundamental human rights*, and is contrary to the Charter."[142] (emphasis added)

196. This was righty pointed out by the Human Rights Committee in its General Comment No. 12 (Article 1: Right to self-determination):

> "In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because *its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights*. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants."[143] (emphasis added)

197. The unlawful and incomplete decolonisation process of Mauritius does not only constitute a violation of the right to self-determination, as guaranteed by customary international law, it also infringes upon the fundamental human rights of present and future generations of Chagossians. The Chagossians have the right under international law to enjoy their political, civil, economic, social and cultural rights as embodied in the two Covenants – *i.e.*, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In particular, they should benefit from the right to freely "dispose of their

[142] General Assembly Resolution 2625 (XXV), *op. cit.*, Annex, para. 1, principle 5.
[143] UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984, para. 1.

natural wealth and resources" and "[i]n no case … be deprived of [their] own means of subsistence".[144]

198. Only the complete decolonisation of Mauritius, in accordance with international law, will allow to put an end to the human tragedy of the Chagossian men, women and children, which commenced at the time of the excision of the Chagos Archipelago from Mauritius. The African Union is confident that the Court will give due consideration to the human dimension of the continued unlawful administration of the Chagos by the United Kingdom.

[144] General Comment No. 12, *op. cit.*, para. 5.

PART IV

The Consequences under International Law arising from the Continued Administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago

199. The second question on which the General Assembly has requested an advisory opinion from the Court in Resolution A/RES/71/292 reads as follows:

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

200. Before dealing with the legal consequences as such, the African Union would like to make general observations in relation to the second question. The African Union will then stress the legal consequences of the continued administration of the Chagos Archipelago arising for the United Kingdom, as well as the legal consequences for other States and international organisations.

I. General Observations

201. The question contained in paragraph (b) of General Assembly Resolution A/71/292 calls for two general observations.

202. *First*, this question should be understood by reference to the specific purpose of a request for an advisory opinion, which is to guide the United Nations organs in

their action and providing them with the necessary elements of law. It does not purport to decide a potential dispute between specific parties.

203. The purpose of advisory opinions was described by the Court itself in the *Wall Advisory Opinion*,

> "advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action" (I.C.J. Reports 1951, p. 19)."[145]

204. The Court's opinion "is given not to the States, but to the organ which is entitled to request it."[146]

205. As previously highlighted by the Court, it is not appropriate to address the issues encompassed in the questions in a manner which "would be substantially equivalent to deciding the dispute between the parties."[147]

206. This allows the Court to fulfil the mission entrusted to it by Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of its Statute, without in any way "circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[148]

207. In the specific circumstances pertaining to the current proceedings, it may be the case that the States directly involved, their nationals or other relevant actors will have already purported to address some of the consequences of the situation prevailing in the Chagos Archipelago.[149]

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[145] *Wall Advisory Opinion*, *op. cit.*, p. 162, para. 60.
[146] *Interpretation of Peace Treaties*, *op. cit.*, p. 71.
[147] *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23), p. 29.
[148] *Western Sahara Advisory Opinion*, *op. cit.*, p. 25 para. 33.
[149] For example, and as recalled by the European Court of Human Rights, sums paid by the United Kingdom to Mauritius in 1973 and 1982 were intended "to assist with the cost of resettlement" of the Chagossians (in 1973), and "*to settle the claims of all the islanders*" (in 1982); see European Court of

208. However, in answering the question, the Court is invited to focus on the general legal principles at stake.

209. The General Assembly has asked the Court to indicate which are "the consequences under international law, including obligations reflected in [its] resolutions, arising from the continued administration" of the Chagos Archipelago.

210. Therefore, the Court is requested to identify the consequences of the application of international obligations "reflected" in relevant resolutions of the General Assembly, that is, obligations under general international law such as, among others, respect for the right to self-determination, including the prohibition of any attempt at dismembering the territory of a colonial country, and of any act violating the territorial integrity of such countries, as well as the guarantee of fundamental human rights.

211. *Second*, the Court is invited to address the legal consequences of the continued administration of the Chagos Archipelago by the United Kingdom, in terms of international responsibility arising out of the wrongdoing State and that of other States and the United Nations.

212. In the *Wall Advisory Opinion*, the Court emphasised that in order to assess the legal consequences of a situation it had to proceed to an assessment of whether that situation is a breach of international law. The relevant part of the decision reads as follows:

> "In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of

Human Rights, *Chagos Islanders v. the United Kingdom*, Decision of 11 December 2012, Application No. 35622/04, paras. 11-12. The African Union takes no position regarding the standing of those payments under international law.

whether that construction is or is not in breach of certain rules and principles of international law."[150]

213. Having concluded that "the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, [were] contrary to various of Israel's international obligations,"[151] the Court went on to address the legal consequences of that conduct in terms of international responsibility. The Court made a distinction between the consequences arising for the wrongdoing State and those arising for other States and the United Nations "[g]iven the character and the importance of the rights and obligations involved."[152]

214. *In casu*, for the reasons explained above,[153] the process of decolonisation of Mauritius was not lawfully completed, because of the separation of the Chagos Archipelago from the Mauritian territory.

215. The Court is now invited to assess the legal consequences arising out of this breach. Given the importance and fundamental character of the obligations at stake, some legal consequences arise necessarily for the United Kingdom – as the wrongdoing state – and for the international community as a whole.

216. The African Union is of the view that the law applicable to the determination of the legal consequences arising from the unlawful administration of the Chagos Archipelago by the United Kingdom is codified in the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 (the "**ILC Articles**"). In drafting these articles, the ILC substantially relied on the jurisprudence of the Court and of its predecessor, the Permanent Court of International Justice, as amply demonstrated by the

[150] *Wall Advisory Opinion*, *op. cit.*, p. 154, para. 39; see also *op. cit*., p. 164, para. 68.
[151] *Wall Advisory Opinion*, *op. cit.*, p. 197, para. 147.
[152] *Wall Advisory Opinion*, *op. cit.*, p. 200, para. 159.
[153] See Part III above.

commentary to the articles.[154] On several occasions since 2001,[155] the Court itself referred to these provisions when dealing with issues of State responsibility. Albeit implicitly, the Court also followed the structure of Part Two of the Articles ("Content of the International Responsibility of a State") when it identified the legal consequences arising from the construction of the wall in the Occupied Palestinian Territory.[156] In addressing those consequences, the African Union will, thus, follow the same approach.

II. Legal Consequences of the Continued Administration of the Chagos Arising for the United Kingdom

217. It follows from Part III of this Written Statement, that the continued administration by the United Kingdom of the Chagos Archipelago, has violated, and continues to violate, a number of distinct international obligations of *erga omnes* character applicable to the United Kingdom, *inter alia*: (i) the respect for the right to self-determination of the Mauritian people; (ii) the prohibition of any attempt at dismembering the Mauritian territory; (iii) the obligation to refrain from any act violating the territorial integrity or the national unity of Mauritius; and (iv) the guarantee of fundamental human rights of Mauritian nationals, in particular those of Chagossian origin.

218. Hence, the international responsibility incurred by the United Kingdom for such acts involves a series of legal consequences.

A. The continued duty of the United Kingdom to perform the obligations that it breached

[154] The text of the draft articles with commentaries thereto is reproduced in *Yearbook of the International Law Commission 2001*, vol. II (Part Two), A/CN.4/SER.A/2001/Add.1 (Part 2), pp. 30-143 (hereinafter the "**ILC Articles and Commentary**").
[155] See, e. g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, I.C.J. Reports 2007, p. 43 (hereinafter "***Punishment of the Crime of Genocide***"); *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, I.C.J. Reports 2010, p.14; *Jurisdictional Immunities of the State (Germany v. Italy), Judgment*, I.C.J. Reports 2012, p. 99 (hereinafter "***Jurisdictional Immunities of the State***").
[156] *See Wall Advisory Opinion*, *op. cit.*, pp. 197-200, paras. 149-160.

219. The United Kingdom is first and foremost obliged to comply with the obligations it has breached, in the course of its continued administration of the Chagos Archipelago. Article 29 of the ILC Articles provides:

> "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached."[157]

220. As such, even though the United Kingdom has committed breaches of international obligations in connection with its unlawful continued administration of Chagos, it remains bound by these obligations.

221. These obligations encompass the United Kingdom's obligation to give effect to the right to self-determination.

222. This right was reaffirmed following the excision of the Chagos Archipelago from Mauritius and throughout the continued unlawful administration of the Chagos Archipelago by the United Kingdom. For instance, Article 1, paragraph 3, common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966:

> "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."[158]

[157] ILC Articles and Commentary, *op. cit.*, Article 29.

[158] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1(3); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1(3). Both Mauritius and the United Kingdom are parties to the Covenants since 1976.

223. The corresponding legal obligation on States to give effect to this right was also reasserted a number of times. For instance, the Human Rights Committee in its General Comment on Article 1 observed that:

> "Paragraph 3 … is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. … It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."[159]

224. Taking into account the specific nature and importance of the obligations at stake, the United Kingdom is legally bound to make every effort so as to enable the Mauritian people, including the Chagossians to realise fully its right to self-determination and, thus, freely and finally to settle the territorial status of the Chagos Archipelago.

225. Decisions of the Assembly of the African Union have specifically called upon the United Kingdom to observe its continued duty to perform the international obligations that it breached during its continued unlawful administration of the Chagos Archipelago. For instance, in 2015, the Assembly of the AU adopted Decision Assembly/AU/Res.1(XXV), in which it "urge[d] the United Kingdom, pending the return of the Chagos Archipelago to the effective control of the Republic of Mauritius, *not to take any measures or decisions that might affect the interests of the Republic of Mauritius without the latter's full prior involvement*."[160] (emphasis added)

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[159] General Comment No. 12, *op. cit.*, para. 6.
[160] **Exhibit AU-11**, Resolution Assembly/AU/Res.1(XXV), Resolution on Chagos Archipelago, June 2015, para. 5.

226. More recently, at the latest Session of the Assembly of the African Union, on 28-29 January 2018, Decision Assembly/AU/Dec.684 (XXX) renewed "its commitment to UN Resolution 2066 (XX) of 16 December 1965 which reaffirms the inalienable right of the people of Mauritius to freedom" and invited "the UK Government (to) implement UN Resolution 1514 (XV) fully and … *to take no action which would dismember the Territory of Mauritius and violate its territorial integrity*."[161] (emphasis original)

B. Cessation and non-repetition

227. In addition to the duty to comply with its obligations under the right to self-determination, the United Kingdom has the obligation to put an end to its wrongful conduct, attached to the continued administration of the Chagos Archipelago. As stated by the Court:

> "According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing."[162]

228. Article 30, cited by the Court, provides that:

> "The State responsible for the internationally wrongful act is under an obligation:
>
> (a) To cease that act, if it is continuing;"[163]

229. On that specific obligation, the ILC explained that:

[161] **Exhibit AU-13**, Decision Assembly/AU/Dec.684(XXX), *op. cit.*, para. 3.
[162] *Jurisdictional Immunities of the State*, *op. cit.*, p. 153, para. 137.
[163] ILC Articles and Commentary, *op. cit.*, Article 30.

> "The function of cessation is to *put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule*. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law".[164] (emphasis added)

230. This obligation extends to all acts, whether material or immaterial, committed by the United Kingdom in pursuance of its continued administration of the Chagos Archipelago. In the *Wall* Advisory Opinion, the Court indeed specified that

> "All legislative and regulatory acts adopted with a view to [the] construction [of the wall], and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with [its] obligations."[165]

231. Therefore, there is no reason to depart from such a conclusion, as far as the obligation of the United Kingdom to cease the continued administration of the Chagos Archipelago in breach of its international obligations is concerned.

232. The responsible State also has the obligation "[t]o offer appropriate assurances and guarantees of non-repetition, if circumstances so require", according to Article 30(b) of the International Law Commission's Articles on State Responsibility. The commentary to that provision explains that such assurances or guarantees "are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily."[166] Accordingly, the African Union is of the view that it would be for Mauritius to determine whether seeking assurances or guarantees would be justified under the prevailing circumstances.

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[164] ILC Articles and Commentary, *op. cit.*, Article 30, Commentary, para. 5.
[165] *Wall Advisory Opinion*, *op. cit*., p. 198, para. 151.
[166] ILC Articles and Commentary, *op. cit.*, Article 30, Commentary, para. 9.

C. Reparation and restitution

233. It is well established, as indicated by the Court in the *Wall Advisory Opinion*, that in international law the wrongdoing State "has the obligation to make reparation for the damage caused to all the natural or legal persons concerned."[167]

234. As stated in the well-known *dictum* of the Permanent Court of International Justice in the *Factory at Chorzów* case, "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[168]

235. In order to achieve that goal in the "concrete circumstances surrounding each case and [given] the precise nature and scope of the injury,"[169] the various forms of reparation may have to be combined. As explained by the ILC:

> "full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused."[170]

236. Article 31(1) of the International Law Commission's Articles specifically addresses this principle. It states:

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[167] *Wall Advisory Opinion*, *op. cit.*, p. 198, para. 152.
[168] *Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), p. 47.
[169] *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, I.C.J. Reports 2004 (I), p. 12, p. 59, para. 119.
[170] ILC Articles and Commentary, *op. cit*., Article 34, Commentary, para. 2.

> "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[171]

237. And, in Article 34 it stated that:

> "Forms of reparation
> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination …"[172]

238. In the specific circumstances relating to the continued administration of the Chagos Archipelago, there is no doubt that the obligation to make restitution *in integrum* would entail the full return of the Chagos Archipelago to Mauritius. In accordance with its practice as reflected in many OAU and African Union Assembly resolutions and decisions, the African Union is of the view that the United Kingdom must "*expeditiously* end its unlawful occupation of the Chagos Archipelago" (emphasis added) and facilitate "the *early and unconditional return* of the Chagos Archipelago, including Diego Garcia, to the effective control of the Republic of Mauritius."[173] (emphasis added)

D. Compensation to Mauritius and to its nationals, in particular those of Chagossian origin

239. Restitution may have to be accompanied by measures of compensation for the material and non-material damage caused. For instance, the Court stated, in the *Wall Advisory Opinion*, that Israel was

> "under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian

[171] ILC Articles and Commentary, *op. cit.*, Article 31(1).
[172] ILC Articles and Commentary, *op. cit.*, Article 34.
[173] **Exhibit AU-11**, Resolution Assembly/AU/Res.1(XXV), Resolution on Chagos Archipelago, June 2015, paras. 4 and 6.

> Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, *all natural or legal persons having suffered any form of material damage as a result of the wall's construction*."[174] (emphasis added)

240. In its judgment on the merits in the *Diallo* case, the Court stated the following:

> "In the light of the circumstances of the case, in particular *the fundamental character of the human rights obligations breached* and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo *must take the form of compensation*."[175] (emphasis added)

241. There is no doubt that the fundamental character of the obligations breached by the United Kingdom, in the course of the incomplete process of decolonisation and of the continued administration of the Chagos Archipelago, calls for a measure of compensation. Thus, in view of the circumstances leading to the present request, the United Kingdom should provide adequate compensation, not only to Mauritius, but also to all natural and legal persons having suffered from material and non-material damage as a result of its wrongful conduct. Such an extension of compensation to natural or legal persons – and not only to the injured State, was clearly contemplated by the Court in the passage of the *Wall Advisory Opinion* quoted above.

242. Furthermore, the violation of the right of permanent sovereignty over natural resources, as a "principle of customary international law"[176] enshrined in General

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[174] *Wall Advisory Opinion*, *op. cit.*, p. 198, para. 153.
[175] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, *Judgment*, I.C.J. Reports 2010, p. 639, p. 691, para. 161.
[176] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 251, para. 244.

Assembly Resolution 1803 (XVII) of 14 December 1962, is likely to have caused reparable damage. In Resolution 3175 (XXVIII) of 17 December 1973, on the "Permanent Sovereignty over National Resources in the Occupied Arab Territories", the General Assembly affirmed

> "the right of the Arab States and peoples whose territories are under Israeli occupation to the *restitution of and full compensation* for the exploitation and looting of, and damages to, the natural resources, as well as the exploitation and manipulation of the human resources, of the occupied territories."[177] (emphasis added)

243. A similar right of compensation belongs to Mauritius and its people, as a form of reparation of the damage suffered as a result of the incomplete decolonisation of Mauritius and of the continued unlawful administration of the Chagos Archipelago.

244. Finally – and most importantly in the current proceedings – the removal of the Chagossian population from the Archipelago and, later, the prohibition of the right of return in the territory are likely to have caused damage to the Chagossians and their property. In this context, a measure of resettlement – even if feasible – would not be sufficient to repair the damage caused to the Chagossians and their property. An additional measure of compensation, covering both the material and moral damage suffered, would thus be necessary *in casu*. In recognition of the principle, the African Court on Human and Peoples' Rights has declared that "according to international law, both material and moral damages have to be repaired."[178]

245. In sum, the Court should recall general international law as contained in UN Resolution 3281 (XXIX) ('Charter on Economic Rights and Duties of States') and according to which, States which practice coercive policies, such as

[177] General Assembly Resolution 3175 (XXVIII), "*Permanent Sovereignty over National Resources in the Occupied Arab Territories*" (A/RES/3175 (XXVIII) of 17 December 1973), para. 3.
[178] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Application No. 013/2011, *Judgment on Reparations*, 5 June 2015, para. 26.

colonialism, "are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples."[179]

E. Satisfaction

246. Finally, the African Union is of the view that the Court should consider whether the injury suffered by Mauritians, in particular those of Chagossian origin, would be fully repaired *via* restitution and compensation. In the alternative, according to Article 37 of the ILC Articles on State Responsibility, it may prove necessary to provide for satisfaction, "consist[ing] in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[180] Given the character and importance of the rights at stake, such a possibility may indeed appear relevant. At the very least, it would appear that a declaration, included in the operative part of the advisory opinion, according to which the United Kingdom would be declared as having failed to comply with its obligations towards Mauritius, its people and its nationals, in particular those of Chagossian origin, would indeed provide an "appropriate form"[181] of satisfaction.

III. Legal Consequences of the Continued Administration of the Chagos for Other States and International Organisations

247. In the *Wall Advisory Opinion*, the Court did not limit itself at stating the consequences of the violations of international law arising for the wrongdoing State. It went on to consider those consequences "arising for other States and, where appropriate, for the United Nations".[182] In doing so, the Court observed that

[179] General Assembly Resolution 3281(XXIX), "*Charter on Economic Rights and Duties of States*" (A/RES/3281 (XXIX), of 12 December 1974), Article 16.
[180] ILC Articles and Commentary, *op. cit.*, Article 37(2).
[181] *Punishment of the Crime of Genocide*, *op. cit.*, p. 234, para. 463. See also *Corfu Channel (United Kingdom v. Albania) case*, *Judgment of 9 April 1949*, I.C.J. Reports 1949, p. 4, pp. 35, 36.
[182] *Wall Advisory Opinion*, *op. cit.*, p. 197, para. 148.

> "the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 32, para. 33)."[183] (emphasis original)

248. Among the obligations concerned, was the obligation to respect the right to self-determination, which constitutes "one of the essential principles of contemporary international law" and has "an *erga omnes* character".[184] As indicated in Part III of the present Written Statement, the same obligation applies in the context of the current proceedings. Accordingly, the African Union sees no reason for the Court, in answering question (b), to depart from the conclusions achieved in the *Wall Advisory Opinion*.

249. Those conclusions were stated as follows:

> "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 al1 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."[185]

[183] *Wall Advisory Opinion*, *op. cit.*, p. 199, para. 155.
[184] *East Timor*, *op. cit*., p. 102, para. 29.
[185] *Wall Advisory Opinion*, *op. cit.*, p. 200, para. 159.

250. In the current proceedings, the African Union is of the view that the Court should follow its consistent practice, and, thus, indicate that all States have the obligation:

a. not to recognise the illegal situation created by the separation of the Chagos Archipelago from Mauritius and the continued British administration of the former;
b. not to render aid or assistance in maintaining that situation; and
c. to cooperate through lawful means in order to bring that illegality to an end.

251. Such an approach would also be in conformity with general international law as reflected in Resolution 2625 (XXV) which stated in its relevant part:

> "*Every State has the duty to promote, through joint and separate action*, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> a. To promote friendly relations and co-operation among States; and
> b. To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned …"[186] (emphasis added)

252. The consequences identified above are actually similar to those contained in the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[187] That provision lists the particular consequences of a serious breach of obligations arising under peremptory norms of general international law

[186] Resolution 2625 (XXV), *op. cit.*, Annex, para. 1, principle 5.
[187] *Jurisdictional Immunities of the State*, *op. cit.*, p. 140, para. 93.

(*jus cogens*). If one were to admit that self-determination now belongs to the realm of *jus cogens* (and it does), consequences of the illegal separation of the Chagos and of the ensuing acts of administration of the Archipelago could concern other fields than that of State responsibility. In particular, pursuant to Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties,[188] any treaty conflicting with the right of self-determination of the Mauritian people would have to be considered void and terminated.

253. Finally, Article 42 of the Articles on the Responsibility of International Organizations, adopted by the International Law Commission in 2011,[189] extends to international organisations the particular consequences stated in Article 41 of the Articles on State Responsibility. While formally limited to serious breaches of obligations of *jus cogens* committed by international organisations, the consequences listed in Article 42 may certainly extend to the reaction by international organisations, in the limits of the functions entrusted to them by their constitutive instruments and mandates, to breaches of *jus cogens* obligations by States.

254. The commentary to Article 42 actually relies on the conclusion given by the Court in the operative part of the *Wall Advisory Opinion* that:

> "[t]he United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion."[190]

[188] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. The United Kingdom and Mauritius have been parties to the Vienna Convention on the Law of Treaties since 25 June 1971 and 18 January 1973 respectively.
[189] General Assembly Resolution 66/100, "*Responsibility of International Organizations*" (A/RES/66/100, of 9 December 2011), Annex.
[190] *Wall Advisory Opinion*, *op. cit.*, p. 202, para. 163. *See also* General Assembly Resolution 66/100, *op. cit.*, Article 42, Commentary, para. 6.

255. In the limits of its mandate, the African Union will cooperate with all actors involved, in order to bring to an end a situation which runs contrary to one of its primary objectives and affects durably one of its Member States.

PART V

CONCLUSIONS AND SUBMISSIONS

256. Through its Written Statement, the African Union has demonstrated the extent to which it is concerned with the complete decolonisation of Africa, including putting a peaceful and legal end to the issue of the Chagos Archipelago in all its aspects.

257. Guided by the Court's *dictum* in the *Western Sahara Advisory Opinion*, in which the Court emphasized that "[i]ts answer is requested in order to *assist* the General Assembly to determine *its future decolonization policy*",[191] (emphasis added), the Africa Union is convinced that the Court will play a definitive role in clarifying and consolidating the international law applicable to decolonisation.

258. For the reasons set out in this Written Statement, the African Union respectfully submits that the Court should answer the questions put to it by the General Assembly as follows:

a. The Court is competent to give the advisory opinion requested by the General Assembly in its Resolution A/RES/71/292 of 22 June 2017;

b. The process of decolonisation of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly Resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967;

[191] *Western Sahara Advisory Opinion*, *op. cit.*, p. 68, para. 161.

c. The continued administration by the United Kingdom of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin, constitutes an internationally wrongful act with several consequences under international law;

d. The continued administration by the United Kingdom of the Chagos Archipelago constitutes a breach of international obligations, reflected in the relevant resolutions mentioned under paragraph "b" hereinabove, as it violates a number of fundamental rules of international law, and in particular:

   i. the right of the people of Mauritius, in particular those of Chagossian origin, to self-determination;
   ii. the inviolability of the territorial integrity of States;
   iii. the respect for State sovereignty;
   iv. the binding relevant and applicable United Nations resolutions;
   v. the relevant provisions of the International Covenant on Civil and Political Rights; and
   vi. the relevant provisions of the International Covenant on Economic, Social and Cultural Rights.

e. The United Kingdom is obliged under general international law to

   i. complete the process of decolonization of Mauritius;
   ii. cease immediately its administration of the Chagos Archipelago;
   iii. make *restitutio in integrum* by returning the Chagos Archipelago to Mauritius; and
   iv. make compensation, covering both the material and moral damage suffered by the people of Mauritius, and in particular those of Chagossian origin.

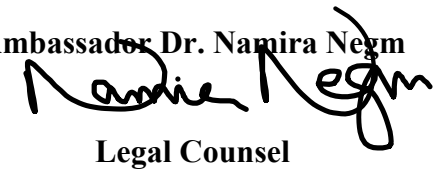
f. All States and international organizations, and in particular the United Nations and all its organs, have a duty to cooperate and to take the appropriate measures in order to induce the United Kingdom to comply with the obligations stated in paragraphs "d" and "e" hereinabove.

g. All States and international organisations, and in particular the United Nations and all its organs, have a duty to refrain from cooperating with the United Kingdom in pursuance of its continued administration of the Chagos Archipelago and the maintenance of the present illegal situation.

259. In light of the above, the African Union respectfully invites the Court to make, at the very least, a declaration in the operative part of its advisory opinion that the United Kingdom has failed to comply with its international obligations towards Mauritius, its people, in particular those of Chagossian origin, so as to provide an appropriate form of satisfaction.

260. Finally, the African Union respectfully invites the Court to recommend to the General Assembly to take all necessary measures to ensure the compliance by the United Kingdom with its Advisory opinion.

Ambassador Dr. Namira Negm



Legal Counsel

African Union