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IS THE UNITED NATIONS A LOCUS OF INTERNATIONAL ORDER IMPERIALITY MAINTENANCE? REFLECTIONS FROM THE SOUTH WEST AFRICA CASE AND CHAGOS ARCHIPELAGO ADVISORY OPINION

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Abstract

The international legal order seen through third-world lenses is embedded with Europe's colonial past. It is also a regime that assimilates the non-European being, its relations, and knowledge. Consequently, changing such a framework is almost impossible because it is constantly rejected by hegemonic powers. The framework is opposed only by the few nations controlling the modern world order. Therefore, this study aimed to verify the argument by some people that the United Nations presented the international legal order by breaking with the imperial system due to sovereign equality among its nations. The United Nations presupposes the maintenance of the status quo between hegemonic and subaltern states to perform its activities. This is based on the analysis of the South West Africa decision delivered in the 1960s by the International Court of Justice, an organ of the U.N. The Court's recent activities on the Chagos Archipelago Opinion of 2019 showed that it tried to break with such a past timidly by reaffirming self-determination and the U.N. General Assembly's relevance. However, this was not enough because the Organization was still a locus of reproduction of imperialism in the international order.

Keywords: *United Nations, Imperialism, Third World, South West Africa Case, Chagos Archipelago Advisory Opinion.*

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I. INTRODUCTION: INTERNATIONAL LAW, IMPERIALISM, AND THE ONGOING OCCULTATION OF THE GLOBAL SOUTH

International law could be read from a critical perspective, considering it is imperial and created out of the colonial encounter.[1] This is reasonable, particularly in countries of the Global South.[2] Due to colonialism and neo-colonialism that affected power distribution between states and people through rules and institutions proposed by imperial nations in the turn of modernity.[3]

[3] Modernity, according to Dussel, is commonly prescribed as "an emancipation, a 'way out' of immaturity by an effort of reason as a critical process, which provided humanity with a new human development. This process took place in Europe, essentially in the 18th century". Nevertheless, here, we understand it, just as presented by Dussel, to have a second view/definition, which "consist[s] in defining as a fundamental aspect of the modern world to be in the 'center' (in terms of States, armies, economy, philosophy, etc.) of world history. That is, empirically there was never world history until 1492 (the date of the start of the 'World-System'). Before that date, empires or cultural systems coexisted among each other. Only with the Portuguese expansion of the 15th century, which reached the Far East in the 16th [century], and with

The results were the many injustices still present in the people's everyday lives.[4]

Since the arrival of the European in the Americas in 1492,[5] the rules and institutions that regulated the relation among peoples were derived from the encounter.[6] The rules and institutions were also set to serve the interests of those in the North[7] or in the center of the world system.[8] This happened even when it meant assimilating the non-Europeans, their relations, and knowledge.[9] The Europeans' will trumped the Amerindians' due to their belief of superiority in knowledge, experience, culture, and wealth accumulation, considered a global model.[10]

Europeanization was imposed forcefully and was considered legitimate.[11].

the 'discovery' of Hispanic America, the entire planet became the 'place' of 'only one' history [dominated by Europeans]". Enrique Dussel, "Europa, modernidade e Eurocentrismo [Europe, modernity and Eurocentrism]," in *A colonialidade do saber: eurocentrismo e ciências sociais* [*The coloniality of knowledge: Eurocentrism and social sciences*], edited by Edgardo Lander (Buenos Aires: Clacso, 2005), 28.

[4] Antony Anghie and Buphinder S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts," *Chinese Journal of International Law* 2, no. 1, (2003): 78, doi: 10.1093/oxfordjournals.cjilaw.a000480.

[5] Enrique Dussel, "Desde o 'ego' europeu: o encobrimento [From the European 'ego': or cover-up]," in *1492: O Encobrimento do Outro* [The Cover-up of the Other], ed. Enrique Dussel (Petrópolis: Vozes, 1993): 18.

[6] Anghie and Chimni, "Third World Approaches to International Law," 84. Buphinder S. Chimni, "The Past, Present, and Future of International Law: A Critical Third World Approach. *Melbourne Journal of International Law* 8, no. 2, (2007): 501.

[7] Walter D. Mignolo, "Colonialidade: o lado mais escuro da modernidade [Coloniality: the darkest side of modernity]," *Revista Brasileira de Ciências Sociais* 34, no. 94, (2017): 3, doi: 10.17666/329402/2017.

[8] *See* Immanuel Wallerstein, *The Capitalist World-Economy* (London: Cambridge University Press, 1979).

[9] Naeem Inayatullah and David L. Blaney, *International Relations and the Problem of Difference* (New York: Routledge, 2004) at 106. From this idea of assimilating others due to their supposed inferiority is that Quijano parts to ponder over the idea of coloniality of power that ruled the international division of labor, creating a workforce based on the "phenotypic differences between conquerors and conquered" (Aníbal Quijano, "Coloniality of Power, Eurocentrism, and Latin America", *Nepantla – views from South* 1, no. 3 (2000): 534). This later was subdivided into the coloniality of knowledge, too, by Quijano, which pointed to whose knowledge were to be considered useful or even who could produce it, and the coloniality of being by Mignolo, which established who could bear rights in society. Aníbal Quijano, "Coloniality and modernity/ rationality", *Cultural Studies* 21, no. 2-3, (2007): 169.; Walter D. Mignolo, "Introduction: coloniality of power and de-colonial thinking", *Cultural Studies* 21, no. 2-3, (2007):156-157.

[10] Dussel, "Europa, modernidade e Eurocentrismo," 29.

[11] This relates to the Valladolid debate (1550-1551) between Bartolomé Las Casas and Juan Gines de Sepulveda who addressed the legality of the European conquest of the Americas, along with Francisco de Vitoria. Sepulveda, in particular, were of the view that, since Amerindians were barbarians, by rejecting the empire's faith – the Christianity preached by the European/civilized – it could be imposed on them through war, being it legit under natural law in his interpretation, and thus binding the Amerindians to *ius gentium*. *See* Enrique Dussel, "Meditaciones anti-cartesianas: sobre el origen del anti-discurso filosófico de la Modernidad [Anti-cartesian meditations: on the origin of the anti-philosophical discourse of Modernity]," *Tabula Rasa* 9 (2008): 153-198; Ramon Blanco and Ana Carolina Teixeira Delgado, "Problematising the Ultimate Other of Modernity: the Crystallisation of Coloniality in International Politics," *Contexto Internacional* 41, no. 3, (2019): 599-619, doi 10.1590/S0102-8529.2019410300006, at 610-612. Concerning Vitoria, even though he considered Indians to possess reason, he thought they were barbarians, thus, being part of an inferior category of beings (compared to slaves) capable of taking orders but not rationally governing

It forced the peoples from the South to follow the European paradigms as general practices, with limited protection from phenotypic differences,[12] societal organization[13] and rulemaking.[14] This paints international law as an instrument of dominating the marginalized and legitimizing the European colonial expansion. Therefore, it implicated several exclusions visible in current society, such as in Latin America, Africa, and Asia. Anghie[15] defined international law as rules that determine the conduct of civilized states in their interactions.

Orford[16] stated that extreme uneven development, inequality, mass movement of peoples, civil war, food insecurity, and poverty are not caused by the inherent characteristics or failed leadership of post-colonial states. They are the effects of a historically constructed global political and economic system. These effects have not ended with the independence of many nations from their European colonizers. They are still ongoing under coloniality, defined as maintaining colonialism after the decolonization[17], which sustains the imperial current international law[18]. According to Ndlovu[19]such logic has prescriptive and performative characteristics. Prescriptive logic relates to denying the possibility of change desired by an anti-systemic agency. Performative logic entails the susceptibility of coloniality's power structure to transformation and re-arrangement without destruction and collapse.

This implies the impossibility of fully rearranging the international order by promoting people's independence and self-determination by attributing sovereignty to the formerly colonized states in the 19th and 20th centuries

themselves. Therefore, because Europeans – precisely the Spanish – had such capacity, they had the just right to travel, trade, spread the Christian religion, and defending themselves from those who oppose to it (as it, in fact, constituted an act of aggression). *See* José-Manuel Barreto, "Imperialism and Decolonization as Scenarios of Human Rights History," in *Human Rights from a Third World Perspective: Critique, History and International Law*, edited by José-Manuel Barreto (Cambridge: Cambridge Scholars Publishing, 2013), 146-149; Antony Anghie, "Colonial Origins of International Law", in *Laws of the Postcolonial*, Eve Darian-Smith and Peter Fitzpatrick, eds. (Ann Arbor: University of Michigan, 1999), 94-97.

[12] Aníbal Quijano, "Coloniality of power, Eurocentrism, and Latin America," *Nepantla* 1, no. 3 (2000): 534.

[13] Sandhya Pahuja, "The postcoloniality of international law," *Harvard International Law Journal* 46, no. 2, (2005): 463.

[14] Antony Anghie, "The evolution of international law: colonial and postcolonial realities," *Third World Quarterly* 27, no. 5, (2006): 741, doi: 10.1080/01436590600780011.

[15] Antony Anghie, *Imperialism, sovereignty and the making of International Law* (Cambridge: Cambridge University Press, 2004), 108.

[16] Anne Orford, "The past as law or history? The relevance of imperialism for modern international law," *IILJ Working Paper 2: History and Theory of International Law Series*, (2002):1-17.

[17] Luciane Ballestrin, "Modernidade/Colonialidade sem 'Imperialidade'? O Elo Perdido do Giro Decolonial [Modernity/Coloniality without 'Imperiality'? The Missing Link of the Decolonial Turn]," *DADOS - Revista de Ciências Sociais* 60, no. 2, (2017): 507, doi 10.1590/001152582017127.

[18] Antony Anghie, 2004, supra note 15, at 105.

[19] Morgan Ndlovu, "Coloniality of Knowledge and the Challenge of Creating African Futures," *Ufahamu* 40, no. 2, (2018): 96, doi: 10.5070/F7402040944.

in the Americas, Africa, and Asia, respectively. The collapse of colonialism was performative within a prescriptive continuous historical structure of coloniality.[20] Since the basis of the system is the same, the countries from the Global North that controlled the world system are still there, though labeled as developed states instead of colonizers.[21]

In the past, the dominated peoples of the South adopted the European standards based on the fallacious promise that they could be civilized.[22] Today, they grasp the same idea, but on the promise of development. This is why the sovereignty acquired by countries of the Global South in a paradigmatic move represents more their alienation and subordination than their empowerment.[23] Additionally, international law is not a different system from the previous imperial model,[24] a view that the United Nations could not even flip. Mutua[25] stated that:

After World War II, many colonies overthrew the yoke of direct colonial rule, but they quickly realized that political independence was largely illusory. Although now formally free, Third World states were still politically, legally, and economically bonded to the West. The United Nations, formed after World War II by the dominant Western powers, aimed to create and maintain global order through peace, security, and cooperation among states. […] Ostensibly, the United Nations was the new order's neutral, universal, and fair guardian. European hegemony over global affairs was transferred to the United States, Britain, France, the Soviet Union, and China, which allotted themselves permanent seats at the Security Council, the most powerful UN organ. The primacy of the Security Council over the UN General Assembly, which Third World states would dominate, mocked the sovereign equality among states.

Otto[26] parted from the postcolonial and not the decolonial perspective

[20] *Ibid*., 97.

[21] Henrique W. Afonso, "A questão desenvolvimentista na segunda metade do século XX: um olhar desde as TWAIL [The developmental issue in the second half of the 20th century: a look from the TWAIL]," *Revista Quaestio Iuris* 12, no. 3, (2019): 108, doi: 10.12957/rqi.2019.38776.

[22] Anghie and Chimni, "Third World Approaches to International Law," 501.

[23] Anghie, *Imperialism, sovereignty and the making of International Law*, 105.

[24] When we affirm it is not different, we do not contend that no one questioned it. On the contrary, some realized that the existing structure would not be sufficient or even adequate to regulate international relations that were now composed of more than European nations and unequal levels of development. Maurice Flory, "Adapting international law to the development of the Third World", *Journal of African Law* 26, (1982): 13 ("*The developing countries look towards an adapted international law as being the formulation of an agreed objective*"); Arghyrios A. Fatouros, "International Law and the Third World", *Virgina Law Review* 50, no. 5 (1964): 783 ("*Western nations should undertake a change in approach and a reassessment of the objectives of international law since the present situation of international society is so dissimilar to that in which the law evolved*").

[25] Makau W. Mutua, "What is TWAIL?" *American Society of International Law Proceedings Washington* 94, (2000): 34, doi 10.1017/S0272503700054896, at 34.

[26] Diane Otto, "Subalternity and International Law: The Problems of Global Community and the Incommen-

while examining the foundations of the new international global order inaugurated by the United Nations. The study found that its European history and commitment to an imperialist-designed state-based conception of the international community presupposed maintaining the status quo between central and marginalized or subalterns nations. It was orchestrated especially through the law-making processes of the Organization that authorize and perpetuate its Eurocentric foundation, frustrating the participation and limiting the power of non-European states.[27]

This study hypothesized that the United Nations pursue the interests of only a few central countries, particularly the Europeans and the United States, since the turn of the 20th century.[28] This is where Global South nations have transferred part of their recently gained sovereignty in a frustrated attempt to see an international law constituted between equals. However, the law remains an instrument to pursue the interests of ancient colonial powers.[29]

This study aimed to test the hypothesis regarding the World Court being required to debate the reminiscences of the colonial past. It used two cases of the International Court of Justice: South West Africa of 1966 and the Chagos Islands Advisory Opinion of 2019. The two cases were selected because they discuss situations of decolonization and the Mandate or Trusteeship System. This study aimed to contrast the findings of the Court in these two documents separated by 53 years. It intended to verify the accuracy of the hypotheses, especially considering the growing dissemination of international law critical studies[30] on an imperial past that aims at other futures.[31]

surability of Difference," *Social & Legal Studies* 5, no. 3 (1996): 338, doi:10.1177/096466399600500304.

[27] Otto was just one example, along with Mutua. Ramina, too, criticizes the United Nations agenda, particularly its movement towards "the universalization of European principles and norms as the spread of human rights which grow out of Western liberalism and jurisprudence", asserting that "[t]he West was able to impose its philosophy of human rights on the rest of the world because it dominated the United Nations at its inception". Nevertheless, considering her focus on the human rights agenda, we will not address it in the main text. Larissa Ramina, "TWAIL - 'Third World Approaches to International Law' and Human Rights: Some Considerations," *Revista de Investigações Constitucionais* 5, no. 1, (2018): 267.

[28] Ramon Grosfoguel, Nelson Maldonado-Torres, and Jose David Saldivar, *Latino/as in the World-system: Decolonization Struggles in the 21st Century U.S. Empire* (Abingdon, OX: Routledge, 2017).

[29] Ramina, TWAIL - 'Third World Approaches to International Law' and Human Rights," 263.

[30] Here we essentially highlight the Third World Approaches to International Law – TWAIL, which beyond a unifying theory or an international law methodology, is a series of approaches aiming at, in a nutshell, understanding the colonial legacy in the field of international law. *See* Galindo, 2016, supra note 2, at 75.

[31] We use the term 'futures' in the plural form with the intention to eco the pluriverse theory that advances the possibility of not excluding/erasing past legal elaborations, but to allow the creation of other alternatives, in the plural sense, which bases itself on the non-exclusion of other possibilities for the future taking into consideration the differences among peoples. *See* Tatiana Squeff and Gabriel Damasceno, "Descolonizar o direito internacional em prol de múltiplas miradas: entre desmistificações e ressignificações [Decolonizing international law in favor of multiple perspectives: between demystifications and resignifications]," in *Direitos Humanos em Múltiplas Miradas* [*Human Rights on Multiple Edges*], edited by Gabriel Mantelli and Laura Mascaro (São Paulo: OAB/ESA, 2021), 277-278.

This study found that the International Court of Justice reproduced a colonial and imperial past. Although the Court discussed the right to self-determination in both cases, the sovereignty acquired by the new nations in the South West Africa decision because of decolonization is insufficient for their international involvement and development. In the Chagos Archipelago Opinion, the Court incisively refuted having colonies in present-day society. However, it did not act toward those pushing to maintain the status quo.

II. SOUTH WEST AFRICA BEFORE THE ICJ: REMINISCENCES OF A COLONIAL PAST

On 4 November 1960, Liberia and Ethiopia filed before the International Court of Justice two applications regarding alleged violations by South Africa mandated by South West Africa. Some submissions by the Applicants required the Court to discuss sensitive issues, such as Apartheid and the principle of self-determination.[32] The two applications were united on a single proceeding called the South West Africa case. In 1962, the Court issued rejected South Africa's preliminary objections,[33] indicating that it would analyze the merits of the dispute.[34] Four years later, the Court decided the applicant states lacked standing to discuss the case, not answering the issues raised by the parties.[35]

Before exploring the Court's rationale and the 1966 decision *per se*, it is important to review the background over which the decision was issued. Higgins, decades later the president of the Court, stated that law and politics were closely intertwined and that understanding the Judgment requires comprehending the events leading to the litigation.[36] Analyzing the applicant states' memorials shows that their claims were centered around self-determination. To show that Apartheid violated international law, they claimed South Africa violated South West Africa's population's right to self-

[32] *South West Africa (Ethiopia/Liberia v. South Africa), Second Phase, ICJ Reports 1966, 11-13.*

[33] Namely: (1) that the Mandate for South West Africa is a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court; (2) that despite the dissolution of the League, Ethiopia and Liberia had locus standi under Article 7, paragraph 2, of the Mandate, to invoke the jurisdiction of the Court; (3) that the dispute between the Applicants and the Respondent was a "dispute" as envisaged in Article 7, paragraph 2, of the Mandate; and (4) that the prolonged exchanges of differing views in the General Assembly of the United Nations constituted a "negotiation" within the meaning of Article 7, paragraph 2, of the Mandate and revealed (that the dispute could not be settled by negotiation within the meaning of that same provision of the Mandate. (*South West Africa (Ethiopia/Liberia v. South Africa), Preliminary Objections, ICJ Reports 1962).*

[34] Rosalyn Higgins, "The International Court of Justice and South West Africa: The implications of the Judgment." *International Affairs 42, no. 4 (1996): 579, doi: https://doi.org/10.2307/2610152.*

[35] *Ibid., 577.*

[36] *Ibid., 573*

determination.[37]

South West Africa was considered by the League of Nations Covenant a C group mandate, defined by article 23 as follows:

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, their small size, their remoteness from the centers of civilization, their geographical contiguity to the territory of the Mandatory, and other circumstances, could be best administered under the laws of the Mandatory as integral portions of its territory subject to the safeguards above mentioned in the interests of the indigenous population.[38]

The topic of self-determination caused many heated debates in the United Nations. Its consideration as a human right directly implicated those nations not yet decolonized and their colonizers.[39] The inclusion of self-determination in the Charter was seen differently by States. Although some Northern countries considered it a human right, they referred to self-determination as a communist political doctrine.[40] Consequently, the question of whether the person to have the right to self-determination became a major political and legal problem within the Organization.[41]

The Soviet view, inspired by Lenin's interpretation of self-determination, demanded an immediate end to European colonialism and made no distinction between different Mandates or colonies.[42] Since the deterioration of their relationship with the central nations, the Soviets started closing their proximity with Asian and African recently independent states, forming alliances in the region. Due to the ongoing decolonization, the Asian and African States increasingly became members of the United Nations during the 1950s and 1960s. Consequently, they kidnapped the topic of self-determination, and the General Assembly became a space favorable for this agenda.[43]

In 1960, the General Assembly adopted the Decolonization Declaration,

[37] Victor Kattan, "'There was An Elephant in the Court Room': Reflections on the Role of Judge Sir Percy Spender (1897-1985) in the South West Africa Cases (1960-1966) After Half a Century," *Leiden Journal of International Law 31, no. 1 (2018): 148, doi: https://doi.org/10.1017/S0922156517000577.*

[38] League of Nations, The Covenant of the League of Nations, (28 April 1919), art. 22.

[39] See, e.g., the following resolutions and their drafting process: United Nations General Assembly, Declaration on The right of peoples and nations to self-determination, A/RES/637(VII) (16 December 1952); United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960).

[40] *See Victor Kattan, 2018, supra note 37.*

[41] James Mayall, "International Society, State Sovereignty, and National Self-Determination," in *The Oxford Handbook of the History of Nationalism, edited by John Breuilly. (Oxford: Oxford University Press, 2013), 542.*

[42] Kattan, "Reflections on the Role of Judge Sir Percy Spender," 151.

[43] *Ibid., 152.*

closer to the Soviet Union's view of self-determination. According to the declaration, it was for the people, not the administering power, to determine when colonialism should end.[44] The Court's judges were aware of this background that inevitably surrounded the South West Africa cases. Some were even former delegates from their respective countries to the United Nations.[45] This supports the analysis of the odd reasoning applied to the judgment from 1966, where the Court nullified the dispute's merits.

In 1966, the Court affirmed that it needed to address a topic about the case merits but with an antecedent character.[46] This indicated that the applicant's standing in the proceedings could not be mistaken with appearing before the Court and was not the object of the 1962 decision.[47] The Court needed to determine whether Liberia and Ethiopia had a legal interest or right regarding the subject matter of the claims.[48] To proceed to this analysis, it divided the articles of the Mandate into two categories. The first category comprised conduct provisions defining the mandatory state's powers and obligations towards the territory's habitants, the League of Nations, and its organs. The second category was special interests provisions conferring certain rights regarding the mandated territory, directed at individual States members of the League or its citizens.[49]

To the Court, the dispute between the parties related to the conduct provisions. This denoted that the question would be whether the League of Nations members, including Liberia and Ethiopia, had any legal interest or right to question the mandatory State conduct regarding the provisions. Another question was whether this function was reserved exclusively for the League as an Organization. In the Court's opinion, when the second option was true, it would imply non-recognition of the applicants, a legal interest, or right, culminating in their lack of standing.[50]

The Court contextualized the mandates' creation, analyzed the League of Nations' role towards them, and understood, among other things, that the League owned due to conduct of the mandates exclusively. Therefore, members had no right to question the mandatory performance or ask the Court to act on their behalf. This was because the affiliation to the League of Nations

[44] United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (14 December 1960).*
[45] Kattan, "Reflections on the Role of Judge Sir Percy Spender," 16.
[46] ICJ South West Africa, para. 4.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid., para. 11.*
[50] *Ibid., para. 15.*

did not confer such rights to its Member States.[51]

This curious legal malabarism[52] applied by the Court was noticed because the new majority of the Court's bench in 1966 comprised the minority of judges in 1962. Additionally, Judge Jessup[53] affirmed in its extensive dissenting opinion that the judgment was unfounded in law. The judgment was based on the question of standing, a reason not even raised by the Respondent.[54] Judge Jessup meant that even when certain claims were to be discussed separately, as the requests that South Africa had to abstain from certain attitudes on the mandated territory, it was hard to deny the applicants a declaratory judgment:

I do not see how this clear picture could be clouded by describing the claims as demands for the performance or enforcement of obligations owed by the Respondent to the Applicants. The submissions may indeed involve that element also, as would be noted. However, this element does not exclude the concurrent requests for interpretation of the Mandate.[55]

Judge Jessup also described in its dissenting opinion two different forms where the applicant states' standing could have been established.[56] Similarly, Judge Higgins affirmed that the distinction made by the Court between standing to appear before it and a standing relative to the case merits was artificial and mistaken. This was because the two concepts must be similar since the categories of states specified in the clause are presumably with a legal interest in exercising the Mandate.[57] Therefore, Judge Higgins agreed that the Court needed to effectively reverse its 1962 decision, though not explicitly acknowledging that in the judgment.[58]

Judge Higgins also stated that the choice to divide the mandate into the conduct and special interests provisions was unpropounded in international

[51] *Ibid., para. 19-25*

[52] Here, we use the expression "legal malabarism" to define the rhetoric employed by the Court to reach its final decision, which, at that time, was deprived of specific (legal) support, unusually formalist, and contradictory.

[53] *South West Africa (Ethiopia/Liberia v. South Africa), Second Phase, Dissenting Opinion of Judge Jessup, ICJ Reports 1966, 325.*

[54] *Ibid., 336.*

[55] *Ibid., 329.*

[56] He affirms that, first, a State would have a legal interest in receiving an authoritative pronouncement by the Court regarding the practices in the mandated territory that would be disturbing the "good understanding between nations", as the apartheid was, under article 7.2 jurisdictional clause, before taking the matter to a diplomatic forum. Second, he also holds that the applicant's standing could have been acknowledged because of their general interests in the matter as members of the international community. *South West Africa (Ethiopia/Liberia v. South Africa), Second Phase, Dissenting Opinion of Judge Jessup, ICJ Reports 1966. 373; 374; 424.*

[57] Rosalyn Higgins, "The International Court of Justice and South West Africa: The implications of the Judgment." *International Affairs 42, no. 4 (1996): 580, doi: https://doi.org/10.2307/2610152.*

[58] *Ibid., 580-581.*

law and unsupported by Article 7 of the mandate.[59] The acknowledgment that Liberia and Ethiopia had standing could be based on conclusions drafted by some judges on their opinions. According to Judge Higgins, such conclusions were separate from the 1950 Advisory Opinion on the International Status of South West Africa. The 1950 Advisory Opinion states that every State which was a Member of the League at the time of its dissolution still had a legal interest in the proper exercise of the Mandate.[60]

Tams[61] considered the Court's interpretation a restrictive approach to the concept of standing, which was most consistent with a structural approach to multilateral obligations. Nevertheless, it is odd how the Court applied a restrictive approach to the 1966 judgment when it used an extensive approach 40 years before on the S.S. Wimbledon case to establish the applicant states' standing. The dispute in the Wimbledon case concerned the legality of Germany's decision to refuse permission for the British steamship Wimbledon to pass through the Kiel Canal. The allies claimed Article 380 of the Treaty of Versailles was violated, while Germany argued that its refusal was in line with its Neutrality Obligations.[62]

Japan and Italy had no interest in the dispute other than the general interest of all State parties in the observance of the treaty regime. The Permanent Court[63] applied a flexible interpretation of the treaty's jurisdictional clause, which prescribed that any interested power could appeal to the jurisdiction. The Court found that each of the four Applicant Powers was interested in executing the Kiel Canal provisions. This was because they all possessed fleets and merchant vessels flying their respective flags. Under this flexible test applied by the Court, every seafaring State that was a party to the Treaty of Versailles could enforce the rules in Article 380 against Germany in an international forum.[64]

In the S.S. Wimbledon case, the Court adjudicated matters compatible with European powers' interests. This is different from the South West Africa case, which concerned Apartheid and the self-determination principle. The question is, why would the World Court issue a controversial decision, effectively reversing its judgment from 1962 and countering its jurisprudence. The role played by the President of the Court, Sir Percy Spender, may assist

[59] *Ibid., 583.*
[60] *International Status of South West Africa, Advisory Opinion, Separate Opinion by Sir Arnold McNair, ICJ Reports 1950, 158.*
[61] Christian Tams, *Enforcing Obligations Erga Omnes in International Law (Cambridge: Cambridge University Press, 2005), 63-69.*
[62] *S.S. Wimbledon (United Kingdom; France; Italy; Japan v. Germany), Judgment, ICJ Reports 1923.*
[63] *Ibid., 20.*
[64] Tams, *Enforcing Obligations Erga Omnes in International Law, 79.*

in answering this question.

Sir Percy was the Chairman of Australia's Delegation to the UN General Assembly from 1950 to 1957. He left the post only to become an International Court of Justice judge in 1957. In 1964, Sir Percy became the President of the Court between the two of South West Africa's decisions. He believed that self-determination was not a human right but a political doctrine aimed at introducing a totalitarian government in South West Africa.[65] As Australia's Chairman,[66] Sir Percy delivered a speech at the United Nations General Assembly's third committee. The speech was a draft resolution that sought to apply self-determination to non-self-governing territories and not just to trust territories. He stated that:

I know the leaders of one great country, the Soviet Union, would welcome the fragmentation of existing nations since it would facilitate their aggressive designs. However, we should not allow the benign principle of self-determination to be used in the interests of world communism. To endeavor to apply the principle of self-determination, which has nothing to do with attaining self-government by territories, or to extend or alter these provisions, would not serve the territories' or the United Nations' best interests.[67]

Kattan stated that Sir Percy was the driving force behind Australia's statements opposing self-determination and defending South Africa based on the domestic jurisdiction provision in Article 2(7) of the Charter.[68] Sir Percy received support from South Africa's Prime Minister, J.G. Strydom, during his election to the Court in 1957. This happened even as South Africa was boycotting the United Nations, assuming it would be unlikely to get a more favorable judge than Sir Percy on legal issues affecting Article 2(7) and South Africa.[69]

For the Court, analyzing the case merits would mean an analysis of the

[65] Kattan, "Reflections on the Role of Judge Sir Percy Spender," 149.

[66] It is relevant to note other episodes during that time. In 1952, in a lecture he gave to the American Society of International Law entitled 'Law, Morality, and the Communist Challenge', he explained that he did not speak of Communism as a political philosophy but of the practice of 'imperialistic Communism' that was 'challenging the free world'. Moreover, while he was Australia's Chairman at the UN, an Australian delegate to the Political Committee delivered the following speech in defense of South Africa's right to pass racially discriminatory legislation: "With reference to the South African legislation, I would remark merely that each country has its own political and moral philosophy, its own economic and social history and consequently its own laws and customs. It would be remarkable if we here were collectively or individually to approve fully all the laws and customs of other countries. In fact, there may be cases where a number of us disapprove quite strongly, but the merit or demerit of domestic laws is not the point at issue. The point is whether they come within the competence of the United Nations Charter." See *Ibid., 145-146.*

[67] *Ibid., 159.*

[68] It is important to highlight that Australia had a rule in Australian New Guinea similar to South Africa's rule in South West Africa. *See Ibid.*

[69] *Ibid., 158.*

formation of customary international law regarding self-determination and racial discrimination. Due to United Nations' political orientation in the 1960s, the inclusion of newly independent states would require considering those States' practices and opinio iuris.[70] This was because most of those States had aligned with the Soviet Union at the United Nations in opposing European colonialism.[71]

The new white majority of 1966, as Venzke noted[72] was composed of the South African ad hoc judges from France, Italy, the United Kingdom, Greece, and Poland and headed by the Court's President, Sir Percy Spender. The majority saw itself in a position where they would be willing to do much, even to write a controversial decision that would destroy the Court's reputation.[73] Nevertheless, the Court retreated into an excessive formalism to defend the interests of the Global North.[74] The international community's reaction to this judgment reminded the Court that balancing the latter and the law and safeguarding humanitarian considerations were its duties entrusted by the international community.[75]

The two African applicant states, Liberia and Ethiopia, part of the Global South, did not receive a response from the Court regarding their questions on South Africa's actions. However, in October 1966, the United Nations General Assembly revoked South Africa's mandate over South West Africa and condemned its attitudes through Resolution no. 2145/1966, stating that:

General Assembly Resolution 1514 (XV) [the Decolonization Declaration] fully applies to the people of the Mandate territory of South West Africa. Therefore, the people of South West Africa have the inalienable right to self-determination, freedom, and independence, according to the Charter of the United Nations. Declaring that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the

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[70] *Ibid., 167.*

[71] *Ibid.*

[72] Ingo Venzke, "Public Interests in the International Court of Justice - A Comparison Between Nuclear Arms Race (2016) and South West Africa (1966)," *AJIL Unbound 111 (2016): 72, doi: https://doi.org/10.1017/aju.2017.23*

[73] John R. Crook, "The International Court of Justice and Human Rights", *Northwestern Journal of International Human Rights 1, no. 1 (2004): 6.*

[74] Rosalyn Higgins comments that even those nations "which have been comparatively well disposed towards the concept of the judicial settlement of disputes, have made it fairly clear by their international conduct that a decision on the merits of the South West African Case would be highly embarrassing to them politically. If men send up smoke-signals, they must not be surprised if they are read" Rosalyn Higgins, "The International Court of Justice and South West Africa: The implications of the Judgment," *International Affairs 42, no. 4 (1996): 590, doi: https://doi.org/10.2307/2610152.*

[75] Gentian Zyberi*, The humanitarian face of the International Court Justice: its contribution to interpreting and developing international human rights and humanitarian law rules and principles (Cambridge: Intersentia, 2008), 115.*

moral and material well-being and security of the indigenous inhabitants of South West Africa have disavowed the Mandate.[76]

A few conclusions could be drawn from this case. First, the time frame of its discussion before the Court highlights the difficulty of the debate regarding the colonial past or legacy in the United Nations. This makes it a political discourse in the West-versus-East contention, typical of the Cold War. It does not reflect an attempt to review inequality between nations of the South beyond recognizing their sovereignty or self-determination. Despite its affirmation in the 1960s, this right does not represent the end of coloniality, making it more discursive.

Second, the case shows the importance of oxygenating the World Court benches. This was evident when Judge Spender indicated no convictions independent of those of his State and member of the Global North. Consequently, it was extremely difficult to advance in the debates put forward by Liberia and Ethiopia. The debates involved the mandatory state's responsibility for human rights violations within a mandated territory. This recalls debates regarding the responsibility to protect and how this is linked to an imperial past.[77] However, South Africa's responsibilities were the ones being addressed. Although the nation also suffered from colonization, it faced internal reminiscences of its colonial past.

The United Nations was an instrument through its Court, promoting the interests of countries in the center of the world system. Nevertheless, the General Assembly should rethink the future of the Organization by proposing a less imperialist debate. At the time of the case in question, the East-West discussion was very much present.[78] However, it is important to explore whether these conclusions could be repeated or maintained. This necessitates analyzing a more recent case, Chagos Islands Advisory Opinion.

III. THE CHAGOS ISLAND ADVISORY OPINION: HAS THE COURT TAKEN A STEP TOWARDS BREAKING WITH AN IMPERIAL PAST?

On 25 February 2019, the International Court of Justice delivered the Advisory Opinion regarding the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[79] This advisory opinion was

[76] United Nations General Assembly, *Resolution 2145 (XXI), A/RES/2145(XXI) (27 October 1966).*

[77] *See* Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Awa*y, (Oxford: Oxford University Press, 2008).

[78] Galindo, "A volta do terceiro mundo ao direito internacional," 67.

[79] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019.

requested on 2 June 2017 by the United Nations General Assembly through Resolution Number 71/292.[80]. Referring to Article 65 of the Court's Statute.[81] The Resolution asked the Court to address the legality of decolonizing Mauritius during its independence in 1968, following the separation of the Chagos Archipelago.[82] The Assembly also requested the Court to indicate consequences under international law that would arise from the continued administration of the Chagos Archipelago by the United Kingdom. This included Mauritius's failure to resettle its nationals in the Archipelago, particularly those of Chagossian origin.[83]

The case relates to the fact that the Republic of Mauritius, including the Chagos Archipelago, comprised a colonial administrative unit of the British Territory in the Indian Ocean. In 1965, three years before Mauritius' independence, the United Kingdom detached the Chagos Archipelago area from the colony of Mauritius. It systematically prevented the Chagossian people from returning to the islands, including from Diego García, its largest island, where the United States wanted to establish military defense facilities.[84]

In 1964, the talks between the United Kingdom and the United States began over Diego Garcia. The United Kingdom was to resettle the population living there and resolve the issues concerning the administration of Mauritius. The United States would be responsible for the construction and maintenance

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[80] The questions presented to the Court were: "*(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?; and (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a program for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin*?" (United Nations, General Assembly, *Resolution Nº 71/292: Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, adopted on 22 June 2017, accessed on 05 February 2022, https://undocs.org/en/A/RES/71/292).

[81] Article 65: 1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or following the Charter of the United Nations to make such a request. 2. Questions upon which the Court's advisory opinion is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents likely to throw light upon the question. (*Statute of the International Court of Justice*, (1945), accessed on 05 February 2022, https://www.icj-cij.org/en/statute).

[82] "*General Assembly Requirement of the United Kingdom of the Chagos Archipelago*", *United Nations News*, (2019), accessed on 05 February 2022, https://news.un.org/pt/story/2019/05/1673491

[83] Lucas C. Lima, "A Opinião sobre o Arquipélago de Chagos: a jurisdição consultiva da Corte Internacional de Justiça e a noção de controvérsia [The Opinion on the Chagos Archipelago: the consultative jurisdiction of the International Court of Justice and the notion of controversy]," *Revista da Faculdade de Direito da UFMG* 75, (2019): 284.

[84] ICJ Chagos Advisory Opinion, supra note 77, at para. 26, 31, 42-43, 94, 114, and 122.

costs of any facility on the island.[85] According to the United Kingdom, Diego Garcia had to be detached from Mauritius before its independence and be placed under its direct administration.[86] It is thought to have the constitutional power to take that action without Mauritius' consent. This predicted possible criticism in the United Nations, especially in light of Resolution 1514 (XV) of 1960.[87] The documents showed that the country decided to accept such detachment before the Mauritian Ministers.[88]

It took over a year for the United Kingdom and Mauritius to agree regarding Chagos Islands' faith. Mauritius expressed concerns about possibly creating a new colony during decolonization and establishing new military bases when they should be getting out of old ones.[89] However, they agreed on various terms, including the payment of £3 million to Mauritius to cover direct compensation to landowners and resettlement costs.[90] A clause also stipulated that any minerals or oil discovered in or near the Chagos Archipelago should be reverted to the Mauritius Government.[91] Another agreement was the possible return of Chagos to Mauritius in the case the need for the facilities on the islands disappeared.[92] Therefore, on 05 November 1965, an agreement called Lancaster House agreement on the detachment was confirmed.[93]

On 25 February 2019, the Court concluded that the decolonization of Mauritius was not legally complete when independence was granted to it. Similarly, it stressed that the United Kingdom was obligated to end its administration of the Chagos Archipelago. The Court divided its analysis into two main moments relating to the questions presented before it. First, the Court turned to the nature, content, and scope of the right to self-determination applicable to Mauritius' decolonization process.

The Court emphasized that it was not resolving a territorial controversy

[85] *Ibid.*, para. 94.
[86] *Ibid.*, para. 95.
[87] *Ibid.*, para. 125. "On 14 December 1960, the General Assembly adopted resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples" (hereinafter "resolution 1514 (XV)"). On 27 November 1961, the General Assembly, by resolution 1654 (XVI), established the United Nations Special Committee on Decolonization (hereinafter the "Committee of Twenty-Four") to monitor the implementation of resolution 1514 (XV)" (Ibid, at para. 30). The Court also recognized this Declaration to have a customary character.
[88] *Ibid.*, para. 95.
[89] *Ibid.*, para. 111.
[90] *Ibid.*, para. 108(iii). This sum was later increased to £650,000 under an agreement concluded between Mauritius and the United Kingdom (*Ibid*, para. 117), and again in another £4 million on an *ex gratia* basis (*Ibid.*, para. 119), which "was disbursed to 1,344 islanders between 1983 and 1984" (*Ibid*, para. 120). This fact made a case brought before the European Court of Human Rights in 2012 by 1,786 Chagossians considered inadmissible (*Ibid*, para. 128).
[91] *Ibid.,* para. 110(ii).
[92] *Ibid.*, para. 108(vii).
[93] *Ibid.*, para. 112.

between the United Kingdom and Mauritius.[94] Conversely, it was resolving a controversy about decolonization and exercising the right of self-determination. The two are cardinal issues in the work of the United Nations and the post-1945 International Law Project.[95] The Court noted that the decolonization process accelerated in 1960, with 18 countries gaining independence, including 17 in Africa. During the 1960s, the people of an additional 28 non-self-governing territories exercised their right to self-determination and achieved independence.[96]

The Court also highlighted that the peoples of non-self-governing territories are entitled to exercise their right to self-determination regarding their territory. This integrity must be respected by the administering Power unless based on the freely expressed and genuine will of the people of the territory concerned.[97] The General Assembly's Resolution no. 2232 (XXI) in 1996 established that partial or total disruption of the national unity and the territorial integrity of colonial Territories is illegal in light of Resolution no. 1514 (XV). However, the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter.[98]

The Court held that the Chagos Archipelago was integral to that non-self-governing territory during its detachment from Mauritius in 1965. According to the Court, Mauritius did not sign the 1965 Lancaster House agreement while it was still a colony of the United Kingdom and under its authority.[99] It meant that this detachment was not based on the free and genuine expression of the people's will. This makes it impossible to consider Chagos legally part of British Indian Ocean Territory since Mauritius must be completely

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[94] It shall be stressed that the United Kingdom and other participants of the proceedings before the Court believed that it would be using its advisory procedure to resolve a contentious bilateral issue between the United Kingdom and Mauritius. However, the Court's jurisprudence reaffirms its position of privileging the advisory function regardless of the possible impacts it may have on bilateral controversies, as stated in the Advisory Opinion on Namibia, in which the Court highlighted the existence of different views between states on legal issues has been present in virtually all advisory procedures. *See* Lucas C. Lima, "A Opinião sobre o Arquipélago de Chagos: a jurisdição consultiva da Corte Internacional de Justiça e a noção de controvérsia", *Revista da Faculdade de Direito da UFMG* 75, (2019): 281-302, at 286; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 274 (1970)*, Advisory Opinion of 21 June 1971, 24.

[95] Although not from a critical approach, *see Gaetano Arangio-Ruiz, "Autodeterminazione dei popoli e diritto internazionale: dalla carta delle Nazioni Unite all'Atto di Helsinki [Self-determination of peoples and international law: from the United Nations Charter to the Helsinki Act]," Rivista di studi politici internazionali 50, (1983): 523-552.*

[96] ICJ Chagos Advisory Opinion, supra note 77, para. 150.

[97] *Ibid.*, para. 160.

[98] *Ibid.*, para. 35.

[99] *Ibid.*, para. 172.

decolonized for that to happen.[100]

The United Kingdom disagreed with the Court, stating that Mauritius lacks sovereignty over the Chagos Archipelago. This is because of the continuous British sovereignty over Mauritius since 1814. Therefore, the United Kingdom thought it could detach Chagos for its interests, which were those of the Global North. Britain puts forward this argument to justify the occupation of part of Mauritian territory by the United States military for nearly 40 years. It has installed a base that has helped the United Kingdom, the United States, and other allies combat some of the most challenging threats to international peace and security, including terrorism, organized crime, and piracy. Moreover, the facility remains ready for a rapid and impactful response to a humanitarian crisis in the region because it is under the United Kingdom's sovereignty and the United States's jurisdiction.[101] The Opinion was silent on the future of the United Stated base on Diego Garcia.[102]

After establishing that the decolonization process of Mauritius was not legally completed, the Court examined the consequences under international law arising from the United Kingdom's continued administration of the Chagos Archipelago. It held that the United Kingdom's continued administration constitutes an unlawful act entailing the international responsibility of that State. Furthermore, the United Kingdom should end its administration of the Chagos Archipelago. All Member States should cooperate with the United Nations to complete the decolonization of Mauritius.[103]

The Court recalled that the right to self-determination is an erga omnes obligation that all States have a legal interest in protecting. According to the General Assembly's prescription, all Member States must co-operate with the United Nations to ensure the complete decolonization of Mauritius.[104] Moreover, the Court stated that the resettlement in the Chagos Archipelago of Mauritian citizens, including those of Chagossian origin, shall be addressed by the General Assembly during the completion of Mauritius' decolonization.[105]

Some remarks could be made based on this decision. First, the Court stated that self-determination would not be considered a basic principle of international law, with a normative character under customary international

[100] *Ibid.*, para. 172 and 174.
[101] "Chagos: Londres rejette l'Advisory Opinion de la CIJ, Port-Louis "deeply disappointed", *LeMauricien,* (2019), accessed on 13 February 2022, https://www.lemauricien.com/featured/chagos-londres-rejette-ladvisory-opinion-de-la-cij-port-louis-deeply-disappointed/275828/.
[102] Stephen Allen, "The Chagos Advisory Opinion and the Decolonization of Mauritius", *American Society of International Law Insights* 23, no. 2 (2019).
[103] ICJ Chagos Advisory Opinion, para. 177-179.
[104] *Ibid.*, para. 180.
[105] *Ibid.*, para. 181.

law with an erga omnes character. On the contrary, all States, including those from the Global North, must follow such a prescription, which is a great gain weakened by the right of self-determination. This provision does not prevent its use from being incorrectly managed by other States to defend self-determination as an erga omnes rule or advance imperialist projects, such as Portugal in the case of East Timor.[106] Furthermore, its provision does not address the rights of the peoples of the Fourth World. The peoples still have their rights within the States violated[107], as is the case in Brazil, regarding the time frame of demarcating indigenous territories.[108]

The Court did not establish basic guidelines for respecting the right to self-determination. It stated that this is a competence of the General Assembly, raising the second point. The Court emphasizes the importance of the General Assembly to debate the issue, recognizing this as the democratic space within the Organization. This is detrimental to the Security Council, which is limited regarding the participants and permanent members having the power to veto, including the United Kingdom. Furthermore, there were no questions in this regard, limiting the scope of the Opinion in establishing parameters for action. The topic may take a long time to enter the agenda. This is due to the political games permeating the Organization since its erection and the debates surrounding it.

The arguments used by the Court in this decision are not necessarily innovative. The factual context of the present case regarding decolonization broadened the scope of action of the Court's advisory jurisdiction. It called upon the international community to take positive steps to end colonization. However, the question is whether this would break the imperial past of the international order and its structural effects on international law. This is impossible because it would require the Court's ambition to build its legacy

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[106] *East Timor (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995, 102.*

[107] Hiroshi Fukurai, "Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law*, Asian Journal of Law and Society* 5, no. 1, (2018): 225.

[108] In Brazil, the debate is open in the Supreme Court. Recently, the Attorney General's Office of the State of Santa Catarina questioned the ownership of the Ibirama Indigenous Land, inhabited by the Xokleng, Kaingang, and Guarini peoples, before the Supreme Court of Brazil. To judge the case, the justices instituted the "temporal landmark" thesis to define if the indigenous people would have the right to the lands according to the time-lapse of acquisition and the promulgation of the Federal Constitution of 1988. While for some justices, such as Edson Fachin, the constitutional protection of indigenous people is independent of the time frame - because it is a human right; for other justices, the analysis of the time frame is indispensable – which makes the rights of indigenous people even more difficult and vulnerable. *See* Dailor Sartori Junior, *Pesamento descolonial e direitos indígenas*: uma crítica à tese do 'marco temporal da ocupação' [Decolonial thinking and indigenous rights: a critique of the thesis of the 'time frame of occupation'], (Rio de Janeiro: Lumen Juris, 2017); Brasil Supremo Tribunal Federal, *Recurso Extraordinário no. 1017365*, Relator Min. Edson Fachin.

regarding constructing other futures.[109]

A new composition of the Court that is more open and with judges from the South[110] could happen in the future. However, the compliance of central countries would be impossible, even in the face of an eventual sentence or opinion that promotes such a rupture in favor of those other futures. This is due to the characteristics of the current international order, nevertheless, the Chagos Opinion is a start.

IV. CONCLUSION

The international law in force in international relations is a European model. It was universalized through European colonial expansion since the turn of modernity. The construction of the law did not involve other people intended as its object. Despite the end of colonialism, this imperial past remained, making the marginalized people mere extras of the international order or even its object. In this case, coloniality is a hallmark of contemporary society. It relegates to the Global South nations the role of spectators in decision-making on the international division of labor, the rights to be attributed to individuals, or how knowledge is created or spread.

An example of this situation is the attempt to create an international framework within the United Nations that cares about sovereign equality between nations. It is a central feature lacking for the peoples of the South to be accepted as central countries in the colonial logic. Therefore, the structuring of rules such as self-determination seemed to be a fundamental requirement and the need to assert sovereignty over natural resources. This was seen when Mauritius demanded while negotiating its independence and the faith of Chagos along with the British.

That would not be enough due to several reasons. First, structuring the Trusteeship System at the United Nations, replacing the League of Nations mandates, is a reproduction of the remaining international imperiality. It was necessary to place a non-self-governing territory under the tutelage of

[109] Antony Anghie; Martti Koskenniemi; Anne Orford, *Imperialismo y derecho internacional: historia y legado [Imperialism and international law: history and legacy] (Bogotá: Siglo del Hombre Editores, 2016), 19.*

[110] Nine out of fifteen are from the South: Judge Tomka is from Slovakia, Judge Bennouna is from Morroco, Judge Cançado Trindade is from Brazil, Judge Yusuf is from Somalia, Judge Xue – a woman - is from China, Judge Sebutinde – a woman - is from Uganda, Judge Bhandari - who won the cast of votes in the Assembly against the British candidate - is from India, Judge Robinson is from Jamaica, Judge Salam is from Lebanon. We understand, however, that the fact that a Judge is from the South does not mean that he/she is aware of the imperiality that surrounds the international order (or even is a TWAILer), but at least coming from reality from the margins, it is believed that he/she is more aware of the existence of coloniality.

another State to make it independent. The Northern countries transmitted this recipe through the Organization to the countries they previously dominated. Sometimes, even placing such nations in the hands of other countries controlled by the North seemed to outwit the existence of coloniality. When this matter was ripe for debating, such as the International Court of Justice in the South West Africa case, it was silenced because the Global North aimed to maintain the *status quo*.

Second, conferring independence and the long-awaited equality no longer proved to be an aspect considered equal in the international order. In the mid-20th Century, it was necessary to be a developed country, which became far from being conquered by the Global South. The idea of the modern international order is not to allow the center to be invaded from the margins.

The International Court of Justice confirmed that the United Nations reproduces imperiality, despite having many tools capable of altering the future. In the South West Africa decision, the Court noted that the politics behind the Organization in the 1960s were aligned with the exchange of sovereignty for development. It was a tool for maintaining power and status quo, as expressed by the Third World Approaches to International Law doctrine.

In the *Chagos Archipelago Opinion*, the Court was timid, despite attempts to open up the international order to the erection. This was seen in refuting the existence of colonies today, arguments against self-determination, or reaffirming the relevance of the General Assembly. This is much linked to international politics because Diego Garcia's future concerning the United States military base was not debated. However, the Court probably did what it could with the cards available on the table.

The international agenda of the second decade of the 21st century is marked by the judicialization of international law. It is also characterized by its common goal of realizing an international justice ideal.[111] This implies breaking with the existent and reminiscent imperialist order. Therefore, the way forward may be to push the International Court of Justice to debate such matters in Advisory Opinions. Bedi[112] stated that this mechanism induces the Court to the legal and mental process of providing a step forward in developing the norms invoked in the case. The issuing of an Opinion may constitute an evolution of the international norm because it declares the law itself. This was stated by Judge Gros in the judgment of the Western Sahara case.[113]

[111] Hans Wehberg, *The Problem of an International Court of Justice, (Oxford: Claredon Press, 1918) at 13.*
[112] Shiv R. S Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, (Oxford: Hart Publishing, Studies in International Law, 2007), at 13.
[113] Judge Gros stated that: "*Je rappellerai seulement que la Cour, lorsqu'elle rend un avis consultatif sur une question de droit, dit le droit. Je rappellerai seulement que la Cour, lorsqu'elle rend un avis consul-*

Consequently, the United Nations could break with imperialism from within, which would be extremely positive. The critical international law approach seeks not to change the past but to allow other futures.

tatif sur une question de droit, dit le droit. L'absence de force obligatoire ne transforme pas la démarche judiciaire en consultation juridique qu'on utilise ou non à sa guise. L'avis consultatif détermine le droit applicable à la question posée; il est possible que l'organe qui a demandé I'avis ne le suive pas dans son action, mais cet organe sait qu'il ne pourrait adopter une position contraire au prononcé de la Cour avec une efficacité quelconque sur le plan juridique" (Western Sahara, Advisory Opinion of 15 October 1975, Separate Opinion by Judge Gros, ICJ Reports 1975, at 73).

BIBLIOGRAPHY

Journal Articles

Afonso, Henrique W. "A questão desenvolvimentista na segunda metade do século XX: um olhar desde as TWAIL [The developmental issue in the second half of the 20th century: a look from the TWAIL]." *Revista Quaestio Iuris* 12, no. 3, (2019): 101-124, doi: 10.12957/rqi.2019.38776.

Allen, Stephen. "The Chagos Advisory Opinion and the Decolonization of Mauritius." *American Society of International Law Insights* 23, no. 2 (2019).

Anghie, Antony. "The evolution of international law: colonial and postcolonial realities." *Third World Quarterly* 27, no. 5, (2006): 739-753, doi 10.1080/01436590600780011.

Anghie, Antony, Chimini, Buphinder S. "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts." *Chinese Journal of International Law* 2, no. 1, (2003): 77–103, doi: 10.1093/oxfordjournals.cjilaw.a000480.

Arangio-Ruiz, Gaetano. "Autodeterminazione dei popoli e diritto internazionale: dalla carta delle Nazioni Unite all'Atto di Helsinki [Self-determination of peoples and international law: from the United Nations Charter to the Helsinki Act]." *Rivista di studi politici internazionali 50, (1983): 523-552.*

Ballestrin, Luciane. "Modernidade/Colonialidade sem "Imperialidade"? O Elo Perdido do Giro Decolonial." *DADOS - Revista de Ciências Sociais* 60, no. 2, (2017): 505-540, doi 10.1590/001152582017127.

Blanco, Roman and Ana Carolina Teixeira Delgado. "Problematising the Ultimate Other of Modernity: the Crystallisation of Coloniality in International Politics", *Contexto Internacional 41, no. 3, (2019): 610-612, doi 10.1590/S0102-8529.2019410300006.*

Chimni, Buphinder S. "The Past, Present, and Future of International Law: A Critical Third World Approach. *Melbourne Journal of International Law* 8, no. 2, (2007): 499-5.

Crook, John R. "The International Court of Justice and Human Rights." *Northwestern Journal of International Human Rights 1, no. 1 (2004): 1-8.*

Dussel, Enrique. "Meditaciones anti-cartesianas: sobre el origen del anti-discurso filosófico de la Modernidad [Anti-cartesian meditations: on the origin of the anti-philosophical discourse of Modernity]." Tabula Rasa 9 (2008): 153-198.

Fatouros, Arghyrios A. "International Law and the Third World." Virgina Law Review 50, no. 5 (1964): 783-823.

Flory, Maurice. "Adapting international law to the development of the Third World." Journal of African Law 26, (1982): 12-20.

Fukurai, Hiroshi. "Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law," *Asian Journal of Law and Society 5*, no. 1, (2018): 221-231.

Higgins, Rosalyn. "The International Court of Justice and South West Africa: The implications of the Judgment." *International Affairs 42, no. 4 (1996): 573-599, doi: https://doi.org/10.2307/2610152.*

Kattan, Victor. "'There was an elephant in the court room': Reflections on the role of Judge Sir Percy Spender (1897-1985) in the South West Africa Cases (1960-

1966) after half a century." Leiden Journal of International Law 31, no. 1 (2018): 147-170, doi: https://doi.org/10.1017/S0922156517000577.

Ramina, Larissa. "TWAIL - 'Third World Approaches to International Law' and human rights: some considerations." *Revista de Investigações Constitucionais* 5, no. 1, (2018): 261-272.

Lima, Lucas C. "A Opinião sobre o Arquipélago de Chagos: a jurisdição consultiva da Corte Internacional de Justiça e a noção de controvérsia [The Opinion on the Chagos Archipelago: the consultative jurisdiction of the International Court of Justice and the notion of controversy]." *Revista da Faculdade de Direito da UFMG* 75, (2019): 281-302.

Mignolo, Walter D. "Colonialidade: o lado mais escuro da modernidade [Coloniality: the darkest side of modernity]." *Revista Brasileira de Ciências Sociais 34*, no. 94, (2017): 1-18, doi: 10.17666/329402/2017.

Mignolo, Walter D. "Introduction: coloniality of power and de-colonial thinking." *Cultural Studies* 21, no. 2-3, (2007): 155-167.

Mutua, Makau W. "What is TWAIL?" *American Society of International Law Proceedings Washington* 94, (2000): 31-38, doi 10.1017/S0272503700054896.

Ndlovu, Morgan. "Coloniality of Knowledge and the Challenge of Creating African Futures." *Ufahamu* 40, no. 2, (2018): 95-112, doi: 10.5070/F7402040944.

Orford, Anne. "The past as law or history? The relevance of imperialism for modern international law." *IILJ Working Paper 2: History and Theory of International Law Series*, (2002):1-17.

Otto, Diane. "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference." *Social & Legal Studies* 5, no. 3 (1996): 337–364, doi:10.1177/096466399600500304.

Pahuja, Sundhya. "The postcoloniality of international law." *Harvard International Law Journal* 46, no. 2, (2005): 459-469.

Quijano, Aníbal Quijano. "Coloniality of power, Eurocentrism, and Latin America." *Nepantla* 1, no. 3 (2000): 533-580.

Quijano, Aníbal. "Coloniality and modernity/ rationality." *Cultural Studies* 21, no. 2-3, (2007):168-178.

Quijano, Aníbal. "Coloniality of Power, Eurocentrism, and Latin America." *Nepantla 1, no. 3 (2000): 533-580.*

Smith, Amber. "Third World Approaches to International Law: The Responsibility to Protect and Regional Organisations: An Overview." Emporium 2 (2019).

Venzke, Ingo. "Public Interests in the International Court of Justice - A Comparison Between Nuclear Arms Race (2016) and South West Africa (1966)." AJIL Unbound 111 (2016): 68-75, doi: https://doi.org/10.1017/aju.2017.23

Books and Book Chapters

Anghie, Antony and Martti Koskenniemi; Anne Orford. *Imperialismo y derecho internacional: historia y legado [Imperialism and international law: history and legacy]. Bogotá: Siglo del Hombre Editores, 2016.*

Anghie, Antony. "Colonial Origins of International Law." In *Laws of the Postcolonial*, edited by Eve Darian-Smith and Peter Fitzpatrick. Ann Arbor. United States: University of Michigan, 1999.

Anghie, Antony. *Imperialism, sovereignty and the making of International Law*. Cambridge: Cambridge University Press, 2004.

Barreto, José-Manuel. "Imperialism and Decolonization as Scenarios of Human Rights History." in *Human Rights from a Third World Perspective: Critique, History and International Law*, edited by José-Manuel Barreto, 146-149.Cambridge: Cambridge Scholars Publishing, 2013.

Bedi, Shiv R. S. *The Development of Human Rights Law by the Judges of the International Court of Justice*. Oxford: Hart Publishing, Studies in International Law, 2007.

Dussel, Enrique. "Desde o 'ego' europeu: o encobrimento [From the European 'ego': or cover-up]." In *1492: O Encobrimento do Outro* [The Cover-up of the Other], edited by Enrique Dussel, 13-70. Petropólis: Vozes, 1993.

Galindo, George R. B. "A volta do terceiro mundo ao direito internacional [Around the third world to international law]." In *Direito global e suas alternativas metodológicas: primeiros passos* [*Global law and its methodological alternatives: first steps*], edited by Michelle R. S. Badin, Adriane S. Brito, Deisy F. Ventura. São Paulo: FGV Direito, 2016.

Grosfoguel, Ramon., Nelson Maldonado-Torres and Jose David Saldivar. *Latino/as in the World-system: Decolonization Struggles in the 21st Century U.S. Empire*. Abingdon, OX: Routledge, 2017.

Mayall, James. "International Society, State Sovereignty, and National Self-Determination." In *The Oxford Handbook of the History of Nationalism, edited by John Breuilly. Oxford: Oxford University Press, 2013.*

Sartori Jr., Dailor. Pesamento descolonial e direitos indígenas: uma crítica à tese do 'marco temporal da ocupação' [Decolonial thinking and indigenous rights: a critique of the thesis of the 'time frame of occupation']. Rio de Janeiro: Lumen Juris, 2017.

Squeff, Tatiana., and Gabriel Damasceno. "Descolonizar o direito internacional em prol de múltiplas miradas: entre desmistificações e ressignificações [Decolonizing international law in favor of multiple perspectives: between demystifications and resignifications]." In Direitos Humanos em Múltiplas Miradas [Human Rights on Multiple Edges], edited by Gabriel Mantelli and Laura Mascaro. São Paulo: OAB/ESA, 2021.

Tams, Christian. Enforcing Obligations Erga Omnes in International Law. Cambridge: Cambridge University Press, 2005, 63-69.

Wallerstein, Immanuel. *The Capitalist World-Economy*. London: Cambridge University Press, 1979.

Wehberg, Hans. *The Problem of an International Court of Justice. Oxford: Claredon Press, 1918.*

Wilde, Ralph Wilde. *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*. Oxford: Oxford University Press, 2008.

Zyberi*, Gentian. The humanitarian face of the International Court Justice: its contribution to interpreting and developing international human rights and humanitarian law rules and principles. Cambridge: Intersentia, 2008.*

Legal Documents

Brasil Supremo Tribunal Federal, *Recurso Extraordinário no. 1017365, Relator Min.*

Edson Fachin.

East Timor (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995

International Status of South West Africa, Advisory Opinion, Separate Opinion by Sir Arnold McNair, ICJ Reports 1950

League of Nations, The Covenant of the League of Nations, opened for signature 28 June 1918, (entered into force 10 January 1920)

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 274 (1970), Advisory Opinion of 21 June 1971

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019

S.S. Wimbledon (United Kingdom; France; Italy; Japan v. Germany), Judgment, ICJ Reports 1923

South West Africa (Ethiopia/Liberia v. South Africa), Second Phase, ICJ Reports 1966

South West Africa (Ethiopia/Liberia v. South Africa), Second Phase, Dissenting Opinion of Judge Jessup, ICJ Reports 1966

Statute of the International Court of Justice, opened for signature 26 June 1945, (entered into force 24 October 1945).

United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (1960) of 14 December 1960.

United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV) (1960) of 14 December 1960.

United Nations General Assembly, Declaration on the right of peoples and nations to self-determination, A/RES/637(VII) (1952) of 16 December 1952.

United Nations General Assembly, Resolution 2145 (XXI), A/RES/2145(XXI)(1966) of 27 October 1966.

Western Sahara, Advisory Opinion of 15 October 1975, Separate Opinion by Judge Gros, ICJ Reports 1975

Web Sources

"Chagos: Londres rejette l'Advisory Opinion de la CIJ, Port-Louis "deeply disappointed", *LeMauricien,* (2019), accessed on 13 February 2022, https://www.lemauricien.com/featured/chagos-londres-rejette-ladvisory-opinion-de-la-cij-port-louis-deeply-disappointed/275828/.

"*General Assembly Requirement of the United Kingdom of the Chagos Archipelago*", *United Nations News*, (2019), accessed on 05 February 2022, https://news.un.org/pt/story/2019/05/1673491.