SEPARATE OPINION OF JUDGE GÓMEZ ROBLEDO

[Translation]

*Effectiveness of the Advisory Opinion for the United Nations — Statehood of Palestine: conditions required under international law — Recognition of right to self-determination as a peremptory norm of international law (*jus cogens*): from unlawful occupation to foreign domination in accordance with resolution 1514 (XV)*.

1. I fully subscribe to all the findings of the Court that the continued presence of Israel in the Occupied Palestinian Territory is illegal; that Israel is under an obligation to bring to an end its unlawful presence as rapidly as possible; that it must cease all new settlement activities immediately, evacuate all the settlers from the Occupied Palestinian Territory and make reparation for the damage caused to all the natural or legal persons concerned in the said Territory (see paragraph 285 (3), (4), (5) and (6)). I also support the findings of the Court that all States are under an obligation not to recognize and not to render aid or assistance in maintaining the unlawful presence of Israel in the Occupied Palestinian Territory (see paragraph 285 (7)). Finally, I fully agree that international organizations, including the United Nations, have an obligation of non-recognition and that the General Assembly and the Security Council need to consider the precise modalities and what further action is required to bring to an end as rapidly as possible the unlawful presence of Israel in the Occupied Palestinian Territory (see paragraph 285 (8) and (9)).

2. While the Advisory Opinion surely meets the expectations raised, I would nevertheless like to stress the importance of its effect as regards the role of the United Nations in contributing to the settlement of the situation in Palestine. It is, of course, not for the Court to tell the General Assembly how to relaunch the peace process and put an end to the Israeli-Palestinian conflict, and the Court, quite rightly, reminds the General Assembly and the Security Council of their responsibilities (paragraphs 281 and 285 (9)). The Court must encourage the United Nations to redouble its efforts, as it did in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*I.C.J. Reports 2004 (I)*, pp. 200-201, paras. 161-162) and as it recalls today in the present Advisory Opinion (paragraph 282). However, the Court must ensure that its Advisory Opinion is capable of being fully effective. In other words, the political organs of the United Nations must be able to put this Opinion to full use in seeking a just and definitive solution to the conflict, in accordance with international law.

In this regard, two aspects of the Court's reasoning could usefully be developed further, with the hope that the analysis below will make it possible to broaden the scope of the Advisory Opinion.

3. The first aspect is the question of Palestine's statehood, which, in my view, is beyond doubt; the second aspect concerns the characterization of the right to self-determination as a peremptory norm of general international law (*jus cogens*).

I. The statehood of Palestine

4. The Advisory Opinion should have been explicit with regard to the statehood of Palestine. In United Nations resolutions it is customary to state that the settlement of the conflict lies in "the two-State solution" or "the two-State solution of Israel and Palestine, living side by side in peace and

security within recognized borders" (see, for example, A/RES/78/78[1] and S/RES/2735 (2024)[2]). Yet the use of such language or of that adopted by the Court in its Opinion — namely "including [the] right [of the Palestinian people] to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States" (paragraph 283) — appears to cast doubt on the existence of Palestine as a State today, as if that State had to be *created* or *formed* in a future that is at the very least uncertain, further to negotiations aimed at a just and lasting peace in the Israeli-Palestinian conflict. This kind of language contributes to making the situation of one of the parties (Palestine) even more unequal in relation to the other (Israel), and from the outset distorts the parameters of the negotiations that will have to take place between them. However, just as the existence of Palestine should no longer be in question, nor should there be any further discussion about the legal personality of Palestine, as the State with which Israel will have to have amicable and neighbourly relations. The ambiguity inherent in the words "its right to an independent and sovereign State" is a further obstacle to the full implementation of the right of the Palestinian people to self-determination, in that it contributes indirectly to the position that the proclamation of the State of Israel on 14 May 1948 was somehow made in respect of territory belonging to no one or *terra nullius*[3], since the Arab States had refused the United Nations Partition Plan in General Assembly resolution 181 (II) of 1947, and the rights of the United Kingdom as a mandatory Power had ceased on 15 May 1948, the date its High Commissioner left, marking the end of the British Mandate over Palestine[4]. Is it necessary to recall that, during that Mandate, Palestine had a government, police, a currency and laws that came from a "constitutional" framework dating back to 1922, even if it fell to the United Kingdom to promulgate all such provisions?

5. This current of opinion, which holds sway in Israel today by virtue of political parties that represent extremist religious positions, would have it that the practice of settling large swathes of the Occupied Palestinian Territory is justified quite simply by the divine plan of land promised to Abraham and his descendants, to the extent that since 1967 the West Bank has not been referred to by its name as such, but, on the contrary, by the biblical place names of Judea and Samaria.

6. It could of course be argued that Palestine's status as a State is implicit in the many resolutions of the General Assembly and the Security Council, since they recommend that the settlement of the conflict should be based on the existence of "two States".

Yet Israel has done and continues to do everything in its power to set aside the commitments it made under the 1947 Partition Plan — on which its declaration of independence was based — and the 1993 and 1995 Oslo Accords. The peace process cannot be the same when the occupying Power

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[1] Available at: https://documents.un.org/doc/undoc/gen/n23/398/12/pdf/n2339812.pdf?token=pDhf7MarMvHKsz4oI6&fe=true.

[2] Available at: https://documents.un.org/doc/undoc/gen/n24/165/11/pdf/n2416511.pdf?token=3HdqH2zaL2Oa0xOYpU&fe=true.

[3] On the concept of *terra nullius*, see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 38-39, paras. 79-80.

[4] See basic principle 1 *(a)* of the Basic Law: Israel as a Nation State of Jewish People, of July 2018, amended in May 2022, which proclaims that the "Land of Israel is the historical homeland of the Jewish People, in which the State of Israel was established". Basic principle 1 *(c)* of the Law also provides that the "realization of the right to self-determination in the State of Israel *is exclusive to the Jewish People*" [emphasis added]. Available in English at: https://main.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf. See also the statements of Golda Meir, the fourth prime minister of Israel, who claimed "[i]t was not as if there was a Palestinian people in Palestine and we came and threw them out and took their country away from them. They did not exist", available at https://www.jewishvirtuallibrary.org/golda-meir-quotes-on-israel-and-judaism. See also *The New York Times*, "A talk with Golda Meir", where she reasserts her position that "there never was a Palestinian nation", available at: https://www.nytimes.com/1972/08/27/archives/a-talk-with-golda-meir.html. Lastly, see the more recent speech by the Minister of Settlements and National Missions, Orit Strook, before the Knesset where she states that "[t]here is no such thing as a Palestinian people, there is no such people", available at: https://x.com/MiddleEastEye/status/1760273162976059627.

does not accept the legal personality of Palestine, claims that the Fourth Geneva Convention does not apply to the Occupied Palestinian Territory and, moreover, contests that the territory is occupied. This attempt to make Palestine *invisible*, to the extent that its existence is denied, is, in my view, a further impediment to the right of the Palestinian people to self-determination. Worse still, this form of denial clearly echoes the arguments of the protagonists in the conquest of the Americas in the 16th century, arguments that were defeated at the time by the renowned Francisco de Vitoria, who refused to accept that the new continent could be considered as a *res nullius* on the ground that it was inhabited by people without civilization[5]. For both Vitoria and Bartolomé de Las Casas, the indigenous populations were the real owners of the lands coveted by the Spanish[6].

It would therefore have been helpful if the Court had expressly stated that the existence of the Palestinian State is established under international law, just as it did in respect of the Palestinian people when it observed that its existence "is no longer in issue" and that "[s]uch existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 182-183, para. 118)[7]. Let us not forget that the Palestinian Authority was able to establish itself in Gaza pursuant to the above-mentioned Oslo Accords and that the takeover of this territory by Hamas in June 2007 is an issue that is internal to Palestine and did not entail any cession of sovereignty, since Israel had moreover withdrawn from this part of the Occupied Palestinian Territory in 2005 while retaining effective control over it (paragraphs 93 and 94). The foregoing cannot be understood as meaning that the right of the Palestinian people to self-determination has been fully achieved. As the Court has observed, that right has been, and continues to be, violated by Israel. However, stating that that right includes the right to a *sovereign and independent State* has the effect of reducing it, at the very best, to a right *in statu nascendi* (see paragraphs 237 and 283).

7. In this regard, it may be noted that the statehood of Palestine, whose existence was proclaimed on 15 November 1988 by the Palestine National Council based on resolution 181 (II) referred to above[8], is a reality for the vast majority of States, since it is acknowledged by the General Assembly in resolution 43/177 of 15 December 1988. In 2012, by resolution 67/19, the General Assembly granted Palestine the status of non-member observer State at the United Nations, while the Palestinian Authority, as the representative of the Palestinian people, has exercised its authority in certain parts of Palestinian territory since 1993.

8. More recently, on 1 May 2024 the General Assembly, pursuant to resolution 76/262[9], debated the veto cast by the United States in the Security Council on 18 April 2024 which, despite the support of 12 members and the abstention of the United Kingdom and Switzerland, prevented the adoption of draft resolution S/2024/312 submitted by Algeria recommending the admission of the State of Palestine to the United Nations. During the debate, the United States declared that the vote

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[5] M. Rodríguez Molinero, *La doctrina colonial de Francisco de Vitoria o el derecho de la paz y de la guerra. Un legado perenne de la escuela de Salamanca*, Librería Cervantes, Salamanca, 1993, pp. 55-68.

[6] G.C. Marks, "Indigenous Peoples in International Law: the significance of Francisco de Vitoria and Bartolomé de Las Casas", *Australian Yearbook of International Law*, Vol. 13 (1991), pp. 35-51.

[7] In this context, it should be recalled that, in its Declaration of Independence of 14 May 1948, Israel stated that it was "prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution of the General Assembly of the 29th November, 1947", namely the Partition Plan that recognizes the existence of two peoples, Jewish and Palestinian, and provides for the creation of two "independent Arab and Jewish States and [a] Special International Regime for the City of Jerusalem" (see A/RES/181(II) B, para. 3).

[8] See Palestinian Declaration of Independence, Algiers, 15 November 1988.

[9] Resolution 76/262 requires the General Assembly to meet within ten working days each time a veto is cast in the Security Council preventing the adoption of a draft resolution (A/RES/76/262).

at issue did not reflect opposition to Palestinian statehood but was an acknowledgment that it can only come from negotiations between the two parties (see General Assembly, debate on the United States veto of the draft resolution submitted by Algeria on the admission of the State of Palestine to the United Nations, seventy-eighth session, 74th and 75th plenary meetings). It is to be recalled that the Court ruled on this question in its Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations* under Article 4 of the Charter, in which it found that

> "a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 65, operative clause, para. 1).

9. This Opinion was implemented by the General Assembly, which adopted resolution 506 (VI) entitled "Admission of new Members, including the right of candidate States to present proof of the conditions required under Article 4 of the Charter", dated 1 February 1952, and in which it establishes that the judgment of the United Nations on the admission of a State

> "ought to be based on facts such as: the maintenance of friendly relations with other States, the fulfilment of international obligations and the record of a State's willingness and present disposition to submit international claims or controversies to pacific means of settlement established by international law"

and not on any other condition (A/RES/506 (VI) A). Palestine fully meets these conditions.

10. Following the failure to adopt the above-mentioned draft resolution S/2024/312, on 10 May 2024 the General Assembly adopted resolution ES-10/23 with 143 votes in favour, that is two thirds of Member States. Under this resolution, the General Assembly decides to extend the rights of Palestine as an observer State and stresses "its conviction that the State of Palestine is fully qualified for membership in the United Nations in accordance with Article 4 of the Charter".

11. The International Criminal Court (ICC), for its part, was invited by the Prosecutor to pronounce on the scope of its territorial jurisdiction in Palestine, further to Palestine's decision of 22 May 2018 to defer the situation there to it, the Palestinian State having acceded to the Rome Statute on 2 January 2015. In its decision of 5 February 2021, Pre-Trial Chamber I considered that the ICC could exercise its criminal jurisdiction over the situation in question and found that its territorial jurisdiction extended to Gaza and the West Bank, including East Jerusalem[10]. While it is true that the ICC was careful to note that its mandate did not permit it to pronounce on the statehood of Palestine, this decision nonetheless confirms that Palestine cannot be treated otherwise than as a State under international law.

12. The foregoing all serves to reinforce the idea that Palestine is a State entity capable of carrying out the obligations contained in the Charter. It should be noted in this regard that the history of the United Nations shows that Members can be admitted even though their status as a State

[10] International Criminal Court, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*, ICC-01/18, 5 February 2021, p. 55, para. 118.

remains to be fully realized, as was the case with India[11]. For a very long time, there were doubts as to whether a particular micro-State met all the criteria to be identified as a State under international law and, consequently, whether that State could be admitted to the United Nations, on account of it having an extremely small territorial base and the exercise of important sovereign powers being devolved to another State[12]. Ultimately, all those that have applied have been admitted to the United Nations.

13. As stated above, I am convinced that Palestine must be considered a State under international law. Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which has been in force since 26 December 1934, provides that "[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". The question of Palestine's lack of effective control over the entirety of Palestinian territory in no way detracts from the fact that Palestine meets the criteria to be identified as a State, as defined in the Montevideo Convention. A State's lack of control over part of its territory has no direct impact on its statehood. The late James Crawford appears to acknowledge that after 1993, under the Oslo Accords, and with all the well-known limitations, there was some transfer of territorial control to the Palestinian Authority in so-called Areas A and B of the West Bank[13]. He contends, moreover, that there is no rule of international law prescribing a minimum area of territory for a State[14]. A State can exist even when another State claims its territory, and it does not vanish when it loses control over part of its territory[15]. The existence of the Palestinian State should not be called into question, and neither should the possibility for it to be admitted as a full Member State of the United Nations. The distinguished Australian jurist concludes his analysis with what is, to my mind, a very pertinent reflection, from which the Court should have drawn inspiration:

> "There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts."[16]

14. Furthermore, it should be recalled that the existence of a State does not depend on recognition by other States or by any international organization. The recognition of a State by another has only a declaratory effect. It does not constitute the State, it does not create it but "merely signifies

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[11] India is considered a founding member of the United Nations and took part in the 1945 San Francisco Conference, although it did not gain its independence until 1947. According to a commentary on Article 4 of the United Nations Charter, "[i]t is first of all stated that the candidate must be a State. Yet the Charter does not give any definition of a State". However, India, which attained independence in 1947, took part in the 1945 San Francisco Conference, because it was already clear that "India, Ukraine and Belarus would be admitted as founding members while their status as sovereign States was open to discussion" (J.-P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies : commentaire article par article*, Economica, Paris, 2005, p. 521) [*translation by the Registry*].

[12] This is the case, for example, with the Vatican City State or the Principality of Monaco. The former's international legal personality is exercised by the Holy See under the Lateran Pacts of 1929, and a number of State competences of the latter are to this day exercised by France under numerous bilateral agreements.

[13] J. Crawford, *The Creation of States in International Law (2nd Edition)*, Oxford Public International Law, 2007, p. 442.

[14] J. Crawford, "State", in *Max Planck Encyclopaedia of International Law*, para. 15.

[15] *Ibid.*, para. 19.

[16] J. Crawford, *The Creation of States in International Law (2nd Edition)*, Oxford Public International Law, 2007, pp. 447-448.

that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law" (Article 6 of the above-mentioned Montevideo Convention). Article 13 of the Charter of the Organization of American States, for its part, confirms the declaratory nature of recognition when it provides that "[t]he political existence of the State is independent of recognition by other States". This belief is not limited to regional international law and academia. As new States were beginning to emerge in the wake of decolonization, Professor Marcel Sibert stated that

> "[f]rom the fact that recognition is declaratory and can in no way confer international legal personality, it may be deduced that it cannot be arbitrarily refused without the refusing State thereby breaching international law . . . From the fact that recognition is declaratory rather than capable of conferring something, it must also be deduced that recognition cannot be conditional."[17]

15. Recognition can nevertheless reinforce the legitimacy of a State and its capacity to take action at the international level, which is not insignificant, as is the case for Palestine. Indeed, the majority of States (149 to date) have already unilaterally recognized Palestine as a State. Furthermore, Palestine has bilateral relations with more than 140 States and is party to some hundred multilateral conventions. I therefore do not understand the Court's excessive caution in this regard.

16. However, the question that should have been developed by the Court is that of the *consolidation and viability of the State of Palestine*. The Advisory Opinion could have taken the current situation into account by recognizing that what is important now is to consolidate the State of Palestine and make it viable, including by settling *through negotiations* the question of boundaries, the sharing of natural resources, the return of refugees and reparation for wrongful acts committed by Israel, but without using ambiguous language that casts doubt over the existence, under international law, of the State of Palestine.

17. To conclude, the Court should have seized the opportunity presented to it by this Advisory Opinion to make a definitive pronouncement on the statehood of Palestine. Such a declaration would have rendered the Advisory Opinion fully effective, for the purpose of launching negotiations between two States, on an equal footing, under the best possible conditions and without any possibility of questioning whether, despite a prolonged occupation that has led to the annexation of large swathes of Palestinian territory, Palestine, as a full subject of international law, is an established fact that should be beyond legal doubt.

II. The right to self-determination as a *jus cogens* norm

18. The Court considered that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (paragraph 233). This right derives from the United Nations Charter (Article 1, paragraph 2, and Articles 55 and 56, which provide for the development of international relations based on respect for human rights and self-determination). It was developed in General Assembly resolution 1514 (XV) and in principle VII of resolution 1541 (XV) on decolonization, both dating back to 1960. General Assembly resolution 2621 (XXV) of 1970 declares that "the further continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law" (A/RES/2621 (XXV)). For its part, the Declaration on Principles of

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[17] M. Sibert, *Traité de droit international public : le droit de la paix*, Dalloz, Paris, 1951, p. 192 [*translation by the Registry*].

International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which is annexed to General Assembly resolution 2625 (XXV) of 1970, stresses the importance of the right to self-determination as a fundamental principle of international law.

19. The right of peoples to self-determination thus emanates, to a very great extent, from the universal parliament that is the United Nations General Assembly. In this context, I think it is worth recalling the still very pertinent question of the legal value of United Nations resolutions. The great Mexican jurist Jorge Castañeda tells us that:

> "[t]here is no essential reason why other international organs, which are broadly representative, cannot validly express, on behalf of the international community, what it considers to *be* international law at a given time . . . Assembly resolutions *do not create the law, but they can prove, with authority, that it exists*"[18].

20. Antonio Gómez Robledo, for his part, adopting the concept of the duality of functions dear to Georges Scelle, points out that the General Assembly, in the form of a resolution that *stricto sensu* has the status of a recommendation, gives rise to a source of international law as authentic as that of custom, and which, given the extraordinary speed of modern means of communication, does not have to conform to the old, slow pace of traditional custom. On that basis, he questions how there can be any doubt that the right to self-determination emanates from an authentic source of international law, when it is the legal conscience of mankind that recognizes and proclaims it[19].

Concerning the identification of *jus cogens* norms, Antonio Gómez Robledo also tells us the following:

> "For our part, we think that it is not possible for all the resolutions of the General Assembly to be endowed with the character of *ius cogens* . . . , but only those resolutions that are to some extent legislative and address the highest interests of the international community . . . General Assembly resolutions would thus not have the status of a generative source . . . but that of a testimonial source. Resolution 1514 (XV), for example, would provide ample proof of this assessment. When for fifteen years (1945-1960) an overwhelming majority of Member States of the United Nations argued in favour of decolonization and the enshrinement of the right to self-determination of peoples, the resolution of the General Assembly simply authenticates an international custom that lacks in neither *diuturnitas* nor *opinion iuris*."[20]

21. The Court has previously declared that the right of peoples to self-determination is a fundamental right that creates an obligation which, by its very nature, concerns all States and therefore has an *erga omnes* character (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155 and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180). It reiterates this once again in the present proceedings, and also refers to the prohibition of the acquisition of territory by force and certain

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[18] J. Castañeda, "Valeur juridique des résolutions des Nations Unies", *Recueil des cours de l'Académie de droit international de La Haye*, t. 129, p. 317, 1970 [*translation by the Registry*].

[19] A. Gómez Robledo, *El derecho de autodeterminación de los pueblos y su campo de aplicación*, Instituto Hispano-Luso-Americano de Derecho Internacional, Undécimo Congreso, Madrid, 4-12 October 1976, p. 19.

[20] A. Gómez Robledo, "Le *ius cogens* international, sa genèse, sa nature, ses fonctions", *Recueil des cours de l'Académie de droit international de La Haye,* t. 172 (III), pp. 174-177, 1981 [*translation by the Registry*].

obligations incumbent on Israel under international humanitarian law and human rights law as obligations *erga omnes* (paragraph 274).

22. Although, in the past, the Court has not expressly characterized the right to self-determination as *jus cogens*, that characterization could already be inferred from the legal consequences repeatedly identified by the Court as a result of its violation, such as the obligation not to recognize or render aid or assistance in maintaining the illegal situation and to co-operate to bring it to an end (see, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 200, para. 159 and *Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, paras. 180 and 182). The Court has established these consequences in the present proceedings, linking them to the nature and importance of the rights and obligations at issue, which require all States "not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory" and "not to render aid or assistance in maintaining the situation created by Israel's illegal presence" (paragraph 279, see also paragraph 275). It is, however, regrettable that the Court has not *directly* established the link between the finding that the right to self-determination has the status of a peremptory norm and the consequences of its violation.

23. In this regard, the consequences identified by the Court arising from violations of the right to self-determination, considered in the light of obligations *erga omnes*, are in line with the provisions of Article 41, paragraphs 1 and 2, of the Articles on the Responsibility of States for Internationally Wrongful Acts[21].

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[21] Article 41:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
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> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

In its commentary on Article 40, the International Law Commission (ILC) observed that "the peremptory character of certain other norms seems also to be generally accepted" and "the obligation to respect the right of self-determination deserves to be mentioned" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 40, *Yearbook of the International Law Commission* (*YILC*), 2001, p. 113, para. 5). The ILC also referred to the *East Timor* case, in which the Court found that "[t]he principle of self-determination of peoples . . . is one of the essential principles of contemporary international law" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), which, according to the ILC, "gives rise to an obligation to the international community as a whole to permit and respect its exercise" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 40, *YILC*, 2001, Vol. II, Part 2, p. 113, para. 5).

See also Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law". In its commentary on Article 26, the ILC stated that "[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination" (Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, commentary on Article 26, p. 85, para. 5).

24. In this context, it may be recalled that, in conclusion 19 of its Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), the International Law Commission (hereinafter the "ILC") addressed the specific consequences of serious violations of peremptory norms of general international law (*jus cogens*), namely the obligation to co-operate, the obligation not to recognize and not to render aid or assistance in maintaining a situation created by a serious breach of those norms[22]. The ILC also recognized the peremptory nature of the right to self-determination by including it in its non-exhaustive list of peremptory norms of general international law in the annex to conclusion 23 of its above-mentioned Draft Conclusions[23].

25. It is precisely the legal consequences of the violation of the right to self-determination that argue in favour of that right being recognized as a hierarchically higher norm, rather than the fact that these are obligations *erga omnes* which give rise to standing but do not, as such, create peremptory norms. That is why the Court takes a fundamental step forward in this Advisory Opinion, even though it still appears to hold back to some extent in this regard.

26. More broadly, the dictum of the Court proceeds from an observation on the "centrality" of the right of self-determination in international law. It should be noted that the reference to a situation of foreign occupation (paragraph 233) has the merit of referring the question to the very core of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)), which declares that "[t]he 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". Thus, a prolonged foreign occupation, such as the one under consideration in these proceedings, becomes alien domination within the meaning of resolution 1514 (XV) and therefore

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[22] In the commentary on draft conclusion 19 referred to above, the ILC noted the following:

"While in both advisory opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* the Court does not make an explicit reference to peremptory norms of general international law (jus cogens), the norms to which the Court attached the duty to cooperate to bring to an end serious breaches are peremptory in character".

It explains that there is a "significant overlap between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* such that the deduction that the Court in these decisions was referring to peremptory norms of general international law (*jus cogens*) is not unwarranted" (see Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries, commentary on draft conclusion 19, p. 72, para. 6).

[23] Conclusion 23. Non-exhaustive list.

"Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;

(b) the prohibition of genocide;

(c) the prohibition of crimes against humanity;

(d) the basic rules of international humanitarian law;

(e) the prohibition of racial discrimination and apartheid;

(f) the prohibition of slavery;

(g) the prohibition of torture;

(h) the right of self-determination."

justifies the right to self-determination being elevated to the level of a peremptory norm in international law.

27. Furthermore, the Court has long recognized that norms such as the prohibition of genocide and torture are *jus cogens* (see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64 and p. 52, para. 125; *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 (I)*, p. 111, para. 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 47, para. 87; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 99. See also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 140, para. 93, where the Court addresses the relationship between *jus cogens* and rule of State immunity).

28. In conclusion, by attaching all the consequences of a violation of a peremptory norm of general international law (*jus cogens*) to Israel's multiple and ongoing violations of the right of the Palestinian people to self-determination, the Court unambiguously places itself on the side of

> "[the] collective guarantee of respect for rules deemed essential for the maintenance of the values of the international community at a certain point in its development as an entity governed by law, [which] is the only logical outcome in view of the importance attached to these rules. This is consistent with the evolution of human rights law"[24].

Thus, the Court gives the primacy of the right to self-determination its full import and weight in the hierarchy of the fundamental rights and duties that structure the contemporary international order. This is of prime importance and should be recalled at all times and in all places to all people.

The Court also confers on the right of peoples to self-determination its full axiological nature, as a concept that reflects and, at the same time, inspires a world view.

(Signed) Juan Manuel GÓMEZ ROBLEDO.

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[24] J. M. Gómez Robledo, "L'avis de la Cour internationale de Justice sur les conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé", *Revue générale de droit international public*, July-September 2005, No. 3, p. 534 [*translation by the Registry*].