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Secession of States and Self-determination in contemporary International Law

Current validity of the external dimension of the self-determination of peoples. Pending cases of decolonization

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Abstract: More than half a century after the adoption of the UN General Assembly's Resolution 1514 (XV), the right of self-determination of peoples remains fully in force. In spite of the ongoing debate within internationalist doctrine over a possible evolution of its content and its extension to other subjects of international law, the author of this study, which does not analyse this question, underlines that there is no doubt whatsoever that it continues to be fully applicable to territories subjected to colonial rule and that these are not restricted to those included in the list de UN's Non-Self-Governing Territories.

Keywords: Self-determination – Decolonization – Non-Self-Governing Territories - *uti possidetis iuris* - Natural resources exploitation

(A) INTRODUCTION

On the occasion of the fiftieth anniversary of the adoption of its Resolution 1514 (XV), on December 10, 2010 the UN GA declared the period 2011-2020 "Third International Decade for the Eradication of Colonialism". Despite the grandiloquence of this declaration and this body's permanent commitment to put an end to this scourge, which in most cases dates back to the 19th century, the fact is that the progress made in the last two decades in the sphere of decolonization has been practically null.

Indeed, as Professor Antonio Remiro has pointed out[1], everything seems to suggest that the 21st century has marked the end of the process initiated with the creation of the United Nations and that, for different reasons, the pending cases have become so frozen that, as we shall see in the following pages, either they are residual cases affecting tiny and very sparsely populated territories, in which the claims for self-determination on the part of the indigenous population

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[1] A. Remiro Brotóns *et al*, *Derecho Internacional. Curso General* (Tirant Lo Blanch, Valencia 2010), at 120-121.

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are very limited or even non-existent, or the interests of the major Powers involved prevent the application of international law.

It is often said that both the Covenant of the League of Nations and the United Nations Charter established the path to follow in order to carry out the decolonization of half the world. However, what the states participating in both organizations envisaged was not the end of decolonization throughout the world, but only in the colonial territories under the control of the states which lost the wars that preceded the creation of both organizations. In fact, both the League of Nations Mandate System and the Trusteeship System (henceforth TS) and Non-Self-Governing Territories (NSGT) regime of the United Nations anticipated the end of the colonial phenomenon, but only in some of the territories that had previously been administrated by the states that lost both wars. So much so that Article 77 of the UN Charter still refers to the winners and losers of the Second World War in terms that are unacceptable in the 21st century, but which clearly reflects the intention of the states that created the Organization: the basic objectives of the TS shall be: "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence (...)" of "the territories which may be detached from *enemy states* as a result of the Second World War".[2]

If the forecast in both texts was the future independence of these territories, for the remaining colonial territories, those administered by states that had not lost the war, what was established was the need for the states which administered them to ensure the development of territories and populations, with no reference to the exercise of the right to self-determination. Thus, if in the case of the TS the target was reached in 1994 with the independence of the Palau Islands[3], in that of the NSGT, following the independence of East Timor in 2002, there are still 16 territories on the list that were included in 1946 (Anguilla, Bermuda, Cayman Islands, Malvinas/Falkland Islands, Turks and Caicos Islands, British Virgin Islands, United States Virgin Islands, Montserrat, Saint Helena, Gibraltar, Guam, New Caledonia, Pitcairn, French Polynesia, American Samoa and Tokelau) and one that was added in 1963 (Western Sahara).

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[2] Emphasis added.

[3] These are the cases of British Togoland, united with the Gold Coast form Ghana (1957); Italian Somaliland, united with British Somaliland to form Somalia (1960); French Togoland, independent as Togo (1960); French Cameroons, independent as Cameroon (1960); British Cameroons: Northern territory joined Nigeria and Southern territory joined Cameroon (1961); la British Tanganyika (1961): in 1964, Tanganyika and Zanzibar, which had become independent in 1963, united as Tanzania); Belgian Ruanda-Urundi, divided in 1962 in two States: Rwanda and Burundi; New Zealand Western Samoa, independent as Samoa (1962); Australian Nauru, independent in 1968; Australian New Guinea, united with Australian Papua to become the independent State of Papua New Guinea (1975); Federated States of Micronesia and Marshall Islands, which became fully self-governing in free Association with the United States in 1990; Northern Mariana Islands, which became fully self-governing as Commonwealth of the United States in 1990, and finally, Palau Islands which became fully self-governing in free Association with the United States in 1994.

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Albeit in summary fashion, in this study I shall analyse the current situation of the territories yet to be decolonized, classifying them for explanatory purposes into four groups[4]. Firstly, I shall refer to the territories in the NSGT list in which, because of their small size or population, there is no strong demand for self-determination on the part of the indigenous population. Secondly, I shall refer to other NSGT in which these demands pose serious problems for the administering Powers. Thirdly, I shall analyse two cases in which decolonization is not linked to the exercise of self-determination by the people of the territory, as it is not really possible to speak of the existence of a people as such, but of the territorial integrity of the states. Finally, I shall analyse a series of territories that, although they do not appear on the list of NSGT, are still pending decolonization.[5]

(B) NSGT IN WHICH THERE IS NO CLEAR CLAIM FOR THE RIGHT TO SELF-DETERMINATION ON THE PART OF THE INDIGENOUS POPULATION OR, IF THIS EXISTS, IT IS VERY LIMITED

(1) Tax Havens

Over time, some of these territories have become a new kind of problem in the international arena that has a significant impact upon the world economy, owing to the establishment therein of genuine tax havens. For this reason, neither the indigenous population, which on occasions enjoys a privileged economic situation compared with other territories with similar dimensions and populations, nor the states that administer them are particularly interested in changing their status. In fact, if definitive decolonization were to occur, this would put an end to the prevailing legal limbo which, among other things, facilitates tax evasion. These are the territories of Anguilla, Bermuda, Cayman Islands, Turks and Caicos Islands, British Virgin Islands, Saint Helena and Montserrat[6], administered by the United Kingdom, and the United States Virgin Islands. In all these territories the GA "strongly urged the administering Power to refrain from undertaking any kind of illicit, harmful and unproductive activities, including

[4] Given the limitations of this work, I am not going to analyse the case of Palestine, in which added to its colonial origins is subsequent Israeli occupation and colonization, as it has been the subject of numerous studies. By way of summary, cf. my paper "Una visión del conflicto palestino: bloqueo histórico, colapso jurídico y fracaso político", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, Servicio de Publicaciones de la UPV/EHU, Bilbao, 2006, pp. 261-332.

[5] Indeed, as was highlighted by Professor Andrés, this list does not include all the territories still pending decolonization (P. Andrés Sáenz de Santa María, 'La libre determinación de los pueblos en la nueva sociedad internacional', 1 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1997), at 146-150).

[6] The case of Montserrat was severely affected by the eruption in 1995 of the volcano Mount Soufrière, almost completely destroying Plymouth, the territory's capital, a city that since then has been deserted. A consequence of this event was a drastic reduction in the island's population, which fell from 11,000 to 4,000, jeopardizing the very existence of one of constituent elements of a state: its population.

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the use of the Territory as a tax haven, that were not aligned with the interest of the people of the Territory".[7]

Aware that the aspirations to independence in these territories are minimal[8], and in order to reach a solution that might bring an end to colonization, the GA declares in its resolutions that "the specific characteristics and the aspirations of the people" of those territories "require flexible, practical and innovative approaches to the options for self-determination, without any prejudice to territorial size, geographical location, size of population or natural resources".[9] Thus, the GA notes that in these territories independence is probably not the most realistic solution and expresses its willingness to accept other forms of decolonization. In fact, in some cases, like that of Saint Helena, the GA recalls that the territory's own representatives have specifically stated that they do not seek independence.[10] In these types of territories, the trend is for, after adoption of new constitutional texts, decolonization to be produced via the establishment of increasingly strong links with the administering Power, similar to those in Free Associated States.[11]

Nevertheless, the basic principle of decolonization is unchanged: the GA continues to insist that "there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognized under the relevant human rights conventions".[12] On many occasions the GA has even openly criticised the manoeuvres of some administering Powers so as to avoid its exercise by the indigenous population.[13]

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7 Cf. for example, the reports of the Committee of 24 (Special Committee on Decolonization) of May 25, 2017, in relation to Saint Helena (A/AC.109/2017/13), or of January 26, 2017, in relation to Anguila (A/AC.109/2017/2).

8 Thus, for example, the GA has recalled that, in the case of Bermuda, most of the population wishes to maintain ties with the UK (GA Res. 72/98, 15 December 2017).

9 Cf. For example, GA Res. 72/97, 7 December 2017, in relation to Anguila, although it is used as a matter of form in those related to other NSGT. This is the case, for example, of GA Res. 72/98, in relation to Bermuda, 72/108, in relation to the Turks and Caicos Islands, 72/100, in relation to the Cayman Islands, and others adopted on the same date.

10 Cf. GA Res. 72/106, in relation to Saint Helena. This is the case of the United States Virgin Island, in a referendum held on October 11, 1993, in which only 31.4% of the electoral roll participated, the successful option favoured a status of continued or improved territory (80.3%), compared with the other two options: "total integration within the USA" (14,2%) and "elimination of USA sovereignty" (4.8%). Cf. A/AC.109/1183, at 15-16.

11 This is the case of, among others, the constitutions of the British Virgin Islands of 2007, Turks and Caicos Islands of 2006 (partially suspended by the UK, which has direct control of the territory), or of Montserrat of 2011.

12 Ibidem.

13 Cf. i.e. GA Res. 72/108 or 72/109.

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(2) Pitcairn, the *Reductio ad Absurdum* of the Right to the Self-determination of Peoples

The archipelago of Pitcairn, situated right in the middle of the South Pacific, administered by the UK, is an extreme case that borders on the absurd and would allow any territory whatsoever to defend its viability as state regardless of its particular circumstances. At the time of writing, the census population of the archipelago is 39 people! And just five years earlier was even lower, because half of the males were imprisoned after being sentenced for decades of sexual abuse in the exercise of what they regarded as a sort of ancestral *droit de seigneur*.[14] Despite this, also in this case the GA resolutions insist on declaring that "there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognized under the relevant human rights conventions".[15] Pitcairn's economy, in the total absence of a tourist sector, depends fundamentally on the sale of postage stamps, since its attempts to attain fishing rights in its Exclusive Economic Zone (EEZ), established in 1992, have proved to be in vain on account of its location over a thousand nautical miles from the nearest populated area. For this reason, the efforts and studies devoted by the United Nations to the constitutional evolution of the territory, its future status and its development at an economic, social and cultural level appear to be a luxury, if compared with processes of decolonization of territories submitted to intense foreign exploitation.

(3) Tokelau, the Blue Print

Finally, I have included the case of Tokelau in this section because, in my opinion, it constitutes a blue print for the decolonization of small insular territories such as those being analysed. The GA itself regards it as an example of efficient cooperation for the decolonization process and praised the way in which the administering Power contributes to the political, economic, social and cultural development of the territory. It is no coincidence that this administrator is neither

[14] The Special Committee's 2017's working paper "clarifies" that "this figure does not include the twelve individuals currently abroad" (A/AC.109/2017/12, of January 25, 2017). The current population of this NSGT are descendants of the sailors who mutinied on the *Bounty*, a British naval ship, in 1790 and of the Tahitian women taken by these during their flight from justice. Various cult films have been made on the subject of this incident, prominent examples including: "Mutiny on the Bounty" (1935 and 1962) and "The Bounty" (1984). In 2004, following various accusations, British justice retried six of the twelve men on the island, an action described by the "island authorities", UN interlocutors, as British neo-colonial conduct. Cf. M.O., Eshleman, 'A Preliminary Legal Bibliography of the Pitcairn Islands, South Pacific Ocean', 106(2) *Law Library Journal* (2014), at 221-236, accessed 27 August 2018. Since then these authorities have refused to intervene, as they had done previously, before the Special Committee. Between 2014 and 2019 the island authorities implemented a repopulation plan. In this respect, in June 2015 they passed the "Same Sex Marriage and Civil Partnership Ordinance" Law, in a desperate attempt to attract people to the island.

[15] GA Resolution 72/105, 7 December 2017.

the USA[16] nor the UK, but New Zealand, a state whose cultural and geographical proximity makes cooperation between the two parties considerably easier. In fact, on the occasion of the arrival in the territory of a UN visiting mission, the local authorities stated that attitude of New Zealand towards the territory was not colonialist and that, therefore, Tokelau was not a colonized country.[17]

In 2003 the island authorities and those of the administering Power signed a "Joint Statement on the Principles of Partnership", which laid the foundations for holding a referendum on self-determination in 2006 on the basis of a draft constitution for Tokelau and a free trade agreement with New Zealand. The condition under which, in this fashion, definitive decolonization of the territory would take place was that the modification of the island's status should be approved by a two thirds majority of votes, something that occurred in neither of the two referendums held in 2006 and 2007[18], as a result of which both parties agreed to a "pause" in the initiatives of self-determination while Tokelau focused on attending its basic needs. The situation remains the same today, although, given the good relationship with the administering Power, it is likely that on the next occasion that majority will be attained, with voting in favour of decolonization in 2007 falling only 2% short of the required figure.

(c) NSGT where there is a strong demand for self-determination on the part of the indigenous population

(1) Guam

The case of Guam is an eloquent example of the intransigence of the USA when it comes to proceeding to the decolonization of the territories it administrates, even ignoring the GA's request to be allowed to send a mission to visit the territory.

There are several significant problems hindering and in fact preventing the decolonization of the territory. On the one hand, the Chamorro people was stripped of their lands in violent fashion and only extremely slowly are the legitimate owners recovering what is rightfully theirs.

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[16] The authorities of the territory have questioned in relation to the future referendum of self-determination the need to clarify the degree to which the 1983 *Treaty between New Zealand and the United States of America on the Delimitation of the Maritime Boundary between Tokelau and the United States of America* (ONU, *Treaty Series*, vol. 1643, Part I, at 28231; United States Treaty and other International Agreements 10775) violated the territorial integrity of Tokelau, by leaving under USA sovereignty the island of Swains which, until then, had formed part of the archipelago. New Zealand explained to the visiting mission that this was a type of deal with the USA to obtain the latter's renunciation of sovereignty over the whole of Tokelau (A/AC.109/2009, of September 7, 1994, at 53).

[17] Ibid., at 65.

[18] In the referendum of 2006, 60% of the votes were in favour of self-government in a regime of free association; in October 2007, 64.4% (A/AC.109/2017/14).

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On the other, the territory is subject to intense and incessant militarization, via the creation of military installations and an increase in related activities that have even been denounced by the GA.

But perhaps most significant and relevant from the point of view of the future exercise of the right to self-determination of peoples is the composition of the census for the referendum. The GA has voiced its concern following a recent ruling by a federal court in the USA, in March 2017, declaring "that a plebiscite on self-determination could not be limited to native inhabitants".[19] This is a key question throughout the whole decolonization process, as the holder of the right to self-determination is the people of the territory, its indigenous population, and not the colonists who have settled there. As I shall go on to indicate, this is one of the factors employed by both Morocco and the European Union in order to undermine this right and its beneficiary in the conflict over the Western Sahara: the territory's indigenous population. Because in Guam and in the Western Sahara massive immigration has resulted in the people of the territory constituting a minority in their own land.

(2) American Samoa

This NSGT is another tax haven, so could well have been included in one of the previous sections but, unlike the aforementioned examples, its population has a marked identity which accentuates the differences with the administering Power and there is significant opposition to the latter's presence in the territory. In any case, and unlike what happens in Guam, the land is the exclusive property of the inhabitants of the territory, given that the area purchased by the US military to set up a naval base was returned to the Samoan Government following the USA's departure from the territory in 1950.

The islands' representatives have declared before the Decolonization Committee that without a "flexible and innovative approach", the prospects of decolonization are bleak, which does not appear to concern the administering Power, which has refused even to accept the request by the local authorities, endorsed by the GA itself, that a mission be sent to the territory.[20] For this reason, the local authorities have specifically requested the GA to maintain the territory on the list of NSGT.

(3) New Caledonia

The colonization of New Caledonia, begun in 1853 by France, had serious consequences for the indigenous population of the territory, the Kanak people, who in the space of a few decades were stripped of their lands, livelihood and sacred sites; their artistic heritage was destroyed

[19] GA Res. 72/102, 7 December 2017.
[20] GA Res. 72/96, 15 December 2017.

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and the population confined to reservations, leading to a loss of references of identity as a people and the destruction of their organizational structures.

This territory, home to over 25% of the world's nickel reserves, is considered as a "French overseas sui generis community" and governed by chapter XIII of the Constitution of France, and has the status of associated territory to the European Union. It was included in the list of NSGT between 1946 and 1947, but when France failed to fulfil the obligations established in Article 73 (e) of the UN Charter, was again included in 1986. In spite of this and the GA's demands and the mission that visited the territory in 2014[21], France continues to withhold the information referred to in the aforementioned article.

The first significant agreements regarding the territory's future were the Matignon-Oudinot Agreements [22] of 1988, reached after a period of use of armed force against the colonial presence (1984-1988). By virtue of the subsequent Nouméa Accord (May 5, 1998), adopted in referendum on November 8 of that year by the inhabitants of the territory (72% of votes in favour), certain competences were transferred to the local authorities, with the exception of those relating to defence, security, justice and currency. The agreement provided for the staging of a referendum on self-determination between 2014 and 2018.

According to 1996 data, in this territory too, as result of immigration, the Kanak people is a minority in its own land (44,1%) and owner of only 50% of the latter[23]. Nevertheless, as provided for in the Nouméa Accord, more or less coinciding with the publication of this study, the referendum on self-determination will be held on November 4, 2018. The census for the referendum is comprised of permanent residents of the territory since 1994[24], and the question to be put to the population, made public on March 27, 2018 by the French Prime Minister following negotiations with all the signatories of the Nouméa Accord, will be: "Do you want New Caledonia to accede to full sovereignty and become independent?". In the event of a triumph of the "no" vote, in accordance with the Noumeá Accord, one third of the members of the Congress of New Caledonia may request that two new referendums be held in 2020 and in 2022[25].

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[21] "The mission encourages the administering Power to report under Article 73 e of the Charter of the United Nations the positive activities being undertaken in New Caledonia, as that would provide the international community with a deeper understanding of all elements of the self-determination process of New Caledonia, in accordance with the Nouméa Accord" (A/AC.109/2014/20/Rev.1, 18 June 2014, para. 116).

[22] A/AC.109/1000, at 9-14.

[23] Ibid., at 5 and 66.

[24] More details of the composition of the census for the referendum (Accessed 22 August 2018)

[25] At the time of writing these lines, the results of this referendum have just been announced: 56.4% of voters (80.83% of the electorate) have rejected the option of independence. Given that, contrary to the forecasts issued prior to the referendum, the difference in votes between the two options is so small, there is likely to be a new referendum in 2020, in which the likelihood of the pro-independence option prevailing or at least continuing to gain ground cannot be ruled out.

(4) French Polynesia

As in the Kanak case, although the territory was included in the list of NSGT in 1946, the GA decided in 2013 to once again add it to the said list ("GA recognizes that French Polynesia remains a Non Self-Governing Territory within the meaning of the Charter, and declares that an obligation exists under Article 73 (e) of the Charter on the part of the Government of France, as the administering Power of the Territory, to transmit information on French Polynesia").[26] In spite of this and the GA's demands, France has yet to fulfil its obligations as set out by the UN Charter, providing the information referred to in Article 73 (e), and allowing a UN mission to visit the territory.

But in this case, there is a circumstance which differentiated it from all the others and which aggravates the colonial Power's responsibility. For, as is well known, because the matter was taken before the International Court of Justice by Australia and New Zealand, the nuclear tests performed by France in this part of the Pacific Ocean over more than three decades had and continue to have serious consequences for the health of the population and the environment in this part of the world.[27] It was not until February 2017 that a French law amended a previous law of 2010, increasing the possibilities of victims of radiation produced by the nuclear tests obtaining compensation from the French Government. In spite of this minor progress, we have no further news of the Polynesian people's right to self-determination.

(5) Western Sahara

Spain began to colonize Western Sahara in 1884.[28] Unlike the British and French, Spanish colonization was not particularly traumatic: the inhabitants of the area enjoyed a cordial relationship with the Spanish colonizers. This continued until 1970 when the first nationalist aspirations appeared. Another factor that set the colonization of Western Sahara apart was that the Spanish had no intention of exploiting the natural resources; their sole interest was in small-scale fishing. However, the situation began to change when important deposits of

[26] GA Res. 67/265, 23 August 2013.

[27] Cf. "The environmental, ecological, health and other impacts of the 30-year period of nuclear testing in French Polynesia", Report of the Secretary-General of 25 July 2014 (A/69/189).

[28] For a general perspective of the conflict Cf. M. Barbier, *Le conflit du Sahara occidental* (Harmattan, Paris, 1982); T.M. Franck, 'The Stealing of the Sahara', 70 *American Yearbook of International Law* (1976): 694–721 (DOI: 10.2307/2200382); R. Riquelme Cortado, 'Marruecos frente a la (des)colonización del Sahara Occidental', *Anuario Mexicano de Derecho Internacional* 13 (2013): 205-265 (DOI: 10.1016/S1870-4654(13)71042-0); J. Soroeta Liceras, *International Law and the Western Sahara Conflict,* (Ed. Wolf, Oisterwijk, The Netherlands, 2014); and 'The Conflict in Western Sahara After Forty Years of Occupation: International Law *versus* Realpolitik', *German Yearbook of International Law* (2016), 59-2016, at 188-224; Y.H. Zoubir and D. Volman (eds.), *International Dimensions of the Western Sahara Conflict* (Westport, CT: Praeger, 1993).

phosphate were discovered in 1960s; this aroused the interest of both Spain and Western Sahara's northern neighbour, Morocco.

From the moment Spain joined in 1955, the United Nations began to pressure it to organize a referendum on self-determination in the territory so that the Sahrawi people could freely decide their own future. After the *Carnation Revolution* in Portugal and the subsequent independence of all Portuguese colonies, Spain finally had no option but to organize the referendum in 1974.[29] Everything at the time seemed to indicate that a new North African State was about to be born. However, Morocco had other ideas: it aspired to annex Western Sahara. This was the height of the Cold War; Morocco's plans received the support of the USA and France who feared the shadow of the socialist block might fall on yet another State. These two countries succeeded in having the GA pass a resolution which obliged Spain to suspend the referendum until the ICJ had ruled on whether Morocco and Mauritania had some sort of sovereign rights over the area.[30]

On the 16th of October in 1975 the Court of The Hague ruled that neither Morocco nor Mauritania had ever had any sovereign rights over the Sahrawi territory and that the conflict should be resolved through a referendum on self-determination.[31] On the 6th of November, the "Green March", a multitude of 350,000 Moroccan civilians assembled by King Hassan II, "peacefully" penetrated Sahrawi territory. However, one week before on the 31st of October, Moroccan forces had invaded the territory from the north and the Mauritanians from the south.[32] Despite the promises of the Spanish prince who would later become King Juan Carlos

[29] On August 20, 1974, the Spanish representative before the United Nations notified the Secretary General of the following: "The Spanish Government will hold a referendum, under the auspices and guarantee of the United Nations, within the first six months of 1975 on the date which will be established duly in advance; it will adopt the measures required for the indigenous inhabitants of the territory to exercise their right to self-determination in conformity with Resolution 3162 (XXVIII), of December 14, 1973; and will establish the procedure for holding the referendum, through the pertinent consultations, within the period stated" (A/9714).

[30] GA Res. 3292 (XXIX), 13 December 1974, requests the ICJ, "without prejudice to the application of the principles embodied in General Assembly Resolution 1514 (XV), to give an advisory opinion at an early date on the following questions: I) Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?; If the answer to the first question is in the negative, II) What were the legal ties between this territory and the kingdom of Morocco and the Mauritanian entity?".

[31] "The Court's conclusion is that the materials and information presented to it do not establish *any tie of territorial sovereignty* between the territory of Western Sahara and the kingdom of Morocco or the Mauritanian entity. Thus, the Court has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the *principle of self-determination through the free and genuine expression of the will of the peoples of the Territory*" (*Western Sahara, Advisory Opinion, I.C.J., Reports 1975*, at 162 (emphasis added).

[32] GA Resolution 34/37, 21 November 1979, "reaffirms the inalienable right of the people of Western Sahara to self-determination and Independence" and "deeply *deplores* the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that *occupation* to the territory recently evacuated by Mauritania" (emphasis added).

I, Spain not only failed to comply with its obligations as the administering Power by defending the territory against the invaders but also handed it over to them through the "Madrid Tripartite Agreements", signed on the 4th of November 1975. To this day, Spain is still the administering Power in the territory and therefore responsible for it[33].

The POLISARIO Front is a national liberation movement recognized by the United Nations as the "sole and legitimate representative of the Sahrawi people".[34] From its formation in 1973, it carried out military operations against Spain; it subsequently waged a war of national liberation against the two States (Morocco and Mauritania) that were illegally occupying its territory. The civilian population fled to the south of the Algerian desert in search of refuge. As they fled, the Moroccan Air Force dropped napalm and white phosphorous bombs on them, actions constituting war crimes and genocide; they are currently the subject of legal proceedings in Spain. Mauritania abandoned the conflict in 1979 and recognized the Sahrawi Arab Democratic Republic (SADR), a State that had already proclaimed its independence on 27th of February 1976. It is currently recognized by more than eighty other States and is a full member of the African Union.

During the war, Morocco built a 2,800 km wall that has divided Western Saharan territory in two ever since. It received military and strategic support from the USA, France, Israel and other States. Two thirds of the territory remain under Moroccan occupation to this day; the other third is controlled by the POLISARIO Front. Since then the Sahrawi population comprises three groups: the ones who remain in their homeland and suffer foreign repression and military occupation; the ones who live in the refugee camps in Tinduf in the south of Algeria; and last of all the ones who live south of the wall in the Sahrawi-controlled sector of the territory.

The cease-fire came into force on the 6th of September 1991 after an agreement between Morocco and the POLISARIO Front under the auspices of the United Nations and the Organization for African Unity (currently the African Union).[35] This agreement made provision for a referendum on self-determination supposed to be held within six months. From 1991 to 2000 the MINURSO (*The United Nations Mission for the Referendum in Western Sahara*) went about compiling the census for the referendum in a process that took ten long

[33] Spain *remains, de jure*, if not *de facto, the administering Power of the territory*, and, as such, until the period of decolonization is completed, retains the obligations contained in Articles 73 and 74 of the UN Charter; including, *providing protection, even jurisdictional protection, to its citizens from all abuse, for which it must widen the scope of its territorial jurisdiction* to cover the acts referred to in the complaint. Cf. *National High Court (Audiencia Nacional)*, 40/2014, Ordinary Procedure 80/2013, Writ (*Auto*) of 4 July 2014.

[34] Ibidem.

[35] SC Res. 621 (1988), 20 September 1988.

years due to the systematic blocking tactics by the Moroccan part.[36] However, once MINURSO had published a provisional electoral list for the holding of the referendum (February 2000)[37], Morocco accused the members of the mission of bias and abandoned the peace plan. King Mohammed VI declared that he would never accept a referendum on self-determination, but an autonomy formula for Western Sahara, which would remain an integral part of its national territory and under its sovereignty. Since then, France's veto in the Security Council has prevented the United Nations from organizing the referendum and obliging the parties involved to abide by its results. In addition, it has prevented the MINURSO from monitoring the respect of human rights in occupied Sahara.

The situation of the Sahrawi refugees is desperate. More than forty years have gone by since they settled in the *hammada*, the most inhospitable part of the desert. Climatic conditions are extreme and they only survive thanks to ever dwindling humanitarian aid. The situation of the group that remains in its homeland and offers peaceful resistance to Moroccan military occupation is also desperate. Morocco commits massive violations of their human rights: forced disappearances, torture, rape, marginalisation, exclusion from employment and education etc.; all these form part of the population's daily lot.[38]

In the meantime, Morocco is illegally exploiting Western Sahara's natural resources – phosphate, fishing, agriculture etc. – violating international law and negotiating with the European Union, which is party to the crime. They may try and deny it but both the European Union and Spain openly support the illegal annexation of the territory. At the same time, Moroccan settlers continue to arrive in the area in contravention of the Geneva Convention of 1949, which prohibits the transfer of population from the occupying State's territory to the occupied territory.

But after years of inaction before the courts, the appeal for annulment lodged by the POLISARIO Front before the ECJ against the free trade agreement signed between Morocco and the European Union, which had been applied in Western Sahara since its entry into force, and the preliminary ruling referred to Court by the British High Court as the result of

[36] Cf. J. Soroeta Liceras, 'El plan de Paz del Sahara Occidental, ¿viaje a ninguna parte?', 10 *Revista Electrónica de Estudios Internacionales* (December 2005), at 1-33; 'Vigencia del Plan de Paz del Sahara Occidental (1991-2013)', in *El derecho a la libre determinación del pueblo del Sahara Occidental. Del ius cogens al ius abutendi* (Thompson Reuters Aranzadi, Pamplona, 2013), at 199-226.

[37] "Moroccan officials questioned again the impartiality and objectivity of Identification Commission members" (GS Report, 17 February 2000, S/2000/131).

[38] An historic event took place in November of 2010; it reflected the extreme frustration of those suffering these injustices. More than 20,000 people set up an enormous camp 10 kilometres from El Aaiun, the capital of Western Sahara. The aim of this massive gathering was to protest against the situation of marginalisation and impoverishment; it was called the Gdeim Izik Camp. The Moroccan army violently dismantled the camp after a month despite the peaceful nature of the protest. The Sahrawi people called it the "Camp for Dignity". Noam Chomsky regarded it as the first incident in the Arab Spring.

proceedings brought by the Western *Sahara Campaign* UK in relation to the fishing agreements, being implemented in the Western Sahara's territorial waters since the 1980s, have lent unexpected momentum to the Saharan claims. These proceedings have been the subject of numerous studies, so I shall only refer to them in summary fashion.[39]

Two ECJ judgements of 2016 and 2018[40] have ended both proceedings. On the one hand, the high court stated something elementary: given that it is a NSGT, *Western Sahara does not form part of Morocco*; on the other, given that pursuant to article 29 of the Vienna Convention on the law of treaties, "[U]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory", the two agreements mentioned are neither applicable "nor applied"[41] (*sic*) in Western Sahara, so they

[39] Among others, cfr. my papers 'La jurisprudencia del TJUE en relación con la legalidad de la explotación de los recursos naturales del Sahara Occidental o *el dogma de la inmaculada legalidad de la acción exterior de la Unión Europea* y sus consecuencias', *Revista General de Derecho Europeo*, 46 (2018), at 61-114; 'La Sentencia de 10 de diciembre de 2015 del Tribunal General de la UE (t-512/12), primer reconocimiento en vía judicial europea del estatuto del Sahara Occidental y de la subjetividad internacional del Frente POLISARIO', *RGDE* (2016) vol. 38, at 202-238, and 'La cuestión de la legalidad de la explotación de los recursos naturales del Sahara Occidental ante el Tribunal de Justicia de la Unión Europea', in *Retos para la Acción Exterior de la Unión Europea* (C.Martínez Capdevila and E.J. Martínez Pérez (Dir.), (AEPDIRI, Tirant Lo Blanch, Valencia, 2017), at 73-96; and 'La jurisprudencia del TJUE en relación con la legalidad de la explotación de los recursos naturales del Sahara Occidental o el dogma de *la inmaculada legalidad* de la acción exterior de la Unión Europea', *Revista General de Derecho Europeo* (2018), in press. See also A. Annoni, 'C'è un giudice per il Sahara occidentale?', 99(3) *Rivista di Diritto Internazionale* (2016), at 866-876; F. Dubuisson and G. Poissonnier, 'La question du Sahara occidental devant le Tribunal de l'Union européen, une application approximative du droit international relatif aux territoires non autonomes', 2 *Journal du Droit International* (2016), at 503-522; J. Ferrer Lloret, 'El conflicto del Sahara Occidental ante los tribunales de la Unión Europea', 42 *Revista General de Derecho Europeo* (2017), at 15-64; J. González Vega, 'La Guerra de los Mundos: realidad versus formalismo jurídico o el poder de la interpretación (a propósito de la sentencia TJUE de 27 de febrero de 2018, Western Sahara Campaign UK, C-266/16)', 60 *Revista de Derecho Comunitario* (2019), mayo-agosto, at 515-561; and 'El Sáhara occidental, de nuevo, en Luxemburgo: las implicaciones de una unión de Derecho', 56 *LA LEY Unión Europea* (2018); P. Hipold, 'Self-determination at the European Courts: The Front Polisario Case or The Unintended Awakening of a Giant', 2(3) *European Papers* (2017), at 907-921; S. Hummelbrunner and A. Carlijn Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union', *Utrecht Journal of International and European Law* (2016) 32(83), at 19-40; E. Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)', 2(1) *European Papers* (2017), at 23-42; E. Milano, 'Front Polisario and the Exploitation of Natural Resources by the Administrative Power', 2(3) *European Papers* (2017), at. 953-966; J. Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)', 111(3) *American Journal of International Law* (2017), at 731-738; O. Peiffert, 'Le recours d' un mouvement de libération nationale à l'encontre d'un acte d'approbation d'un accord international de l'Union: aspects contentieux', 52(2) *Revue Trimestrielle de Droit Européen* (2016), at 319-336; A. Rasi, 'Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?', 2(3) *European Papers* (2017), at. 967-975.

[40] Judgment of the Court (Grand Chamber) of 21 December 2016, *Council v. Front Polisario*, C-104/16 P, EU:C:2016:973, and Judgment of the Court (Grand Chamber) of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118.

[41] *Ibid.*, at 131-132.

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are valid. Nevertheless, as the General Court indicated in 2015, it is clear that, on the one hand, the agreement is applied in Western Sahara, "or, more precisely, to the largest part of that territory which is controlled by the Kingdom of Morocco"[42], and on the other, that throughout all the negotiations that was the undisguised intention of both parties (European Union and Morocco). To exempt the European institutions from international responsibility, and despite the fact that the latter explicitly recognized that the agreements have been applied in Saharawi territory since their entry in force, the ECJ has stated that the agreements have been applied in the territory only "*de facto*", a declaration devoid of legal content aimed at preventing appeals by the POLISARIO Front against illegal exploitation of Saharawi natural resources during the last thirty years.

Both ECJ judgements make it clear that the EU and Morocco may not conclude agreements regarding the exploitation of the territory's natural resources without the consent of the "people of Western Sahara" which "must be regarded as a *third party*"[43]. But the European institutions have not given up. To resolve this question, they aim to replace "the consultation of the people of Western Sahara" with the fact that "the people concerned by the agreement be adequately involved"[44]. To justify this legal aberration, the Commission commits another that is even more serious, since, following the discourse of the Moroccan government, it even questions the very existence of the Saharawi people.

Thus, there were "consultations with a wide range of socio-economic and political actors in Western Sahara, especially through interviews with civil society organisations, Western Saharan MPs, economic operators and representatives of the Polisario Front"[45]. These are bodies and institutions created by the Moroccan government, elected via a census in which most of the voters are colonists, in elections in which the Sahrawis do not participate, and, therefore, institutions that defend the official position of the Moroccan government. There are only two exceptions: the POLISARIO Front, which rejected any type of agreement between the EU and Morocco vis-à-vis exploitation of Saharawi natural resources, and the only two "legalized" Saharawi human rights associations according to the Moroccan administration[46], which refused to meet the members of the Commission and denounced the EU's attempt to "validate" the agreements, eluding the obligation established by the ECJ to consult the Sahrawi

[42] Judgement of the General Court (Eight Chamber) of 10 December 2015, *Front Polisario v. Council*, C T-512/12, EU:T:2015:953, at 103.

[43] Judgment of the Court (Grand Chamber) of 21 December 2016, *Council v. Front Polisario*, C-104/16 P, EU:C:2016:973, at 106.

[44] European Commission Staff Working Document (SWD (2018) 346 final, at 10, accessed 13 September 2018).

[45] Ibid., at 7.

[46] *ASDVH* (*Asociación Saharaui de Víctimas de Graves Violaciones de los Derechos Humanos Cometidas por el Estado marroquí*) and *Association El Ghad pour les droits de l'Homme*.

people through the POLISARIO Front, considered by both associations to be their sole and legitimate representative.

These "consultations" served as an excuse for the Council to adopt two Rulings in July 2018 which modify the aforementioned agreements on free trade and fishing and render them applicable. At the time of writing, both Decisions are still pending approval by the Parliament, which for decades has defended the Saharawi people's right to self-determination, as the only holder of this right, which therefore does not correspond to the Moroccan colonists. One hopes that the Parliament will act in coherence with its previous policy and reject the Council's proposal. Otherwise the POLISARIO Front will be forced to go to the ECJ to demand enforcement of its judgments.

In any case, the ECJ judgements have enabled the Saharawi national liberation movement to initiate legal proceedings all over the world against companies that negotiate with Morocco the illegal exploitation of the territory's natural resources. A May 2017 judgement by the South African *High Court* declaring that phosphates transported from El Aaiun to New Zealand are not the property of the company that extracts and sells them, but of the SADR[47], marks a before and an after in international trade in these resources. Fearing further legal proceedings against them, the Moroccan companies that illegally extract these resources from Western Sahara have been forced to abandon the traditional routes of the south of the African continent and the Panama Canal, where a similar appeal was also lodged[48], and transport this merchandise to America, Asia and Australasia by sailing round Cape Horn, making this trade more difficult and far more expensive. Meanwhile, legal action taken before domestic courts of other States, and even the mere threat of such action, has led since December 2015 to a multitude of companies abandoning the Saharawi territory for fear of having to pay hefty reparations. The POLISARIO Front has begun a long legal journey in order to defend the rights of the people it represents and will no doubt continue to do so, given that for the first time after over 40 years of occupation it has succeeded in breaching the bunker built by Morocco and the EU.

(D) TERRITORIES WHOSE DECOLONIZATION MUST BE DEVELOPED VIA APPLICATION OF THE PRINCIPLE OF THE TERRITORIAL INTEGRITY OF STATES

[47] *High Court of South Africa, Eastern Cape local Division*, Port Elizabeth, Case 1487/17, judgement of 5 May 2017 (Accessed 29 June 2018).

[48] The appeal was lodged on May 17, 2017 by the Saharan Arab Democratic Republic (SADR) against a company transporting a cargo of phosphates to Canada. Writs (Autos) of the Primer Tribunal Marítimo de Panamá no. 122 and 126, of 16 and 19 May 2017 (the author of this study has a copy).

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In this section I shall refer to two NSGT, Gibraltar and the Malvinas/Falkland Islands, which are under the administration of the UK, which has made it quite clear that it is not prepared to proceed to the decolonization of either.

These are two territories in which one cannot speak of the existence of a people that seeks to exercise the right to self-determination. For this reason, although the United Nations resolutions state that the interests of the territory's population must be taken into account[49], "in cases such as this, the said population does not legally decide its own destiny, does not hold the right to free determination, and is not the dominantly protected legal asset. The consequence of decolonization is, purely and simply, the retrocession of the territory".[50] As Professor Remiro has pointed out, these are the only two cases in which the United Nations has regarded as decolonizing the claims of other States upon a NSGT it being understood that the right to self-determination is attributed to the population of the claimant State and is materialized in the reintegration of the territory. The aim is to avoid the consolidation of the colonial status of a territory via the population imported by the colonial Power.[51]

Both cases (in particular that of Gibraltar[52]) have been the object of extensive studies by internationalist doctrine, so I shall not dwell on their analysis.

(1) Gibraltar

The British government, which in 1830 had included the territory among the *Crown colonies*[53], began in 1946 to provide the information that, pursuant to article 73 (e) of the Charter, must be provided by States that administer NSGT, thus acknowledging the colonial status of the

[49] GA Res. 2231 (XXI), 20 December 1966.

[50] J.D. González Campos, L.I., Sánchez Rodríguez and P. Andrés Sáenz de Santamaría, *Curso de Derecho Internacional Público* (2nd ed., Civitas, Madrid, 1998), at 774 (we translate).

[51] A. Remiro Brotóns, 'Desvertebración del Derecho Internacional en la Sociedad Globalizada', 5 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2001), at 105.

[52] Among the extensive Spanish literature on the question, cf. for example, P. Andrés Sáenz de Santamaría and C. Izquierdo Sans, *'Eppur si muove*. Un nuevo enfoque en las negociaciones sobre Gibraltar (A propósito de los Comunicados Conjuntos de 27 de octubre y 16 de diciembre de 2004)', 56(2) *Revista Española de Derecho Internacional* (2004), at 741-764; C. Antón Guardiola, *Gibraltar: Un desafío en la Unión Europea* (Tirant lo Blanch, Valencia, 2011); A. Del Valle Gálvez and I. González García (Eds.), *Gibraltar, 300 años* (Servicio de Publicaciones Universidad de Cádiz, 2004); A. Del Valle, 'Gibraltar, su estatuto internacional y europeo, la incidencia de la crisis de 2013-2014', 48 *Revista Catalana de Dret Públic* (2014), at 24-52; J. Díez-Hochleitner, 'Les relations hispano-britanniques au sujet de Gibraltar: etat actuel', 35 *Annuaire Français de Droit International* (1989), at 167-187; C. Izquierdo Sans, '¿Quid de Gibraltar hoy?', *6 Cursos de derechos humanos de Donostia-San Sebastián* (2006), at 243-264; M Ortega Carcelén, 'Gibraltar y el Tratado de Utrecht', *Real Instituto Elcano* (2013); J. Verdú Baeza, 'La controversia sobre las aguas de Gibraltar: el mito de la Costa Seca', 66(1) *Revista Española de Derecho Internacional* (2014); and *Gibraltar: Controversia y Medio Ambiente* (Dykinson, Madrid, 2008).

[53] A/AC.109/PV/208.

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territory.[54] Despite this, when in 1963 the question was addressed by the Decolonization Committee, it refuted the latter's competence to analyse the question of the Gibraltar's sovereignty.[55] Arguing that the applicable principle is that of self-determination, on September 10, 1967 the British government called a referendum in which almost the entire population (99.64%) voted in favour of maintaining ties with the United Kingdom.

The GA denied any effect to the referendum, since it contravened various previous resolutions issued by the GA itself. They stated that the maintenance of Gibraltar as a colony of the United Kingdom was in violation of Spanish territorial unity and integrity[56], and called upon both parties to reach a negotiated agreement, taking into account "the interests" of the Gibraltarian population.[57] By means of Resolution 2429 (XXIII), the GA requested "the administering Power to terminate the colonial situation in Gibraltar no later than 1 October 1969 ", urging the British Government to initiate negotiations with a view to the return of the territory to Spain.[58] However, in 1969 the British Government decided to convert Gibraltar into a *British Overseas Territory*. Meanwhile, logically, the Spanish Government shares the GA's considerations and understands that the applicable principle is that of territorial integrity, and therefore considers that the will of the population of the territory lacks any legal relevance.

The negotiations for Spain's adhesion to the EEC gave rise to the so-called *Brussels Declaration* (1984), which appeared to steer the conflict towards solution, but the fact is that the European Union has been able to do little to change the main aspects of the dispute.[59] Thus, for instance, a proposal of co-sovereignty, which could be a possible solution to the conflict, was rejected by Gibraltar's population in a new referendum held in 2002. This was followed shortly afterwards by the creation of the *Tripartite Forum for Dialogue on Gibraltar*, with the participation of the two States and the Gibraltarian authorities, but the results of its work were limited.[60] Britain's decision to abandon the European Union has opened a new chapter, given the serious consequences this may have for the economy and population of the colony. The fact that 95.91% of the population voted in favour of "*remain*" is an eloquent demonstration of their concern over a future outside the EU. Although Spain has formally invited the UK to

[54] In 1962 the Committee of 24 included Gibraltar among the NSGT (ST/TRT/B.1962/1/ Add.1).

[55] A/AC.109/PV/208, 11 September 1963.

[56] GA Res. 2353 (XXII), 8 January 1968.

[57] GA Res. 2070 (XX) and 2231 (XXI), 16 December 1965 and 20 December 1966.

[58] GA Res. 2429 (XXIII), 18 December 1968.

[59] C. Izquierdo Sans, *Gibraltar en la Unión Europea. Consecuencias sobre el contencioso hispano-británico y el proceso de construcción europea* (Universidad Autónoma de Madrid, Madrid, 1996).

[60] On this Forum, cf. A. Del Valle Gálvez and I. González García, *Gibraltar y el Foro Tripartito de Diálogo* (Dykinson, Madrid, 2009).

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reconsider the proposal of joint sovereignty[61], it is still too soon to know whether *Brexit* can provide or not a definitive solution for the Rock.[62]

(2) The Malvinas/Falkland Islands

Although this is a very old colonial controversy, the war in 1982 between Argentina and the UK over the territory's sovereignty stained it with blood, wrecking the half-hearted attempts at rapprochement previously made by the governments of both states, and brought to the attention of international public opinion the existence of this NSGT.[63] But in this study I shall leave aside analysis of this question to focus on the colonial issue and the applicability of the right to self-determination.

The GA Resolutions on the question have reiterated since 1965 the UK's obligation to decolonize the territory, and "invite the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to proceed without delay with the negotiations recommended by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of *General Assembly resolution 1514* (XV) and the interests of the population of the Falkland Islands (Malvinas)".[64]

Perfectly applicable to this case is the reference to Gibraltar with regard to the "interests of the territory's population"; in the Malvinas/Falklands Islands there is no "people" or "indigenous population" seeking self-determination, since, as in Gibraltar, the arrival of the British in the territory resulted in the expulsion of its inhabitants. For this reason, the GA insists on taking into account the "interests", but not the "opinion" of the territory's inhabitants.

[61] A/AC.109/2017/8, 7 March 2017, at 52.

[62] On the possible consequences of *Brexit* in relation to the Gibraltarian conflict, cf. the collective work of M. Martín Martínez and J. Martín Pérez de Nanclares (coordinators), *El Brexit y Gibraltar: un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores y de Cooperación, Madrid, 2017).

[63] On the main issues of this conflict, cf. L. Coconi, '¿Islas Malvinas o Falkland Islands?: la cuestión de la soberanía sobre las islas del Atlántico Sur', *Asociación para las Naciones Unidas de España, Conflictos olvidados* (2007) 5; N.E. Consani, 'La cuestión Malvinas', 38 *Relaciones internacionales* (2010), at 11-16; B.A. Bologna, 'Los derechos de Inglaterra sobre las Islas Malvinas: Prescripción', 4(4) *Revista de Estudios Internacionales* (1983), at 782 y s.; H. Gros Espiell, 'El caso de las Malvinas y el derecho a la libre determinación de los pueblos', 7 *Anuario Hispano-Luso-Americano de Derecho Internacional* (1984), at 27-42; A.M. Viejonuevo Sonia, 'Self-determination v. territorial integrity: The Falkland/Malvinas dispute with reference to recent cases in the United Nations',16 *South African Yearbook of International Law* (1990-1991), at 11-14.

[64] GA Res. 2065 (XX), 16 December 1965. This was followed by many others, the most noteworthy being GA Res. 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19, or 43/25.

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Despite the fact that it is still on the list of NSGRT, and therefore pending decolonization, the United Kingdom denies the territory's colonial status;[65] understands that the applicable right is that of self-determination that the population has clearly expressed its wish to continue being British and that there will be no negotiations over sovereignty until the inhabitants so desire.[66] As Gros Espiell would observe, the decolonization of the territory must be effected via application of the principle of the sovereign territorial integrity of the State, "lo que no sólo es compatible con el principio de la libre determinación de los pueblos, sino la única forma correcta y justa de aplicación de este principio".[67]

The fact is that the conflict is far from being resolved and new tensions arise with relative frequency. Thus, for example, the UK's decision to extend its jurisdiction over maritime space adjacent to the islands provoked a note of protest from the Argentine government which, in turn, was rejected by the administering Power: "The United Kingdom does not recognize Argentine jurisdiction over the area, which lies within 200 miles of the Falkland Islands and more than 200 miles from Argentine baselines".[68] This conflict also extends to the islands' continental shelf.[69] Meanwhile, in April 2015 the Argentine Government filed criminal charges in its courts against five oil companies for illicit activities of exploration and eventual extraction of hydrocarbons on the islands' continental shelf.[70] The inclusion in the Constitution of Argentina of a specific reference to Argentine sovereignty was in turn the object of an official protest by the United Kingdom...[71]

Both in the case of Gibraltar and that of the Malvinas/Falkland Islands, apart from violating the obligation to decolonize both territories, the UK violates the duty of every state to *comply*

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[65] The Argentine claims also extend to the islands of South Georgia and South Sandwich, situated to the east of the Falklands, over which the UK in fact exercises its sovereignty. The Argentine Constitution of 1994 reiterates that these islands form part of the territorial integrity of Argentina.

[66] A/AC.109/2010/15, 16 March 2010.

[67] H. Gros Espiell, *supra* n. 62, at 236 ("what is not only compatible with the principle of the self- determination of the peoples, but the only correct and just way to apply this principle", we translate). In spite of this, the Legislative Council of the Falklands stated in 1995 that "the Falkland Islands (Malvinas) had achieved most of the goals set by the Special Committee. The Islanders had the right to self-determination enshrined in their Constitution, and the Territory had enjoyed 155 years of peaceful democracy, interrupted briefly in 1982, when the Republic of Argentina chose to invade the Islands. The Islanders had a free association with an independent State, namely, the United Kingdom of Great Britain and Northern Ireland which, apart from defense and foreign policy, amounted to self-government. The United Kingdom recognized the Islanders' right to self-determination; Argentina did not" (A/AC.109/2121, 18 June 1995, at 25).

[68] A/AC.109/2027, 22 June 1995, at. 6 and 8.

[69] Thus, for example, on April 30, 1998 Argentina denounced the illegality of a public tender for the exploration and exploitation of natural resources on the continental platform of the Falkland Islands, via a note addressed to the UK embassy in Buenos Aires (cf. A/53/121, 12 May 1998).

[70] These are the British companies *Rockhopper Exploration plc, Premier Oil plc, Falkland Oil And Gas Limited* and the US companies *Noble Energy Inc. and Edison International SpA.*

[71] Cf. A/AC.109/2027, 22 June 1995, at 10.

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in good faith with its obligations under the Charter, since when the GA requests that it negotiates with Spain and Argentina, it does not merely intend formal negotiations to be held *sine die*, but that the negotiations have a purpose and genuinely seek to resolve the conflict.[72] As some authors have noted, the systematic repetition of this conduct is contrary to the duty to negotiate in good faith the solution to an international controversy and contrary to UN Law on decolonization.[73]

(E) OTHER TERRITORIES UNDER COLONIAL RULE

(1) Puerto Rico

Although it does not usually occupy a prominent position in studies on decolonization, given, on the one hand, the island's status within the USA as "Associated Free State", and, on the other, the fact that it is not on the list of NSGT, this is a territory with regard to which, as recently noted by Philip Alston, UN Special Rapporteur on extreme poverty, "in light of recent Supreme Court jurisprudence and Congress's adoption of PROMESA there would seem to be good reason for the UN Decolonization Committee to conclude that the island is no longer a self-governing territory".[74] In fact, since the 1980s the Decolonization Committee has been requesting that the analysis of the question should revert to the GA.

In 1946 Puerto Rico was included in the list of NSGT, but in 1952, following the promulgation of the Constitution of the Associated Free State, it was removed. GA Resolution 748 (VIII) stated that "when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination", and that "in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico

[72] As the ICJ indicated, "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, at 47).

[73] J.D. González Campos, L.I. Sánchez Rodríguez and P. Andrés Sáenz de Santamaría, *supra* n. 49, at 693.

[74] As is indicated by this report presented before the UN Human Rights Council in 2018, "69. Political rights and poverty are inextricably linked in Puerto Rico. If it were a state, Puerto Rico would be the poorest state in the Union. But Puerto Rico is not a state, it is a mere 'territory.' Puerto Ricans have no representative with full voting rights in Congress and, unless living stateside, cannot vote for the President of the United States. In a country that likes to see itself as the oldest democracy in the world and a staunch defender of political rights on the international stage, more than 3 million people who live on the island have no power in their own capital (...) 71. It is not for me to suggest any resolution to the hotly contested issue of Puerto Rico's constitutional status. But what is clear is that many, probably most, Puerto Ricans believe deeply that they are presently colonized and that the US Congress is happy to leave them in the no-man's land of no meaningful Congressional representation and no ability to really move to govern themselves" (Accessed 27 August 2018).

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have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity". Accordingly, it concluded that "the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter can no longer be applied to the Commonwealth of Puerto Rico".[75]

Nevertheless, since 1972 the Decolonization Committee have been analysing the situation in Puerto Rico. Thus, the Decision of the Committee of 20 June 2016 recalls that "25 July 2017 marks the 119th anniversary of the *intervention in Puerto Rico by the United States of America*", and insists that "the process of decolonization of Puerto Rico, in compliance with General Assembly resolution 1514 (XV) and the resolutions and decisions of the Special Committee on Puerto Rico, has not yet been set in motion".[76] Meanwhile, the Decolonization Committee's June 18, 2018 Resolution, adopted by consensus, after explicitly declaring the inalienable right of the Puerto Rican people to self-determination and independence in accordance with GA Resolution 1514 (XV), again urges the USA to assume responsibility for initiating a process that would enable Puerto Rico to take sovereign decisions vis-à-vis its urgent economic and social needs.[77]

Since 1967 the population has been consulted on successive occasions (1993, 1998, 2012 y 2017), consultations that on the one hand are not binding for the USA, and on the other, do not satisfy the minimum requirements in order to be considered tantamount to what is required by Resolution 1514 (XV), in spite of the denomination of the latter as: "Law for the immediate decolonization of Puerto Rico". As the Special Committee has recalled, in the 2012 consultation "a majority of the people of Puerto Rico rejected its current status of *political subordination*, and that in the context of the significant upsurge of the economic and fiscal crisis in Puerto Rico, such status *prevents it from taking sovereign decisions* to address their serious economic and social problems, including unemployment, marginalization, insolvency, poverty, and issues related to education and health; a situation made worse by the imposition of a *Puerto Rico Oversight, Management, and Economic Stability Act* by the United States Congress". It also noted that "the Supreme Court of the United States, in conformity with the request made by the Department of Justice, decided in June 2016 in the case of *Puerto Rico v. Sánchez Valle*, that *the original and ultimate source of governmental power in Puerto Rico lies in the United States Congress*, and that any limited concession of self-government to Puerto Rico may be unilaterally revoked by the United States Congress".

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[75] GA Res. 748 (VIII), 27 November 1953, was adopted by a slim majority after intense debates and pressure from the USA: 26 votes in favour, 16 votes against and 18 abstentions; in other words, only 43%.

[76] A/AC.109/2017/L.12 (Emphasis added).

[77] Available electronically here (accessed 27 August 2018).

The Special Committee also reveals its concern because as a result of the *Puerto Rico Oversight, Management, and Economic Stability Act*, which mandated the establishment of the Financial Oversight and Management Board, "the already weakened area in which the prevailing regime of political and economic subordination in Puerto Rico operates is reduced even further".[78]

As well as stating that all these questions leave Puerto Rico in a situation of dependence and subordination in relation to the USA similar to that of the territory prior to the proclamation of the Associated Free State, the Special Committee draws attention to another circumstance, which also occurs in the USA's colonization of some of the territories that it administers: military exploitation. This is the case of island of Vieques, which was used for over 60 years by the US army to perform military manoeuvres, bombings included, with the corresponding negative consequences for the population's health, the environment and economic and social development. For this reason, the Special Committee urges the Government of the United States "to complete the return of occupied land and installations on Vieques Island and in Ceiba to the people of Puerto Rico, respect fundamental human rights, such as the right to health and economic development, and expedite and cover the costs of the process of cleaning up and decontaminating the areas previously used in military exercises through means that do not continue to worsen the serious consequences of its military activity in order to protect the health of the inhabitants of Vieques Island and the environment".

Meanwhile, the USA confines itself to "respectfully" asking the Committee "to focus its time and energy on the 17 NSGT that are waiting to be removed from the list"...

It is plain to see that this is a blatantly colonial situation. In fact it could be said that "Puerto Rico is even further from true self-governance today than it was in 1953".[79] Despite this, given that approximately half the citizens of Puerto Rico (around 3,500,000) currently reside in the USA[80], the option of the island becoming independent does not appear to have much future. But the possibility of reopening the debate over the decolonization of the territory in an international scenario would force the US authorities to initiate new negotiations that would make it possible to increase the territory's level of self-government and improve the living conditions of its inhabitants.[81] In any case it should be the people of Puerto Rico that decides the future of the territory, and not the US courts.

78 A/AC.109/2017/L.12 (emphasis added).
79 *Developments in the Law - The U.S. Territories*, 130 *Harv. L. Rev.* (2017), at 1656-1679, at 1679.
80 A/AC.109/2002/L.4, at 3.
81 Ibidem.

(2) West Papua

The process that led this territory, also known as West Irian, to become a part of Indonesia, an integration still strongly challenged by the population[82], was not undertaken via consultation of the territory's population respecting universal suffrage, but by means of a consultation (*musjawarah*) of the tribal councils.

The fact is that when the United Nations arrived in the territory to attend the preparation of the referendum (UNSF)[83], Indonesia had already decided that the latter would not be held and that the consultation was to take the form of the aforementioned *musjawarah*, basing this decision upon the fact that the people of West Papua was one of the most primitive and underdeveloped populations in the world.[84] It also justified the non-holding of a referendum or a plebiscite on account of the fact that in the New York agreement, under which Holland and Indonesia negotiated the way in which the territory's self-determination should be implemented, there was no mention of the terms "referendum" or "plebiscite".

Despite "supervision" by a special envoy of the United Nations, this process constitutes a serious violation of the right to self-determination, particularly because in addition to the absence of a referendum respecting universal suffrage, the "consultation" of the tribal councils was strictly controlled by the Indonesian army, which isolated and coerced the council members, so that, as was indicated by T.D. Musgrave, "the Act of Free Choice was clearly nothing of the kind, and certainly did not represent the view of the vast majority of Papuans, who had shown their resistance to becoming a part of Indonesia through repeated demonstrations and armed rebellions throughout the entire period of Indonesian administration".[85]

But what is also particularly serious is the fact that the administration of the territory was transferred to the UN during a transitional period of nine months, after which administration of the territory was handed over to Indonesia, which six years later would perform the "consultation" of the tribal councils (approximately 1,000 of the territory's 800,000 inhabitants were consulted[86]).

This was the crude manner in which the integration was consolidated. It was subsequently endorsed by the GA through Resolution 2504 (XXIV), of November 19, 1969. This resolution

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[82] On the current situation of West Irian, cf. P. King, *West Papua & Indonesia since Suharto. Independence, Autonomy or chaos?* (University of New South Wales Press Ltd, Sydney, 2004).

[83] Unites Nations Security Force in West New Guinea (October 1962-April 1963).

[84] T.D. Musgrave, 'An analysis of the 1969 Act of Free choice in West Papua', in C. Chinkin & F. Baetens (ed.) *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford*, (Cambridge University Press, 2015), at 220.

[85] Ibidem.

[86] Cf. J. Morand-Deviller, "Autodétermination en Irian occidental et à Bahrein", 17 *Annuaire Français de Droit International* (1971), at 513-540.

recalled that "the arrangements for the act of free choice *were the responsibility of Indonesia* with the advice, assistance and participation of a special representative of the Secretary-General", something that, as T. Franck graphically observed in relation to the Saharawi conflict, was "like inviting a cat to consult the canaries".[87] As Morand-Deviller pointed out, the basic assumption was the legality of the consultations carried out in the processes of decolonization that were supervised by a UN envoy whose presence was accepted by the administering Power, so when he latter opposed this supervision, the process fell under suspicion.[88]

As F. Villar says, the example of Western Irian is "uno de los episodios más lamentables en que se hayan visto envueltas las Naciones Unidas en el proceso de descolonización".[89] Obviously, this case cannot be regarded as a precedent, but as "une dérogation à une règle générale dont la valeur juridique demeure entière: l'exigence d'une consultation du peuple pour toute intégration d'un territoire non autonome à un Etat indépendant, conformément au Principe IX de la résolution 1541 (XV)".[90] Although, in the UN's eye there is nothing surprising about the integration of a colonial people into a non-colonial Power since it is no more than a form of independence, of freedom[91], this integration must be the product of a decision freely taken by the people in question, which, obviously, did not occur in the case of West Papua.

(3) The Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India

Since 1979 the GA has maintained in its programme the analysis of the question of Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India.[92] At the request of Madagascar, which claims sovereignty over these since its independence in 1960, in 1979 the GA adopted Resolution 34/91, in which besides declareing the "the necessity of scrupulously respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence", invited "the Government of France to initiate negotiations without further delay with the Government of Madagascar for the reintegration of the above mentioned islands, which were *arbitrarily separated from Madagascar*" and urged the Government of France "to repeal the measures which infringe the *sovereignty and territorial integrity of Madagascar* and

[87] T.M. Franck, *supra* n. 29, at 717.

[88] J. Morand-Deviller, *supra*, n. 85 at 514.

[89] F. Villar, *El proceso de autodeterminación del Sahara* (F. Torres ed., Valencia, 1982), at 258-260 ("one of the most regrettable episodes in which the United Nations has been involved in the process of decolonization", we translate).

[90] C. Rucz, 'Un referendum au Sahara occidental?', 40 *Annuaire Français de Droit International* (1994), at 248.

[91] J.F. Guilhaudis, *Le Droit des peuples à disposer d'eux-mêmes* (Presses Universitaires de Grenoble, 1976), at 86.

[92] Its status of "island" according to international law is very questionable, as, while Bassas da India only emerges at low tide, the other three are uninhabited, with only a small French military detachment of around ten soldiers who ensure control over the islands.

to refrain from taking other measures that would have the same effect and could hinder the search for a just solution to the present dispute".[93]

During the next session, GA Resolution 35/123 "invites the Government of France to initiate with the Government of Madagascar, as a matter of urgency, the negotiations provided for in resolution 34/91, with a view to settling the question in accordance with the purposes and principles of the Charter of the United Nations".[94]

In this case, as in the one addressed in the next section, France violated the principle *uti possidetis iuris*, by separating at the moment of independence these islands from the main island[95], "la Grande Île", since as the ICJ established in its judgement of December 22, 1986, in the *case of the Frontier dispute* (*Burkina Fasso/Republic of Mali*), "as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs".[96]

In spite of the GA's insistence that France respect Malagasy territorial integrity, given the establishment of the EEZ around what it called the "Îles Eparses"[97], which along with the island of Mayotte ensure this state both control of the fishing resources in practically half of the Mozambique Channel[98] and future exploitation of the vast hydrocarbon reserves present on its continental shelf, nothing suggests that this permanent member of the SC, accustomed to ignoring GA Resolutions in questions of decolonization, is going to change its position.[99]

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93 Emphasis added.

94 In the same sense, cf. GA Res. 36/452, 37/424, 38/422, 39/421, 40/429, 41/416, 42/415, 43/419, 44/419, 45/402, 46/402, 47/402, 48/402, 49/402, 50/402, 51/402, 52/402...

95 Décret n°60-555 du 1 avril 1960 relatif à la situation administrative de certaines îles relevant de la souveraineté de la France (Accessed 28 August 2018).

96 *Frontier Dispute, Judgment, I.C.J. Reports 1986*, at 566, paragraph 23.

97 Under this common denomination, France includes Tromelin, an islet of 0.8 km2 whose sovereignty is claimed by Mauritius. Through a joint communiqué, in December 2002 the governments of Mauritius and Madagascar agreed to support their respective demands: "sur la question de Tromelin et les îles Éparses, le gouvernement mauricien continuera à accorder son appui à la revendication du gouvernement malgache sur les îles Éparses (Juan de Nova, Europa, Bassas da India et les îles Glorieuses). Le gouvernement mauricien a, de son côté, réitéré sa souveraineté sur Tromelin et a souhaité pouvoir continuer de bénéficier du soutien du gouvernement malgache à cet effet. Le gouvernement malgache a pris note de la position mauricienne" (Accessed 28 August 2018).

98 Via the establishment of an EEZ around these islands, the EEZ that France controls measures 636,000 km2. On these questions and for the French point of view, cf. B. Dujardin, 'Les espaces maritimes français', 477 *La Revue Maritime* (2006), faccessed 28 August 2018).

99 The French position is reflected perfectly in the words of Jean-Marc Châtaigner, former French ambassador to Madagascar, when he criticizes the contents of Resolution 34/91 in the following terms: "Cette résolution, se référant étonnamment aux principes de décolonisation (alors que les îles Éparses n'ont aucune population autochtone), est souvent citée à tort, par les partisans de la souveraineté malgache sur les îles Éparses, comme un fondement juridique de leur position. Il convient en effet de rappeler que les résolutions de l'AGNU n'ont pas de valeur juridique contraignante en droit international public, contrairement aux résolutions du Conseil de sécurité"

(4) Mayotte and the Decolonization of the Comoros Islands

Following the UN's steps in order to bring an end to the decolonizing process, the authorities of the Comoros Islands and France concluded the agreements of June 15, 1973, which anticipated the holding of a referendum on self-determination in the territory. On December 22, 1974 the referendum was held on the four islands that make up the archipelago (Grande Comore, Anjouan, Moheli and Mayotte). The first three voted in favour of independence, while Mayotte voted against.[100]

Although it is not necessary to recall the absolute validity of the principle of *uti possidetis iuris*, and consequently, the illegality of the attempt to separate Mayotte from the rest of the islands that form the archipelago, on the basis of these results (I am not going to analyse the irregularities that characterized the election campaign in Mayotte), the French Government organized two referendums (February 8 and April 11, 1976) on the island. In both the population voted in favour of remaining under French administration, as a result of which France accepted the independence of the new State of the Republic of Comoros, but excluded its main island.

GA Resolution 31/4 declared that "the referendums imposed on the inhabitants of the Comorian island of Mayotte constitute a violation of the sovereignty of the Comorian State and of its territorial integrity", and described the French presence on the island as "occupation". Consequently, it "condemns and considers null and void the referendums", and "*calls upon* the Government of France to withdraw immediately from the Comorian island of Mayotte". The resolution could not be more robust. This resolution was adopted on the basis of the primacy of the principle of territorial integrity over that of the free choice of the people of Mayotte, especially bearing in mind that "in accordance with the agreements between the Comoros and France, signed on 15 June 1973 (...) the results of the referendum of 22 December 1974 were to be considered *on a global basis and not island by island*"[101]. This is one of the first GA resolutions on the question, followed by others of a similar nature, adopted on an annual basis.

In the domestic French sphere, it appeared that F. Mitterrand's entry into Government in May 1981 might change this island's destiny, since in his election manifesto he argued in favour of its reintegration into the Comoros, but this proposal was never more than a paper tiger. In recent years there have been proposals of economic, scientific and environmental co-

(J.M. Châtaigner, 'Les îles Éparses : enjeux de souveraineté et de cogestion dans l'océan Indien', *La Revue maritime* (2015), at 84, accessed 28 August 2018. The ambassador forgets that, as we have seen in the cases of Gibraltar and the Malvinas/Falklands, decolonization does not mean that the population should exercise the right to self-determination and that on occasions, like this one, the applicable principle for decolonization to occur is that of territorial integrity.

[100] In the case of the first three islands the vote in favour of Independence was 99.8% (150,000), compared with 65% against in Mayotte (around 5,000 votes)

[101] AG Res. 38/13, 21 November 1983.

management of these island territories, but the pressure exerted by the more nationalist right has prevented these proposals from being voted on in the French National Assembly, as they were considered to be an abandonment of sovereignty. Meanwhile, the instability in the rest of the islands has steadily increased since 1995, with French mercenaries inciting the pro-independence movements.[102]

After a new referendum called by Sarkozy in 2011, Mayotte became French Department 101 and in January 2014 became a RUP (*Région Ultra Périphérique*) under European administration. But it seems that neither the French authorities nor the indigenous population, who regarded this privileged status as a major advance in their development, anticipated the possible consequences of converting this little island into a piece of the European Union more than 8,000 kilometres from the French capital and in the middle of a particularly poor part of the world. This circumstance has led to the biggest crisis in the island since its separation from the rest of the country, and it has resulted in massive immigration from the rest of the islands to Mayotte in search of the "European" dream, to the extent that, despite the expulsion of over 20,000 of these immigrants, in April 2018 the "illegal" population of the island constituted 50% of the total (approximately 260,000 inhabitants).

Nonetheless, French economic interests in the exploitation of economic resources in both the EEZ and the island's continental shelf prevent significant progress in the solution of the conflict, in other words, in decolonization.

(5) The Chagos Archipelago: Law enters the stage

In 1965, three years before the declaration of the independence of Mauritius, which already appeared to be inevitable, the United Kingdom separated from its territory the Chagos archipelago,[103] with the intention of creating on the largest island, Diego García, a military base. This action was endorsed in the same year by the *Lancaster House Undertakings*, concluded between the UK and the Mauritian representatives during the negotiations prior to the territory's independence, in which the archipelago's separation was a *sine qua non* of

[102] As P. Caminade has noted, since 1995 French mercenaries have contributed to the destabilization of the country, fomenting the nationalism that has emerged in the rest of the country's islands. This author considers that the instability in the Comoros is a direct consequence of illegal French occupation and France's neo-colonial policy. Since then citizens arriving in Mayotte from the other islands have been returned immediately by the French authorities. In the eyes of the UN this is a single state, so these expulsions are in breach of international law (P. Caminade, *Comores-Mayotte: une histoire coloniale* (Agone, Marsella, 2003).

[103] On November 8, 1965 the archipelago became the *British Indian Ocean Territory* (B.I.O.T.), via the *The British Indian Ocean Territory Order 1965*, *Statutory Instruments 1965*, No. 1920. As has been said, the island of Tromelin was also segregated from Mauritius by France.

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decolonization.[104] According to this agreement, the UK committed to, amongst other questions, the following: "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius". In spite of this, on December 20, 1966 the UK ceded its "new colony" to the USA for fifty years with the option of prolongation for further twenty years.

Between 1968 and 1973, the year in which the military base became operational, the approximately 2,000 inhabitants of the island of Diego García were expelled, and had to resettle in Mauritius and the Seychelles in conditions of extreme poverty, in order that the USA could build the base.

GA Resolution 2066 (XX), after reiterating "the inalienable right of the people of the Territory of Mauritius to freedom and independence in accordance with General Assembly resolution 1514 (XV)", invites the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".[105] This resolution was followed by other similar ones which have always been ignored by the British authorities.

In this same sphere of the United Nations, the Human Rights Committee has been addressing the question and has criticised the fact that despite its previous recommendation, the UK has not included the Chagos archipelago in its periodic report because "it claims that, owing to an absence of population, the Covenant does not apply to this territory". It has also stated that the UK "should ensure that the Chagos islanders can exercise their right to return to their territory (...) and consider compensation for the denial of this right over an extended period".[106]

But beyond the limited scope of the resolutions adopted by the United Nations GA or the Human Rights Committee, both the victims of the expulsion and the Republic of Mauritius itself have recurred to every possible judicial institution in defence of their rights.

On the one hand, though with little success, the citizens that were expelled from Diego García have launched different proceedings in the domestic courts of the USA and the UK,

[104] Among others, and in addition to the aforementioned, the following commitments: (...) compensation totalling up to £3m should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands; (...) the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable: (a) Navigational and Meteorological facilities; (b) Fishing Rights; (c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers; (...) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government". Cf. *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, 18 March 2015, at 77, accessed 9 September 2018.

[105] GA Res. 2066 (XX), 16 December 1965.

[106] "Consideration of reports submitted by States parties under article 40 of the Covenant", 30 July 2008 (CCPR/C/GBR/CO/6, para. 22).

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and in the ECHR itself. An excellent work by Pigrau Solé analyses all of these in detail, so I shall not address the question in depth in this short study.[107] These proceedings have been largely unproductive, and as this author notes, they highlight both "los instrumentos jurídicos que permiten a los gobiernos eludir el escrutinio judicial de sus decisiones políticas y utilizar a los tribunales nacionales, en los Estados Unidos y el Reino Unido, justamente para blindar dichas decisiones", and the considerable reluctance of these courts to recognize the relevancy of the International Law in their respective legal systems.[108] Similarly, the ECHR has preferred to ignore the origin of the expulsion of the claimants, in other words, the UK's violation of the principle of *uti possidetis iuris* and of its obligations established in article 73 (e) of the UN Charter, dismissing the legal action on procedural grounds.[109]

Meanwhile, the Mauritian Government, since the very moment of its independence, and particularly since 1984, has been very belligerent in its demands. In that year it claimed the 200 miles of EEZ surrounding the archipelago which, despite the UK's protests[110], and as P.H. Sand recalls, "was recognized in the Agreement between the European Economic Community and the Government of Mauritius on Fishing in Mauritian Waters (June 10, 1989)".[111] For its part, the UK proceeded that same year to declare its own EEZ[112], though this did not prevent the Mauritian boats from continuing to fish there.

Going a step further, in 2010 the United Kingdom declared a "Marine Protected Area" (MPA) around the archipelago, although it excluded from the latter the island of Diego García. The result of this action was that Mauritius, on December 20, 2010, submitted the case to arbitration under UNCLOS Annex VII, disputing the compatibility of the MPA with UNCLOS and the competence of the UK to establish it. For, if in spite of the declaration of the EEZ by the UK, until then the Mauritian boats had fished in these waters without great

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[107] Cf. A. Pigrau Solé, "El caso de la Isla de Diego García: territorio sin Derecho Internacional, personas sin derechos", 31 *Revista Electrónica de Estudios Internacionales* (2016), at 1-36. As Professor Pigrau recalls, this is jurisprudence from US courts, which in 2004 and 2006 blocked legal proceedings in application of the well-known doctrine of the "political question", and from British courts in five key decisions: *Michel Ventacassen Case*, 1975; *Bancoult 1 Case*, 2000; *The Chagos Islanders Case*, 2003 and 2004; *Bancoult 2 Case* (2006, 2007 and 2008) (ibid. at 9-17) y *Bancoult 3 Case* (2016 and 2018). See also P.H. Sand, "The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics", *The Global Community Yearbook of International Law & Jurisprudence* (2013), I, at 125-149.

[108] Pigrau Solé *supra* n. 108, at 35 ("the legal instruments that allow governments to avoid judicial scrutiny of their political decisions and use national courts in the United States and the United Kingdom to justify such decisions", we translate).

[109] European Court of Human Rights, Fourth Section, Decision, Application no. 35622/04, *Chagos Islanders against the United Kingdom*, 11 December 2012.

[110] United Kingdom's Note Verbale of 18 February 1985. See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, at 105.

[111] P.H. Sands, *supra*, n. 108 at 138, n. 84.

[112] Fisheries Zone. Proclamation No. 8 of 1984.

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problems, the declaration of the MPA expressly prohibited commercial fishing. As Pigrau Solé has pointed out, and as Mauritius maintained, behind the environmental justification lies the real reason for the declaration of the MPA: consolidate the military activity of the Diego García base and protect the decision to prevent the return of the original inhabitants.[113]

The Tribunal decided that it lacked jurisdiction to consider Mauritius' claim that the UK was not the "coastal State" in respect of the Chagos Archipelago for the purposes of the Convention;[114] that it also lacked jurisdiction to consider Mauritius' alternative claim that the *Lancaster House Undertakings* endowed Mauritius with attributes of a "coastal State".[115] The Tribunal stated that the dispute concerned the question of sovereignty over the Chagos Archipelago and not a matter concerning the interpretation of the UNCLOS and that it did not therefore have jurisdiction to decide the matter.

However, although partially, the court found in favour of the claimant state. In its opinion, the "Lancaster House Undertakings" were a *sine qua non* imposed by the United Kingdom upon the negotiators in order that Mauritius could become an independent state,[116] and consequently Mauritius holds legally binding rights to fish in the waters surrounding the Chagos Archipelago, to the eventual return of the Chagos Archipelago to Mauritius when no longer needed for defence purposes, and to the preservation of the benefit of any minerals or oil discovered in or near the Chagos Archipelago. But perhaps most importantly from the perspective of international law is the application to the UK of the institution of the *estoppel*,[117] identifying the existence of two necessary circumstances for the latter: "(a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in

[113] Pigrau Solé *supra* n. 108, at 25.

[114] *In the Matter of an Arbitration Before An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland.* Award of 18 March 2015, at 221.

[115] Ibid. at 228.

[116] "The Tribunal considers the *Lancaster House Undertakings* to have been an essential condition to securing such Mauritian consent to the detachment of the Archipelago as was given. Without yet passing on the legal nature of these commitments or the validity of Mauritian consent, the Tribunal is confident that, without the UK's undertakings, neither Sir Seewoosagur Ramgoolam nor the Mauritius Council of Ministers would have agreed to detachment" (Ibid. at 422).

[117] The British position has been stated on numerous occasions in the following terms: "The British Government maintains that Chagos archipelago is British since 1814. It does not recognize the sovereignty claim of the Mauritian Government. However, the British Government has recognized Mauritius as the only State which has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes and does not recognize the sovereignty claim of the Mauritian Government. But recognizes Mauritius as "the only State that has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty" (A/55/PV.28, 22 September 2000).

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question".[118] So, "these representations took the form both of confirmation that the United Kingdom had given an undertaking in the past[119] and of independent promises, and were made in statements by the Prime Minister and Foreign Secretary of the United Kingdom, who were unequivocally authorized to speak for it on this matter. The Tribunal also considers that the United Kingdom's consistent, unvaried practice of permitting Mauritian fishing in the waters of the Archipelago constituted a representation by conduct that such fishing rights would be continued, not necessarily".[120] Therefore, the Court concludes that "in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention".[121]

It is clear from the text of the judgement that it seeks to satisfy both parties, something unfortunately very common in international jurisprudence. Thus, regrettably it avoids reference to the causes of the conflict. In this respect, I am in total agreement with the dissenting and concurring opinion of Judges Kateka and Wolfrum: the Mauritian Ministers were coerced in 1965 into agreeing to detachment and UK's detachment of the Archipelago violated the international law of self-determination.[122] In any case, and as some authors have observed,[123] this arbitration decision appears to oblige the parties to negotiate over the future of the archipelago although the USA's presence renders its resolution far more difficult.

But there is yet another fact that may prompt the definitive decolonization of the territory which, as in the case of the Malvinas/Falklands or Gibraltar, should be undertaken via application of the principle of territorial integrity. On 22 June 2017, the GA adopted resolution 71/292 in which it requested 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

[118] *In the Matter of an Arbitration Before An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea Between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland.* Award of 18 March 2015, at 438.

[119] "[t]he British Government has therefore given an undertaking to the Government of the Republic of Mauritius that, when the islands are no longer needed for the defence purposes of the United Kingdom and the United States, they will be ceded to Mauritius" (Letter dated 1 July 1992 from the British High Commissioner, Port Louis, to the Prime Minister of Mauritius (Annex MM-103) Ibid., at 439. See also Letter dated 10 November 1997 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Prime Minister of Mauritius (Annex MM-105) (Ibidem).

[120] Ibídem.

[121] Ibid. at 547.

[122] Dissenting and Concurrent Opinion Judge James Kateka and Judge Rüdiger Wolfrum, at 70-80.

[123] Pigrau Solé *supra* n. 108, at 35; M. Walbel, 'Mauritius v. UK: Chagos Marine Protected Area Unlawful', at 5, published 17 April 2015, accessed 9 September 2018).

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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?"

"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?"

At the time of writing, the public hearings phase has concluded and the Court is ready to begin its deliberation,[124] so it is too soon for any kind of evaluation. In spite of the fact that these are not contentious proceedings, so their consequences will necessarily be limited, it is to be hoped that the Court takes into account both the arbitration decision of 2015 and its advisory opinion of 1975 on the Western Sahara and the decolonization policy practised by the United Nations during the more than fifty years since the UK decided to segregate the archipelago of Mauricio, violating, like other colonial Powers (the aforementioned case of Mayotte is an eloquent example), the principle of *uti possidetis iuris*. The Court has a unique opportunity to once again insist on the need to conclude the decolonization process. Everyone is aware that the advisory opinion could have an impact upon other incomplete processes.

The decolonization of the Chagos Archipelago represents a classic problem of decolonization, but its geo-strategic situation on one of the main Pacific routes for hydrocarbons and strategic raw materials, and the return to the Cold War since Trump's arrival in the White House appear today to constitute an insurmountable obstacle. Nevertheless, in this case, as in that of the Western Sahara, the use of jurisdictional channels seems to have slightly opened a door that appeared to be closed. Although as André Oraison predicted almost three decades ago, "Diego Garcia risque de rester, longtemps encore, un 'super porte-avions' britannique ancré au coeur de l'océan Indien et armé par les Américains pour le compte de l'Occident",[125] those of us who still believe the virtues of international law when in the hands of judges hope that this does not prove to be the case.

(F) SOME CONCLUSIONS

In recent decades the debate has reopened with regard to the current scope of the right of peoples to self-determination, a question that is analysed in depth in this edition of the *Spanish Yearbook of International Law*. But apart from this debate, its applicability to peoples subjected to colonial rule is beyond any doubt. The repeated reference to its validity in resolutions adopted every year by the GA and the SC in relation to NSGT leaves no room for doubt.

[124] *ICJ Press Release* No. 2018/44, 6 September 2018.

[125] A. Oraison, 'À propos du litige Anglo-Mauricien sur l'archipel des Chagos (La succession d'États sur les îles Diego Garcia, Peros Banhos et Salomon)', *Revue belge de droit international* (1990), 1, at 53.

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Big Powers and their allies insist on prioritizing their interests over respect for international law, maintaining the prevailing *statu quo* in the territories they administer or occupy. Their main argument is the passage of time: the right of peoples to self-determination is an "obsolete right", an "anachronism"[126]. But behind this affirmation with no legal basis lie all kinds of hidden interests: from the strictly economic (exploitation of the land territory's natural resources, of the EEZ[127] and of the continental shelf) or political, military or geo-strategic, to rancid and antiquated nationalistic claims. Although the passage of time obviously complicates the decolonization of these territories, under no circumstance can it serve as an excuse to consolidate and "legalize" a situation born of a serious violation of international law; even less so in cases of military occupation.

Despite this, in some cases the problems involved in decolonization appear to be almost insurmountable. This is the case of some NSGT that have become authentic tax havens, in which, if it occurred, decolonization would consist in incorporation into the administering powers, albeit they were then dressed up as "associated free states". To the decolonization of other NSGT, in which the colonizers dispossessed the population of its lands to use them for military purposes (such as Guam, American Samoa or New Caledonia) or even to carry out nuclear tests (French Polynesia), and in spite of strong protests by their inhabitants, is added the problem of registration for the census, given the demographic changes resulting from colonial power's organized policy of colonization, which has turned the indigenous population into a minority in its own land. This is also the situation of the population of Western Sahara, the largest African territory pending decolonization, in which purely economic interests (fishing, agriculture, phosphate...) combine with other political and geo-strategic aspects of greater importance to the European Union (immigration control, combatting jihadist terrorism, stability of the regime). The UN's intervention in the Peace Plan has already borne fruit: the MINURSO did its job thoroughly and since 2000 a census for the referendum has existed, but the intransigence of the occupying power and the French veto on the SC prevent the referendum from being held. Something similar occurs with the decolonization of the two NSGT that should be undertaken via the application of the principle of territorial integrity (Gibraltar and Malvinas/Falkland), although in this case it is the UK that is preventing the application of international law.

Although their resolution is equally complex, the case of other territories that are not on the list of NSGT and whose decolonization was deemed to have terminated by the middle of the

[126] "The era when self-determination was synonymous with an absolute right to political independence has passed, and more flexible and creative bases for compromise between disputing parties are presently in order" (S.J. Spector, 'Western Sahara and the Self-Determination Debate', *Middle East Quarterly*, summer 2009, at 33-43).

[127] Although a simple glance at the coast of its mainland territory suggests the opposite, France currently possesses the largest EEZ in the world, 8% of the total.

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last century, like Puerto Rico or West Papua, is once again on the Decolonization Committee's agenda along with that of others that were segregated from their respective states when they gained independence, in violation of the principle of *uti possidetis iuris* (The Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India, Mayotte and the Chagos Archipelago). This is further evidence that the GA does not consider the phenomenon of decolonization to be over and that it takes the matter seriously.

The United Nations was created by the states that won the war, which granted themselves the right to veto which makes it impossible for the SC to impose the application of international law and conclude the decolonization process. Three of them, USA, France and the UK, are responsible for this situation, since with the exception of West Papua, all the territories mentioned are under the administration or military occupation of these three states or their allies. In these circumstances there is little cause for optimism. So far the right to veto has been the final phase of these processes.

However, the recourse to legal proceedings taken by the authorities of some of these territories has begun to bear fruit. When the frustrated attempts by Portugal with regard to East Timor or Nauru in relation to Australia before the ICJ seemed lost in the mists of time, domestic courts within the states and international courts like the ECHR, the ECJ or the ICJ itself have had to dust off the international law manuals and study the key points of the rights of peoples to self-determination. I am not so naive as to think that these proceedings will be sufficient for that Third International Decade for the Eradication of Colonialism, due to end in 2020, to be a reality. But they may represent the push that the international community needs in order, once and for all, to achieve this. I hope this is the case.

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