PRO SOUALIGA FOUNDATION

April 2nd, 2024

Att: Chair & Vice Chair
Permanent Forum on People of African Descent
Geneva, Switzerland

Re: Submission Third Session of the Permanent Forum on the People of African Descent

Your Excellency,

In February of 2018, the Kingdom of the Netherlands stated in its Written Statement to the International Court of Justice (ICJ) in paragragh 2.2 that ".....decisions on the political status and the economic, social and cultural developments are made by the people itself, or its legitimate representatives, not by others. Moreover, such decisions shall be made in full freedom, without any outside pressure or interference." According to the Kingdom of the Netherlands this is all included in the definition of the "peremptory or jus cogens" right to self-determination. Pro Soualiga Foundation hereby submits documentation regarding the continued violation of St. Maarten's peremptory or jus cogens right to self- determination by the Netherlands from which there is no derogation as clearly defined in the Vienna Convention on the Law of Treaties. These violations include outside pressure and interference by means of Orders in Council, a Governor with executive power, and the fact we cannot amend our constitution or change our legal system (The population speaks English while the laws are in Dutch) without approval from the Netherlands.

Included in this submission are the following documents:
a. Ultra Vires – a paper prepared by Pro Soualiga dd May 2, 2022, describing our vision of the "jus cogens or peremptory" right to self-determination.
b. Our request to the Dutch State Secretary for Kingdom affairs dd. April 28, 2022 requesting confirmation that the "jus cogens or peremptory" right to self-determination prevails over Kingdom or municipal Law.
c. Her answer dd. July 4, 2022 confirming that in event of a conflict the peremptory norm prevails.
d. The Written Statement of the Kingdom of the Netherlands to the ICJ dd. Feb. 27, 2018, with special reference to paragraph 1.5, 2.2 and 4.10

Sincerely,

Mr. Renate L. Brison
Pro Soualiga Foundation

Brill Drive #17, Middle Region
St. Maarten
(721) 523 9256
(721) 580 3711
brislegal06@gmail.com
rennylbrison@gmail.com

Brill Drive #17, Middle Region
St. Maarten

(721) 523 9256
(721) 580 3711

brislegal06@gmail.com
rennylbrison@gmail.com

To the State Secretary
The Hon. Alexandra van Huffelen
The Hague, Netherlands
Via email: djz.ir@minbuza.nl

April 28, 2022

Re: Verzoek uit oogpunt van de rechtstatelijkheid en goed bestuur

Excellency:

The Apex Court has ruled:

> *Het folterverbod heeft een absoluut karakter: geen enkele uitzonderlijke omstandigheid, ongeacht of het gaat om een oorlogstoestand, een oorlogsdreiging, binnenlandse politieke onrust of welke andere openbare noodsituatie ook, kan worden aangevoerd als rechtvaardiging voor foltering (art. 2 lid 2 Verdrag tegen foltering).* (ECLI:NL:PHR:2014:369, r.o. 2.2)
>
> *Omdat het folterverbod volkenrechtelijk tot het ius cogens wordt gerekend, moet een verplichting van Nederland op grond van het uitleveringsverdrag met de V.S. wijken voor een verplichting van Nederland op grond van het folterverbod.* (*ECLI:NL:PHR:2014:369, r.o. 3.16)*

While in the Written Statement of the Kingdom of the Netherlands to the International Court of Justice on February 27, 2018, the Kingdom posited:

> *Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination" (par. 3.9)*

The Kingdom clearly recognizes the right to self-determination and torture both as "*peremptory*" or "*jus cogens*" norms.

Article 53 of the Vienna Convention on the Law of Treaties provides that:

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

Brill Drive #17, Middle Region
St. Maarten
(721) 523 9256
(721) 580 3711
brislegal06@gmail.com
rennylbrison@gmail.com

Question:

1. Can the State Secretary confirm that because the right to self-determination is also a "*jus cogens/peremptory*" norm that it prevails over the Rijkswet COHO and that there is no lawful way to circumvent or, derogate from, a "*jus cogens/peremptory*" norm?
2. Can the State Secretary confirm that the right to self-determination also prevails over the Kingdom Charter or "Het Statuut"?

We would appreciate your reply within three weeks of the date of this letter.

Sincerely,

Renate Brison
Secretary
Pro Soualiga Foundation

Brill Drive #17, Middle Region
St. Maarten
(721) 523 9256
(721) 580 3711
brislegal06@gmail.com
rennylbrison@gmail.com

Ministerie van Binnenlandse Zaken en
Koninkrijksrelaties

Pro Soualiga Foundation
Attn Mr. Renate Brison, Secretary
Brill Drive #17, Middle Region
Sint Maarten

www.rijksoverheid.nl
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Kenmerk
2022-0000352889

Uw kenmerk

Datum 4 JUL 2022
Betreft Questions regarding right to self-determination and ius cogens

Dear Mr. Brison,

Thank you for your letter with a request regarding the right to self-determination and ius cogens. Below you will find an answer to the questions, listed in your letter of April 28.

Question 1:
Can the State Secretary confirm that because the right to self-determination is also a "jus cogens/peremptory" norm that it prevails over the Rijkswet COHO and that there is no lawful way to circumvent or, derogate from, a "jus cogens/ peremptory" norm?

Answer:
As the Kingdom of the Netherlands has stated in its written statement of 17 April 2009 in the International Court of Justice's Advisory Opinion procedure 'Accordance with international law of the unilateral declaration of independence in respect of Kosovo' (para. 3.2) and in its written statement of 27 February 2018 in the International Court of Justice's Advisory Opinion procedure 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (para. 2.5), the right of self-determination of peoples is a permanent, continuing, universal and inalienable right with a peremptory character. In case of a conflict between a rule of international law with a peremptory character and national legislation, international law takes precedence over such national legislation (see more generally https://zoek.officielebekendmakingen.nl/kst-29861-19.html). The Kingdom of the Netherlands, however, considers that the Rijkswet COHO is in accordance with the right of self-determination of peoples. Therefore, the issue of precedence does not arise.

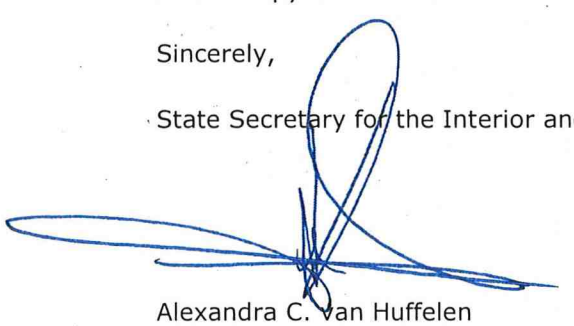
Question 2:
Can the State Secretary confirm that the right to self-determination also prevails over the Kingdom Charter or "Het Statuut"?

Answer:
See the answer to the first question. Also in this regard the Kingdom of the Netherlands considers that the Charter (het Statuut) of the Kingdom is in accordance with the right of self-determination of peoples.

I trust that this answers your questions. On request of the committee of Kingdom Relations of the Dutch Parliament, I will send them a copy of this letter. I will also send a copy to the Prime Minister of Sint-Maarten.

Sincerely,

State Secretary for the Interior and Kingdom Relations,



Alexandra C. van Huffelen

PRO SOUALIGA FOUNDATION

Mr. Stephen Mathias
Assistant Secretary-General for Legal Affairs
United Nations Headquarters
Room No S-3624
New York, NY 10017
Via email: mathiass@un.org

July 9, 2021

Re: error of omission on preliminary NSGT's list of 1963

Sir:
This request is based on two considerations:

1. UN resolution 945X of December 15, 1955 contains an amendment by Uruguay which was explained by Uruguay as follows: *The amendment was intended to offer the peoples of the Netherlands Antilles and Surinam 'a safeguard, an opportunity of coming at a later date to knock at the door of the United Nations, should the need arise".*
2. UN resolution 75/104 of December 10, 2020 operative paragraph #8 *"Urges those specialized agencies and other organizations of the United Nations system that have not yet provided assistance to Non Self-Governing Territories to do so as soon as possible."*

The matter at hand.
The (former) Netherlands Antilles were placed on the list of Non Self-Governing Territories by Resolution 66(1) of December 14, 1946. They therefore can only be removed from said list by a subsequent UN resolution, and as far we can ascertain, no such resolution exists.

The scope of UN Resolution 945X of December 15, 1955
By Resolution 945X of December 15, 1955 the Administering State, the Government of the Netherlands was released from its obligations under Art. 73e of the UN Charter. The resolution did not state *"Chapter XI of the UN Charter can no longer be applied to the Netherlands Antilles"*. Resolution 945X also contains an amendment by India to the effect that resolution 945X only applies to art. 73e and that paragraphs a to d remain in force and can be invoked by the General Assembly *"at any time"*. In our opinion, these two amendments (India and Uruguay) plus the absence of a UN resolution authorizing removal, indicate that the former Netherlands Antilles are still, formally, on the list of NSGT's.

The classification error on the 1963 list of NSGT's
It appears from work carried out by researchers at the University of Leiden in the Netherlands, that the former Netherlands Antilles were omitted from the 1963 list due to a classification error. We subsequently obtained document A/5446/Rev.1, which contained the work of the committee and were able to confirm that indeed, the method used caused the omission from the preliminary list of NSGT's in 1963. The list has subsequently, as far as we are aware, never been declared final so that one can conclude that it is still subject to correction or revision

.

The request to the Office of Legal Assistance
The undersigned Non-State Actors/NGO would like to present our findings in more detail to the OLA. Can you kindly inform us when, and how, such a presentation can be arranged?

Enclosed Please find UN Resolution 945X including the India and Uruguay amendments, as well as the statutes, chamber of commerce registration and incorporation documents of Pro Soualiga Foundation.

Sincerely,

Denicio Brison-President Pro Soualiga Foundation

Brill Drive #17, Middle Region
St. Maarten
(721) 523 9256
(721) 580 3711
brislegal06@gmail.com
rennylbrison@gmail.com

The Uruguay and India amendments to UN Resolution 945

945 (X) Communication from the Government of the Netherlands concerning the Netherlands Antilles and Suriname

The General Assembly,

Recalling that, by resolution 222 (III) of 3 November 1948, the General Assembly, while welcoming any development of self-government in the Non Self-Governing Territories, considers it essential that the United Nations be informed of any change in the constitutional status of any such Territory as a result of which the responsible Government concerned thinks it is unnecessary to transmit information in respect of that Territory under Article 73 e of the Charter of the United Nations,

Recalling that, by resolution 747 (VIII) of 27 November 1953, the General Assembly invited the Government of the Netherlands to communicate to the Secretary-General the results of the negotiations between the representatives of the Netherlands, the Netherlands Antilles and Surinam, and invited the Committee on Information from Non-Self-Governing Territories to report to the General Assembly on the information received,

Having received the communication dated 30 March 1955, by which the Government of the Netherlands transmitted to the Secretary-General the constitutional provisions embodied in the Charter for the Kingdom of the Netherlands promulgated on 29 December 1954, together with an explanatory memorandum thereon,

Having studied the report prepared by the Committee on Information from Non-Self-Governing Territories during its session of 1955, on the question of the cessation of the transmission of information with respect to the Netherlands Antilles and Surinam,

***Bearing in mind*, the competence of the General Assembly to decide whether or not a Non-Self-Governing Territory has attained the full measure of self-government referred to in Chapter XI of the Charter of the United Nations**,[1]

1. *Takes note* of the documentation submitted, and of the explanation provided, to the effect that the peoples of the Netherlands Antilles and Surinam have expressed through their freely elected representative bodies, their approval of the new constitutional order, and takes note also of the opinion of the Government of the Netherlands;

2. *Expresses the opinion*, that **without prejudice to the position of the United Nations as affirmed in General Assembly resolution 742 (VIII) of 27 November 1953, and to such provisions of the Charter of the United Nations as may be relevant**[2], on the basis of the information before it as presented by the Government of the Netherlands, and as desired by the Government of the Netherlands, cessation of the transmission of information under Article 73 e of the Charter in respect of the Netherlands Antilles and Surinam is appropriate.

557th plenary meeting, 15 December 1955

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[1] Amendment submitted by Uruguay. The representative of Uruguay had explained that he submitted this amendment because the Netherlands Antilles and Surinam were still not fully self-governing. The amendment was intended to offer the peoples of the Netherlands Antilles and Surinam "a safeguard, an opportunity of coming at a later date to knock at the door of the United Nations, should the need arise. (525th Meeting, p 315, *viz.* Hillebrink p. 224)

[2] Amendment submitted by India. India explained this amendment by stating that it intended to declare that the decision of the General Assembly only related to Article 73 e and that paragraphs a to d remained in force and could be invoked by the General Assembly at any time. (Hillebrink, *op. cit.* p. 223)

St. Maarten Commercial Register
Excerpt from the Commercial Register
Registration number: 28259 (0)
Date: January 20, 2021 **Time:** 11:46:50 AM

In the Commercial Register of the St. Maarten Chamber of Commerce & Industry is registered under number 28259: PRO SOUALIGA FOUNDATION

Trade name	
Legal form	Foundation
Official name	PRO SOUALIGA FOUNDATION
Statutory seat	Sint Maarten
Date of incorporation	July 24, 2020
Date last amendment	January 11, 2021
Date registered	July 24, 2020
Description	1. To take court and other legal action in order to promote the right to a full measure of self-government and self determination pursuant to the Charter of the United Nations of St. Maarten, Aruba, Curacao, Bonaire, St. Eustatius and Saba. 2. To file petitions at the United Nations and other international bodies and countries to achieve the objectives set forth above. 3. To engage with the government of Aruba, Curacao, Bonaire, Saba and St. Eustatius and St. Maarten and the government of the Netherlands to achieve the objectives set forth above sub 1. 4. To pursue the decolonization of the abovementioned islands, by means of court action against the Dutch State and by presenting the matter of the decolonization of the islands mentioned before the United Nations, other international organizations as well as other countries. 5. To pursue the removal of the function of governor and the removal of articles 44, 50 and 51 from the Kingdom Charter in order to make the Kingdom Charter United Nations compliant. 6. To obtain a United Nations resolution for all six islands mentioned above, or for any one, as the case may be, declaring that the right of self-determination has been exercised, that the full measure of self-government has been obtained and that Chapter XI of the United Nations Charter no longer applies.

Business Address(es)

Address	Brill's Drive 17
Area name	Middle Region, Lower Prince's Quarter

Correspondence Address(es)

Address	Brill's Drive 17
Area name	Middle Region, Lower Prince's Quarter

Officials

Function	Board member
Title	President/Chairman
Name	PEDRO DENISIO BRISON
Address	Brill's Drive 17,
Date of birth	July 30, 1952
Place of birth	Aruba
Country of birth	Aruba, Netherlands West Indies
Nationality	Dutch (Netherlands Antilles)
Date in function	July 24, 2020
Authority	Jointly authorized

Function	Board member
Title	Secretary
Name	RENATE LISANDRO BRISON
Address	Mildrum Road 9,
Date of birth	April 2, 1972
Place of birth	Sint Maarten
Country of birth	Sint Maarten
Nationality	Dutch (Netherlands Antilles)
Date in function	July 24, 2020
Authority	Jointly authorized

Only valid if stamped and signed by the Chamber of Commerce

Sint Maarten, January 20, 2021

INTERNATIONAL COURT OF JUSTICE

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

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

27 February 2018

1. Introduction

1.1 In Resolution 71/292, adopted on 22 June 2017, the General Assembly of the United Nations decided, pursuant to Article 65 of the Statute of the International Court of Justice, to request the Court to render an advisory opinion on the following questions:

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

1.2 In its Order of 14 July 2017, the Court designated 30 January 2018 as the time limit within which written statements on the question may be presented to it, by the United Nations and States entitled to appear before the Court, in accordance with Article 66.2 of the Court's Statute.

1.3 As the Kingdom of the Netherlands is a Member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations (UN Charter) also a Party to the Statute of the Court, it wishes to avail itself of the opportunity afforded by the Court's Order of 14 July 2017 to make a written statement on the abovementioned request by the General Assembly for

an advisory opinion of the Court.

1.4 It is submitted that the question put before the Court essentially relates to the international legal rules applicable to the exercise and realization of the right of self-determination of peoples, as well as the international legal consequences of a possible violation of the right of self-determination, in the context of decolonization.

1.5 According to the Kingdom of the Netherlands, the right of self-determination of peoples is not exhausted by a one-off exercise, but a permanent, continuing, universal and inalienable right with a peremptory character. However, there are essential differences between the colonial and post-colonial context in regard of the entitlement of peoples to the particular implementation of this right. In *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, the Kingdom of the Netherlands has expressed it views in regard of a number of aspects related to the implementation of the right of self-determination in the post-colonial context. In this submission, the Kingdom of the Netherlands expresses its views in respect of the subject, legal status, implementation and exercise of the right of self-determination in the colonial context, with particular attention to the transition from the implementation of the right of self-determination in the colonial context to the implementation and exercise of the right of self-determination in the post-colonial context.

2. Scope of the right of self-determination

2.1 Relevant international instruments contain comparable formulations regarding the content of the right of self-determination of peoples. Paragraph 2 of Resolution 1514 states:

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

An identical formulation has been included in Articles 1 of the 1966 Covenants. Resolution 2625 states:

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

And Article 20(1) of the African Charter holds that "[a]ll peoples [...] shall have the unquestionable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."

2.2 It is submitted that, on the basis of these formulations in international treaties and authoritative United Nations' declarations, the right of self-determination of peoples relates to the determination of the political status of a people, and the pursuit of its economic, social and cultural development and future. On the basis of these formulations, it must also be concluded that the decisions on the political status and the economic, social and cultural development are made by the people itself, or its legitimate representatives, not by others. Moreover, such decisions shall be made in full freedom, without any outside pressure or interference.

2.3 The right of self-determination is a right that was of crucial importance to the decolonization of dependent territories and peoples. However, from the outset it must be observed that decolonization was only one particular manifestation of the exercise and implementation of this right. As observed by Judge Kreća in his dissenting opinion in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

> "[t]he fact that in the Court's practice [...], the right to [...] self-determination has been linked to non-self governing territories cannot be interpreted as a limitation of the scope of the right to self-determination *rationae personae*, but as an application of universal law *ad casum.*" (*ICJ Reports 1996,* p. 595, at para. 72).

2.4 Indeed, from its inclusion in the Charter of the United Nations, the concept of self determination of peoples developed from a legal principle into a right of peoples that was implemented in a particular manner in the context of decolonization. It is submitted, however, that the right of self-determination of peoples continues to apply in the post-colonial era. As will be elaborated below (para. 3.32), the exercise and realization of the right of self determination by a people in a colonial context in accordance with the applicable rules of international law terminates the status of such a people as a 'colonial people' and their territory as a 'colonial territory'. Together with the termination of that status, the entitlement to decolonization and the related modes of implementation of the right of self-determination in the context of decolonization also come to an end. In case the relevant people of the colonial territory have opted, in full freedom, for integration in or association with an existing State, this does not, however, end the applicability of the right of self-determination to that people nor does it terminate the corresponding legal obligation of the State in which the territory has been integrated, or with which the territory has become associated, to respect and promote the right of self-determination of that people in the new, post-colonial situation. Moreover, it is

submitted, in the case that a people of a colonial territory chooses, in full freedom, to establish an independent State, under international law this newly established State is obliged to respect and promote the right of self-determination of the peoples residing within its international boundaries.

2.5 The arguments above are based on the view of the Kingdom of the Netherlands that the right of self-determination of peoples is a permanent, continuing, universal and inalienable right with a peremptory character (see also Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.2) that extends beyond situations of decolonization and foreign occupation. The right of self-determination has been included in several international instruments that do not, or do not exclusively, deal with situations of decolonization or foreign occupation. Reference can be made to Articles 1 of the 1966 Covenants, General Assembly Resolution 2625, the African Charter on Human and Peoples' Rights, Section I.2 of the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, and Part VIII of the Final Act of the Conference on Security and Co-operation in Europe. A common feature of these instruments is that they all refer to "all peoples" and not merely to 'colonial' or 'oppressed' peoples as the holders of the right of self-determination; a terminology which in itself denotes a universal and continuous character of at least some aspects of the right of self-determination.

2.6 In the context of the advisory proceedings before this Court in *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, the Kingdom of the Netherlands submitted that under international law a distinction must be made between situations in which the right of self
determination is

> "exercised in a manner that preserves international boundaries (internal self-determination) or in a manner that involves a change of international boundaries (external self-determination)" (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.5).

In the colonial context, the right of self-determination can be realized through independence, association or integration. It is submitted that in the post-colonial era the right of self determination of peoples must, in principle, be exercised within the international boundaries of the State in which a people resides and that it is this internal dimension of the right of self determination that is referred to in Articles 1 of the 1966 Covenants as well as in the other international instruments referred to above.

2.7 Even though in the post-colonial era the right of self-determination must, in principle, be exercised within the international boundaries of a State, situations exist in which a legitimate claim to external self-determination can be made by a people. In such post-colonial situations, the right of self-determination can still be realized through independence, association or integration through (a) the dissolution of a State, (b) the merger of one or more States, or (c) the secession from a State. On the basis of the right of self-determination, peoples residing in a State may, by free and consensual agreement, decide to dissolve a State and create two or more States on its territory or allow one or more of those peoples to secede from that State (consensual secession). Such a consensual agreement can be agreed *ad hoc* or embedded in, for instance, the Constitution of a State. The Kingdom of the Netherlands continues to be of the opinion that in the post-colonial era a right to unilateral secession only arises when particular substantive and procedural conditions that apply cumulatively have been met: (a) a persistent and serious violation of the right to internal self-determination of the people concerned (substantive condition), such as the absence of a government representing the whole people belonging to the

territory of the State (Resolution 2625), and the exhaustion, in good faith, by the people concerned of all available remedies to exercise its right to self-determination within the international boundaries of the State (procedural condition), or (b) the existence of widespread and grave violations of fundamental rights of the members of the people concerned (substantive condition). In regard of the procedural condition the Kingdom of the Netherlands stated in *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*:

> "all avenues must have been explored to secure respect for the and the promotion of the right of self determination through available procedures, including through bilateral negotiations, the assistance of third parties and, where accessible or agreed, recourse to domestic and/or international courts and arbitral tribunals" (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.11).

In the same Written Statement, the Kingdom of the Netherlands continued by stating:

> "The right to political self-determination may [thus] evolve into a right to external self-determination

in exceptional circumstances, in unique cases or cases *sui generis*. This is an exception to the rule and should therefore be narrowly construed. The resort to external self-determination [via unilateral secession] is an *ultimum remedium*" (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.11).

3. The right of self-determination and decolonization

Legal status of the right of self-determination in the context of decolonization

3.1 After self-determination was proclaimed by the United States and the United Kingdom during World War II in the Atlantic Charter (Third Principle), self-determination was subsequently included in the Charter of the United Nations. The principle of self-determination is referred to twice in the Charter. Article 1(2) mentions as one of the purposes and principles of the United Nations:

"[t]o develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace."

The second reference to self-determination is in Article 55(c) of the Charter. However, the UN Charter did not define the content of the principle of self-determination nor did it define the term 'peoples'. Through the adoption of numerous resolutions in the following years, in particular by the General Assembly, insights were given into the content of the principle and its subject in the context of decolonization.

3.2 As United Nations' and State practice developed, it became clear that Chapter XI and Chapter XII of the UN Charter became the background for the evolution of self-determination from a principle into a positive legal right in the field of decolonization in the first two decades after the establishment of the United Nations.

Although self-determination was not explicitly mentioned, the principle underlies Chapter XI and Chapter XII of the Charter, of which Chapter XII can be seen as the successor regime to the League of Nation's Mandate System, having essentially similar purposes. Chapter XI, on the other hand, laid down a rather new regime for Non-self-governing territories which were referred to in Article 73 of the Charter as "territories whose peoples have not yet attained a full measure of self-government". In this way, the scope of application of the notion of self determination was substantially expanded in comparison to the era of the League of Nations.

Pursuant to Article 73(e), under which "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government" were to "transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply", the Secretary-General invited Member States to give their opinion with regard to the factors that should be taken into account in determining whether or not a territory constituted a non-self-governing territory (UN Doc. A/47, 29 June 1946, and UN Doc. A/47, Ann. I to VIII and Add. 1 and Add. 2). On the basis of the information received, seventy-four territories constituting territories under Article 73 of the Charter were listed by the General Assembly in its Resolution 66(I) (UN Doc. A/Res/66 (I), 14 Dec. 1946). In 1960, four Spanish and nine Portuguese territories (UN

Doc. A/Res/1542 (XV), 15 Dec. 1960) and, in 1962, Southern Rhodesia (UN Doc. A/Res/1747 (XVI), 28 June 1962) were added to the list of Non-self-governing territories by the General Assembly. In 1963 the list was expanded with the addition of Western Sahara (UN Doc. A/5514, Annex III). In 1986 New Caledonia (UN Doc. A/Res/41/41, 2 Dec. 1983) and in 2013 French Polynesia (UN Doc. A/Res/67/265, 17 May 2013) were re-listed.

Both Chapter XI and Chapter XII provided for a gradual development of Non-self-governing territories towards self-government, or, in the case of Trust Territories, towards independence "as may be appropriate" (Article 76(b)). But in the early 1950s, this policy of progressive and gradual development towards increased self-government was put under pressure more and more by the General Assembly (see, e.g., UN Doc. A/Res/637 (VII), 16 Dec. 1952). Eventually, the General Assembly set aside the policy of gradual development and replaced it with a policy which asserted that subject and dependent or colonial territories should immediately be granted independence.

3.3 General Assembly Resolution 1514 (XV) ("Declaration on the Granting of Independence to Colonial Countries and Peoples") was of fundamental importance to the development of self determination into a right of colonial territories and peoples. The Resolution was adopted with eighty-nine Member States voting in favour, no vote against, and nine abstentions. In the Preamble, the General Assembly stresses "[t]he necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" as one of the main objectives of the Resolution. In its operative part, the General Assembly declares that:

1. "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and this Declaration on the basis of equality, non interference in the internal affairs of all states, and respect for the sovereign rights of all peoples and their territorial integrity."

3.4 In Resolution 1514, the General Assembly refers to self-determination as a *right* and not as a principle. This raises the question whether the General Assembly regarded self-determination as a right under international customary law at the time of the adoption of Resolution 1514. The Kingdom of the Netherlands is of the view that this question must be answered in the affirmative.

3.5 It is recalled that, as early as 1952, the General Assembly adopted a number of resolutions under the title of "The right of peoples and nations to self-determination". In these resolutions, it was stated that "the States Members of the United Nations shall recognize and promote the realization of the right of self-determination of peoples of Non-Self-Governing and Trust Territories who are under their administration" (UN Doc. A/Res/637 A-B-C, 16 Dec. 1952). And in 1953 the General Assembly adopted a resolution containing factors which should be used by the Assembly as a guide in determining whether a territory is still or no longer within the scope Chapter XI of the Charter. The Resolution declared that "each concrete case should be considered and decided upon in the light of the particular circumstances of that case and taking into account the right of self-determination of peoples" (UN Doc. A/Res/742 (VIII), 27 Nov. 1953). In addition, Resolution 1188 (XII), adopted by the General Assembly in 1957, reaffirms in its first operative paragraph that those member States bearing responsibility "for the administration of Non-Self-Governing Territories shall promote the realization and facilitate the exercise of the right [of self-determination] by the peoples of such Territories".

3.6 Of the thirteen States abstaining from voting with respect to the draft of Resolution 1188 (XII) as a whole, a number of States voted against paragraph 1 of the draft. These States included those States that administered colonial territories. It has sometimes been suggested that if the principal colonial powers voted against or abstained from voting with regard to resolutions proclaiming self-determination as a right of peoples, it seems impossible to state that a rule of customary law had emerged at the relevant time. However, this conclusion would not seem to be supported by the debates preceding the adoption of the draft of Resolution 1188 (XII). As comes to the fore from the debates, for many (colonial) States the principal reason for voting against or abstaining from voting in 1957 was not so much the use of the term 'right', but the fact that according to these States self-determination was not confined to the populations of Non-self-governing territories (see, e.g., UN GAOR, 12th Sess., Third Comm., 821st mtg., 26 Nov. - 3 Dec. 1957: United Kingdom (pp. 303, para. 4, and 325, para. 62: "[the United Kingdom] had voted against operative paragraph 1, since even in independent States the principle of self-determination could be disregarded [...]"); the Netherlands (p. 313, para. 4: the Kingdom of the Netherlands "emphasized the distinction between internal and external self determination and expressed [its] surprise that some representatives limited their views to the colonial side of the question, whereas there many peoples outside the colonial sphere who would like to exercise their right of self-determination and were unable to do so"); Canada (p. 319, para. 2: "the discussion has shown that the question of self-determination was not confined to situations relating to traditional colonialism"); New Zealand (p. 321, para. 21: "it had been suggested that self-determination was a practical question only in cases of NSGT's. Article 1

of the draft Covenants [on Human Rights] had however not been adopted on such premises. It could hardly be explained to a large segment of the world public, including the subjects of police States, that the right of self-determination was in their cases a kind of constitutional fiction. Such an interpretation would deprive the [draft] Covenants [on Human Rights] and the United Nations of all moral authority").

3.7 It would appear that there was not only *opinio juris* in regard of the character of the right of self-determination as a right under customary international law in the course of the 1950s, but also widespread state practice reflected in the fact that some thirty non-self-governing and Trust Territories achieved independence prior to the adoption of Resolution 1514 on 14

December 1960. Moreover, if the terminology used by the General Assembly in its resolutions on the right of self-determination between 1952 and 1957 is compared with the terminology used in Resolution 1514, the latter is formulated in a much more mandatory manner by which the impression at least is created that this Resolution aims at expressing the applicable law. It would therefore appear that Resolution 1514 reflects an existing rule of customary international law insofar as a right of self-determination for "colonial countries and peoples" is concerned.

3.8 In any event, it would appear that the right of self-determination in the sense of a right of peoples in a colonial context to choose either independence, association or integration developed into a rule of customary international law in the course of the 1960s. This is reflected in the numerous resolutions adopted both by the Security Council and by the General Assembly affirming the existence of a right of self-determination, as well as in the dismantling of almost the entire dependency system in terms of Non-self-governing territories, Trust Territories and other colonial territories in the course of the 1960s and 1970s. In this respect, it should be noted that, in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court stated:

> "the last fifty years [...] have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched [...]." (*ICJ Reports 1971*, p. 16, at para. 52)

3.9 It is, furthermore, submitted that the obligation to respect and promote the right of self determination of peoples in a colonial context, as well as the obligation to refrain from any forcible action which deprives such peoples of this right, is an obligation arising under a peremptory norm of international law. During the discussions preceding the adoption of Resolution 2625 in 1970, States have characterized the right of self-determination as "a fundamental principle of contemporary international law binding on all States" (A/AC.125/SR.41 (Poland)), "one of the fundamental norms of contemporary international law" (A/AC.125/SR.40 (Yugoslavia)), "one of the most important principles embodied in the Charter" (A/AC.125/SR.69 (Japan)), "a universally recognized principle of contemporary international law" (A/AC.125/SR.70 (Cameroon)), and "indispensable for the existence of community of nations" (A/AC.125/SR.68 (United States)). The fundamental character of the right of self-determination has been stressed with regard to the process of decolonization, and in that respect it has been explicitly qualified by States as a peremptory norm of international law (Spain, *Western Sahara* case, *ICJ Pleadings*, Vol. I, pp. 206-208; Algeria, *Western Sahara* case, *ICJ Pleadings*, Vol. IV, pp. 497-500; Morocco, *Western Sahara* case, *ICJ Pleadings*, Vol. V, 179-80; Guinea-Bissau, *Case Concerning the Arbitral Award of 31 July 1989*, (Guinea-

Bissau v. Senegal), ILR, Vol. 83, p. 1 at p. 24; and A/AC.125/SR.70, 4 Dec. 1967, p. 4 (Romania)). The right to self-determination has been characterized as an "inalienable right" (e.g. S/Res/264, 20 March 1969); 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, Section I.2; 1984 General Comment No. 12 of the Human Rights Committee on Articles 1 of the 1966 Covenants, para. 2). In the *East Timor* case, the Court observed that the right of self-determination "is one of the essential principles of contemporary international law" and described as "irreproachable" the assertion that the right of peoples to self-determination has an *erga omnes* character (*ICJ Reports 1995*, p. 90, at para. 29). In its advisory opinion on the *Legal Consequences of the Construction of a*

Wall in the Occupied Palestinian Territory, the Court observed that the obligation to respect the right of peoples to self-determination is an obligation *erga omnes* (*ICJ Reports 2004*, p. 136, at para. 155). And with reference to the *East Timor* case, the International Law Commission describes "the obligation to respect the right of self-determination" as a norm whose peremptory character is "generally accepted" (Commentary to Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, para. 5). The International Law Commission continues by stating:

> "[s]o far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination" (Commentary to Article 26 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, para. 5).

3.10 The Court has recognized the existence in international law of peremptory norms in the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application* (*ICJ Reports 2006*, p. 32, at para. 64).

The subject of the right of self-determination and the principle of territorial integrity

3.11 Although the UN Charter refers to self-determination of "peoples", and Resolution 1514 proclaims that "all peoples" have the right to self-determination, United Nations' practice until the mid-1960s reveals that it was mainly the right of self-determination in a colonial context which was developed during that period.

3.12 In its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court observed that the development of the scope of the right of self-determination was not limited to Trust Territories. In particular, the Court stated that:

> "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to al1 "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial regime." (*ICJ Reports 1971*, p. 16, at para. 52)

3.13 An indication of what constitutes a non-self-governing territory as the object of the right to self-determination was given in Resolution 1541 which defines a non-self-governing territory in Principle IV as a "territory which is geographically separate and is distinct ethnically and/or

culturally from the country administering it". This phrasing is often referred to as the 'salt water barrier' or 'salt water' theory. Principle IV is supplemented by Principle V which lays down possible additional criteria for the determination of a non-self-governing territory.

3.14 United Nations decolonization practice was almost entirely along the lines of the 'salt water barrier'. Thus, the identified object of the right of self-determination during this period of history was – in addition to Trust Territories – a territory, as the Court noted in its advisory

opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, "under a colonial regime" (*ICJ Reports 1971*, p. 16, at para. 52). By doing so, the Court, in accordance with the overwhelming majority of cases of United Nations' decolonization practice, applied a territorial rather than an ethnical definition of the subject or holder of the right of self determination in the context of decolonization.

3.15 This territorial definition of the subject or holder of the right of self-determination is inextricably linked to the applicability of the principle of territorial integrity to the colonial territory in regard of the implementation of the right of self-determination.

In Resolution 1514, the General Assembly stipulates in paragraph 6 that:

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

In addition, paragraph 4 of the same Resolution stresses that "the integrity of [the] national territory [of dependent peoples] shall be respected". The term "country" in paragraph 6 of Resolution 1514 would seem to refer to "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" (paragraph 5 of Resolution 1514). The practice of the United Nations and its Member States may be taken to suggest that this paragraph on the principle of territorial integrity of a colonial territory is a reflection of international customary law. The Kingdom of the Netherlands would like to make three observations in this respect.

3.16 First, according to the Kingdom of the Netherlands, neither Resolution 1514 nor subsequent State practice in the field of decolonization should be interpreted in a way that the title to the colonial territory of the administering State became illegal or void *ab initio*. The Charter of the United Nations does not regard the existence of colonies or colonial regimes as a violation of international law *per se*. What it did mean, it is submitted, was that a positive legal rule was developed which held that States administering these territories were under an obligation to decolonize these colonial territories in accordance with the wishes of the inhabitants of these territories. In those cases where, in violation of this obligation, administering States did not transfer sovereignty to the people or authorities of the colonial territory, the right of self-determination of the people of the colonial territory prevailed over any claim by the administering State to the maintenance of its sovereignty over the colonial territory. Therefore, no violation of the principle of territorial integrity occurred when the people of a colonial territory chose to dissolve the bonds with the State administering the colonial territory without the administering State's consent.

Second, the applicability of the principle of territorial integrity to the colonial territory meant that States administering colonial territories, as well as third States, were under an international legal obligation to respect the territorial integrity of the colonial territory. A prime example of a violation of this principle is formed by South Africa's attempt to fragment Namibia by

creating a number of 'bantustans'. The United Nations declared this conduct illegal and contrary to the provisions of the Charter of the United Nations (see, e.g., UN Doc. S/Res/ 264, 20 March 1969; UN Doc. S/Res/301, 20 Oct. 1971; UN Doc. S/Res/366, 17 Dec. 1974; UN Doc. S/Res/385, 30 Jan. 1976. See also UN Doc. A/Res/2372 (XXII), 12 June 1968; UN Doc.

A/Res/2403 (XXIII), 16 Dec. 1968; UN Doc. A/Res/31/146, 20 Dec. 1976).

Third, it would appear that in United Nations' and State practice the right of self-determination was interpreted *in the light of* the principle of territorial integrity, which meant that the fragmentation of the colonial territory before the realization of independence (or integration or association) as a result of unilateral secession by a segment of the colonial population was not accepted by the United Nations and the international community at large.

3.17 In sum, in the context of decolonization the right of self-determination was applied to all inhabitants of a colonial territory and not to minority, ethnical groups or segments of the population within that territory. The holder of the right of self-determination or 'right to decolonization' was thus primarily territorially defined. Therefore, as a general rule, self determination had to be granted to Trust Territories and Non-self-governing territories as a whole. But exceptions were accepted.

3.18 The United Nations' insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition, but only if that was the clear wish of the majority of all inhabitants of the territory in question. For instance, in the case of the non self-governing territory of the Gilbert and Ellice Islands, the General Assembly first agreed to an administrative division of the colonial territory and subsequently approved the partition of the colony as a result of the express wishes of the inhabitants of the Ellice Islands resulting from a referendum, which became the State of Tuvalu (see UN Docs. A/Res/32/407, 28 Nov. 1977 and A/Res/3288 (XXIX), 13 Dec. 1974). Furthermore, mention may be made of the separation of the Trust Territory of Ruanda-Urundi in two separate States, Rwanda and Burundi (see UN Doc. A/Res/1746 (XVI), 27 June 1962) and the division, following the results of plebiscites held among the people of Northern Cameroons and the people of Southern Cameroons, by the United Kingdom of the Trust Territory of British Cameroons into a southern and northern region, of which the former acceded to Cameroon and the latter to Nigeria (see UN Doc. A/Res/63 (I), 13 Dec. 1946, A/Res/1350(XIII), 13 May 1959 and A/Res/1608(XV), 21 April 1961). Another example is formed by the division of the 'strategic' Trust Territory of the Pacific Islands in 1978 with the agreement of the inhabitants expressed in referendums and the Trusteeship Council (see UN Doc. S/Res/683, 22 Dec. 1990 and Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands, 1977-1978, UN SC Official Records, 33rd year, Special Supplement No. 1, p. 75 *ff.*). Four separate entities were created, three of which became independent States, namely the Federated States of Micronesia, Palau and the Marshall Islands, and one – the Northern Mariana Islands – came to be associated with the United States. Following the freely expressed wishes of the people concerned, the United Nations was prepared to accept the partition of these colonial territories.

3.19 In conclusion, in the context of the decolonization of colonial territories, administering States as well as third States were obliged under international law to respect the territorial integrity of the colonial territory. Partition of the colonial territory was only permitted if that was the clear wish of the majority of all inhabitants of the territory in question. This condition of the freely expressed wishes of the people concerned constitutes a core principle in the exercise of the right of self-determination which will be discussed in more detail in para. 3.23 below.

3.20 One day after the adoption of Resolution 1514, on 15 December 1960, the General Assembly adopted Resolution 1541 (XV) ("Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter"). Principle VI mentions three results on the basis of which it must be "concluded that a non-self-governing territory had reached a full measure of self government":

> *(a)* Emergence as a sovereign independent State;
> *(b)* Free association with an independent State; or
> *(c)* Integration with an independent State.

3.21 As stated in Resolution 1541, any specific territorial status chosen by the inhabitants of a colonial territory in their exercise of self-determination, whether this concerned independence, association or integration of the territory, meant that the colonial territory and people "had reached a full measure of self-government" and had thus realized the right of self-determination, at least in the context of decolonization.

3.22 It must be noted that 'independence' is but one mode of realizing the right of self determination by a colonial territory. In numerous resolutions of the General Assembly on decolonization, self-determination has been connected with independence – so much that it has been popularly (and incorrectly) assumed that the terms were synonymous in theory or, at least, that they were so in United Nations' practice. As stated in Principle V ('The principle of equal rights and self-determination of peoples') of Resolution 2625, any other political status chosen by a people in a colonial context, short of independence, integration or association, can also be considered as a realization of the right of self-determination:

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

The principle of 'free choice'

3.23 Resolution 1514 states that the choice by a people in a colonial context for a particular political status should be "freely" determined by that people (para. 2). Principle VII of Resolution 1541 states that association

> "should be the result of the free and voluntary choice by the peoples of the territory concerned expressed through informed democratic processes",

and Principle IX(b) that integration

> "should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes [...]."

3.24 Even though Resolution 1541 specifies the general ramifications for the implementation of the requirement of a 'free' determination by a people in a colonial context in regard of

integration and association, it is submitted that United Nations' and State practice shows that

this requirement equally applies to a choice for independence "or the emergence into any other political status freely determined by a people" (Resolution 2625). As was stated by Judge Nagendra Singh in his Declaration in *Western Sahara*, "ascertaining the freely expressed will of the people [is] the very *sine qua non* of all decolonization" (*ICJ Reports 1975*, p. 12, at p. 81).

3.25 The principle that the determination of the future political status by a people shall be free and a genuine expression of the will of the people as the subject of the right of political self determination is also reflected in other international instruments dealing with decolonization: "freely to determine their political status" (Articles 1 of the 1966 Covenants), "freely to determine, without outside interference, their political status" (Resolution 2625).

3.26 This core principle, which may be referred to as the 'principle of free choice', has been confirmed by the Court in the *Western Sahara* case, where, on the basis of Resolution 1514 and its own statements in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court stated that "the application of the right to self-determination requires a free and genuine expression of the will of the people concerned" (*ICJ Reports 1975*, p. 12, at para. 55). The Court continued by defining "the principle of self-determination […] as the need to pay regard to the freely expressed will of peoples" (*ICJ Reports 1975*, p. 12 at para. 59).

3.27 According to the Court in the *Western Sahara* case, only in those instances where a population of a colonial territory "did not constitute a 'people' entitled to self-determination" (as in the case of Gibraltar where the inhabitants were not considered to constitute a people for the purpose of external self-determination; see UN Doc. A/Res/2353 (XXII), 19 Dec. 1967) or when the conviction existed "that a consultation was totally unnecessary, in view of special circumstances," the obligation "to pay regard to the freely expressed will of peoples" could be dispensed with (*ICJ Reports 1975*, p. 12, at para. 59). Or as put by Judge Singh in his Declaration in this case: "the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary" (*ICJ Reports 1975*, p. 12, at p. 81).

3.28 While recalling Resolution 1514, the General Assembly declared in Resolution 54/90, addressing the future status of a number of Non-self-governing territories, that "referendums, free and fair elections and other forms of popular consultation play an important role in ascertaining the wishes and aspirations of the people" and it recognized "that all available options for self-determination of the Territories are valid as long as they are in accordance with the freely expressed wishes of the peoples concerned" (UN Doc. A/Res/54/90, 4 Feb. 2000 ('Resolution Adopted by the General Assembly on the Report of the Special Political and Decolonization Committee')).

3.29 United Nations practice with respect to requiring compliance with the principle of free choice appears practically uniform. Compliance with the principle was sought, to be guaranteed by the United Nations, through the organization and supervision of elections, referenda and/or plebiscites, especially in cases where association or integration would presumably be the result

of the exercise of self-determination. Examples include the British Togoland Trust Territory (UN Doc. A/Res/944(X), 15 Dec. 1955), French Togoland (UN Doc. A/Res/1182(XII), 29 Nov. 1957), Western Samoa (A/Res/1569(XV), 18 Dec. 1960), the Cook Islands (A/Res/2005(XIX), 18 Feb. 1965), Equatorial Guinea (A/Res/2067(XX), 16 Dec. 1965), the New Zealand Territory of Niue (A/Res/3285(XXIX), 13 Dec. 1974), the Northern Marianas (A/Res/2160(XLII), 4 June 1975) and the French Comoros Islands (A/Res/3161(XXVIII), 14 Dec. 1973). In cases where the population of the colonial territory was expected to opt for independence, the wishes of the people were normally to be established by the usual political processes of the territory, save for those special cases where it was considered necessary to make special arrangements as, for example, with regard to the Ellice Islands in 1974 where a referendum – leading to independence – was held in the presence of United Nations observers (see Report of the United Nations Visiting Mission to the Gilbert and Ellice Islands, (A/AC. 109/L 984), 1974 and A/Res/3288(XXIX), 13 Dec. 1974). Thus, as a matter of principle, strict democratic standards were required for association or integration, while the choice for independence had to be free, but not necessarily based on 'democratic' verification standards, that is, in accordance with (the Western view of) the principle of 'one man one vote'. For instance, an acceptable procedure of consultation with leaders of opinion and organizations took place in Bahrain pursuant to an agreement between Iran and the United Kingdom in 1970. The latter had been a protecting power and the former had claimed sovereignty. Under their agreement, a representative of the United Nations Secretary-General consulted representative leaders in Bahrain in the course of March - April 1970 and concluded in his report that "the Bahrainis [...] were virtually unanimous in wanting a fully independent sovereign State" (UN Doc. S/9772, 30 Apr. 1970, p. 11). The report was unanimously endorsed by the Security Council (UN Doc. S/Res/278, 11 May 1970).

3.30 In practice, "the will of the people" meant the will of the majority of the inhabitants of a colonial territory (H. Gros Espiell, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, Study Prepared by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/¬405 (Vol. 1), 20 June 1978, pp. 10-11). In those cases where serious doubts existed as to the genuine expression of the wish for independence, additional safeguards were required. The situation of Southern Rhodesia under the Smith régime serves as a prime example. In this respect, reference can be made to the Security Council's determination of the invalidity of the proclamation of independence by the white minority régime in Southern Rhodesia in 1965 (S/Res/216, 12 Nov. 1965) and the Council's subsequent demand for "arrangements [...] for a peaceful and democratic transition to genuine majority rule and independence", which arrangements "include the holding of free and fair elections on the basis of universal adult suffrage under United Nations supervision" in order to "effect the genuine decolonization of the Territory" (S/Res/423, 14 March 1978). The Lancaster House Agreement of 12 December 1979 called for elections and a transition period under British rule. The Agreement was endorsed by the Security Council (S/Res/463, 2 Feb. 1980), which no longer demanded United Nations supervision of the elections, but which did require the United Kingdom to create conditions in Southern Rhodesia to ensure free, democratic and fair elections resulting in genuine majority rule, calling upon "all Member States to respect only the free and fair choice of the people of Zimbabwe" (S/Res/463, 2 Feb. 1980, para. 9).

3.31 In respect of the principle of free choice, the Kingdom of the Netherlands considers that, in principle, negotiations between the administering State and the (legitimate representatives of

the) inhabitants of the colonial territory about the future relationship between the territory and the administering State do not form part of the exercise of the right of self-determination by the people concerned. Such negotiations may involve arrangements on future military cooperation or development cooperation as well as matters regarding citizenship. However, if negotiations on such future cooperation are used by the administering State to influence the act of free choice by the people concerned, this may amount to unlawful interference and thus to a violation of the right of self-determination of this people.

Termination of colonial status

3.32 It is submitted that once the inhabitants of a colonial territory have, through their freely expressed will, genuinely exercised their right to self-determination through a choice for either independence, integration or association or the emergence into any other political status, the colonial status of the territory and the people concerned comes to an end. Practice shows that in cases of Non-self-governing territories this termination of colonial status is formalized through the removal of the territory by the General Assembly from the United Nations list of Non-self-governing territories. This also means that the obligations contained in Article 73 of the UN Charter no longer apply to the former administering State. In cases of Trust Territories, the Trusteeship Agreement with the Trustee is terminated. The practice of the United Nations in regard of Non-self-governing territories has been practically uniform in declaring, subsequent to a report by an administering State on the genuine exercise of the right to self determination by the inhabitants of the colonial territory and a verification of that process by the United Nations, that the transmission of information under Article 73 e of the Charter could cease, after which the territory is removed from the United Nations list of Non-self-governing territories. Examples are Puerto Rico (A/RES/748(VIII) 27 Nov. 1953), Greenland (A/RES/849(IX) 22 Nov. 1954), the Netherlands Antilles and Surinam (A/RES/945(X) 15 Dec. 1955), Alaska and Hawaii (A/RES/1469(XIV) 12 Dec. 1959), Nyasaland (A/RES/1953(XVIII) 11 Dec 1963), Malta (A/RES/1950(XVIII) 11 Dec 1963), Cook Islands (A/RES/2064(XX) 16 Dec. 1965), Niue Island (A/RES/3285(XXIX) 13 Dec 1974), Cocos (Keeling) Islands (A/RES/39/30 5 Dec. 1984), and East Timor (A/RES/56/282, 1 May 2002).

As for Trust Territories, the Trust Agreement was terminated after a verification of the realization of the objectives of the Agreement. Examples are Somaliland (Somalia) (A/RES/1418(XIV), 5 Dec. 1959), Ruanda-Urundi (A/RES/1746(XVI), 27 June 1962), Western Samoa (A/RES/1626(XVI) 18 Oct. 1961), Zanzibar (A/RES/1642(XVI) 6 Nov. 1961), Nauru (A/RES/2347(XXII) 19 Dec. 1967), Papua (A/RES/3284(XXIX) 13 Dec. 1974), and Palau (SC/RES/956 (1994) 10 Nov. 1994).

3.33 Thus, the entitlement of peoples in a colonial context to exercise the right of self determination through either independence, integration or association or the emergence into any other political status comes to an end after such a people has freely chosen for any of these options. From that moment onwards, the right of self-determination evolves into an entitlement of that people to exercise this right within the boundaries of the State in which this people resides (internal self-determination). Without prejudice to the possibility of consensual secession, the right to external self-determination through unilateral secession is, under international law, only applicable as an *ultimum remedium* (see para. 2.7, above).

4. Violation of the right of self-determination

Self-determination and obligations and rights erga omnes

4.1 Under the law of self-determination, the administering State is under an obligation to respect and promote the right of self-determination of the inhabitants residing in the administered colonial territory. These inhabitants have a corresponding right *vis-à-vis* the administering State to have their right to self-determination respected and promoted. This situation thus concerns an obligation and a corresponding right *erga singulum*. A violation of the right of self
determination by the administering State amounts to an internationally wrongful act that entails the international responsibility of that administering State.

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

4.3 In the *Barcelona Traction* case, the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole" (*ICJ Reports 1970*, p. 32, at para. 33). With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*". The Court provided a non exhaustive list of obligations owed to the international community as a whole, including "the principles and rules concerning the basic rights of the human person […]" (*ICJ Reports 1970*, p. 32, at para. 34). In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explicitly recognized that the obligation to respect the right of self-determination constituted an obligation *erga omnes* (*ICJ Reports 2004*, p. 136, at para. 155). With reference to the *East Timor* case, the International Law Commission observes that the obligation to respect the right of self-determination is an obligation to the international community as a whole (Commentary to Chapter III and to Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts, para. 3 and para. 2, respectively).

4.4 It is submitted, however, that not only the obligation to respect the right of self determination, but also the obligation to *promote the realization* of this right constitutes an obligation *erga omnes*. In this respect the Court in the *Wall* case directly connects the *erga omnes* character of the obligation of States in regard of the right of self-determination to the terms of General Assembly Resolution 2625 (XXV), which states:

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle […]." (*ICJ Reports 2004,* p. 136, at para. 156 (emphasis

added))

The obligation of States not only to respect, but also to promote the realization of the right of self-determination is also contained in Article 1(3) of the 1966 Covenants, and, it is submitted, must be regarded as a rule of international customary law.

4.5 However, the right of self-determination does not only give rise to an obligation *erga omnes*. In the *East Timor* case the Court held:

> "[i]n the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable." (*ICJ Reports 1995*, p. 90, at para. 29).

It is submitted that this finding of the Court is of an essentially different nature than the Court's statements in the *Barcelona Traction* case and the *Wall* case, and is of fundamental importance to the legal protection of the right of self-determination of peoples under international law. In the view of the Kingdom of the Netherlands, the Court's qualification of the right of self
determination as a *right* that shall be respected *erga omnes* means that a people is not only entitled to respect for its right of self-determination *vis-à-vis* the State within which international boundaries that people resides, but also *vis-à-vis* all other States and, indeed, the international community as a whole. In regard to decolonization this means that the inhabitants of a colonial territory are not only entitled to respect for their right of self-determination *vis-à vis* the administering State, but also *vis-a-vis* the international community as a whole. In turn, the members of the international community are under a corresponding obligation to respect the right of self-determination of the inhabitants of the colonial territory. It is submitted that, given the Court's statements in the *Barcelona Traction* case and the *Wall* case and because of the fundamental character of the right of self-determination under international law, the corresponding obligation on the part of the members of the international community must be deemed to have an *erga omnes* character as well.

Legal consequences of a violation of the right of self-determination

4.6 It has been submitted above (para. 3.1 *ff*, above) that the inhabitants of a colonial territory, whether it concerns a Trust Territory, a non-self-governing territory, or any "other territories which have not yet attained independence" (paragraph 5 of Resolution 1514), have a right to self-determination on the basis of which they shall be enabled to freely determine their future political status through a choice for either independence, integration or association or the emergence into any other political status.

4.7 It has also been observed (paras. 3.11 – 3.19, above) that the principle of territorial integrity in regard to colonial territories meant that States administering colonial territories as well as third States were under an international legal obligation to respect the territorial integrity of colonial territories. Furthermore, it was set out that the United Nations' insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition, but only if that was the clear wish of the majority of all inhabitants of the territory in question.

4.8 Against this background, the Kingdom of the Netherlands wishes to make three observations. First, it is submitted that the right of self-determination of the people concerned

is violated if it has been established that (a) the partition of a colonial territory has not resulted from the freely expressed wishes of the inhabitants of the colonial territory or (b) approval for partition of the colonial territory has been obtained by the administering State or a third State through the exercise of pressure of any nature on the inhabitants or their legitimate representatives. If the intended result of such conduct by the administering State is to maintain

a legal title to part of the colonial territory or if the intended result of such conduct by a third State is to obtain such a legal title, it is submitted that no such title can be maintained or will be transferred under international law. Given the peremptory character of the right of self determination of colonial territories and peoples, any such title is null and void *ab initio,* in accordance with the principle *ex injuria jus non oritur*. This also means that the right of self determination of the people concerned would still be applicable to that part of the colonial territory that has been detached from the colonial territory in violation of international law. However, the absence of freely expressed consent by the inhabitants of a colonial territory or their representatives in regard of the partition of the colonial territory should be clearly established.

4.9 Second, the corollary of the right *erga omnes* of the inhabitants of a colonial territory is the obligation of third States to respect the right of self-determination of the inhabitants of that colonial territory. As has been observed above (para. 4.5, above), it is submitted that this obligation incumbent on third States is itself an obligation *erga omnes*. This means that the conduct of a third State, whether or not in conjunction with the conduct of the administering State, in violation of the right of self-determination of the inhabitants of a colonial territory under the responsibility of the administering State amounts to an internationally wrongful act entailing the international responsibility of that third State. Such responsibility arises not only *vis-à-vis* the inhabitants of the colonial territory, but also *vis-à-vis* third States who have a legal interest in the protection of the right of self-determination of the inhabitants of the colonial territory.

4.10 Finally, Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts requires third States not to recognize as lawful a situation created by a serious breach of a peremptory norm of general international law. In its Commentary to Article 41, the International Law Commission observed that "[t]he obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples" (para. 5). The Commission continued by observing that the obligation of non-recognition "not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition." This international legal rule and its applicability in cases of a violation of the right of self determination of peoples has been confirmed by the Court. In the *Namibia* case, the Court observed that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (*ICJ Reports 1971*, p. 16, at para. 126). The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia (e.g. S/Res/216, 12 Nov. 1965) and the Bantustans in South Africa (e.g. A/Res/31/6 A of 26 Oct. 1976). In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, after having concluded that the obligation *erga omnes* to respect the right of self determination of the Palestinian people had been violated (*ICJ Reports 2004*, p. 136, at para. 155), observed that "[g]iven the character and the importance of the rights and

obligations involved […] all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem." The Court continued by stating that all States "are also under an obligation not to render aid or assistance in maintaining the situation created by such construction". Furthermore, the Court observed "[i]t is also for al1 States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought

to an end" (*ICJ Reports 2004*, p. 136, at para. 159). In sum, the Kingdom of the Netherlands submits that, given the peremptory character of the right of self-determination, a serious breach of the right of self-determination obliges all States not to recognize the situation created as a result of that breach and not to render aid or assistance in maintaining the situation created as a result of the serious breach of that right.

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