

The peremptory nature of the right to self-determination of peoples according to the international court of justice.

A natureza peremptória do direito à autodeterminação dos povos de acordo com a Corte Internacional de Justiça.

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Abstract: This article analyzes how the International Court of Justice (ICJ) addressed the right of peoples to self-determination in its 2024 Advisory Opinion on the Occupied Palestinian Territory, which Court recognized, for the first time, the peremptory nature of this right in contexts of foreign occupation. The study examines the Court's jurisprudential evolution, highlighting the shift from previous decisions, which had recognized self-determination only as an obligation *erga omnes*, not as *jus cogens*, to the innovative stance of the 2024 Opinion. It also considers the contribution of the International Law Commission's work on peremptory norms and its influence on the Court's reasoning. Special attention is given to the ICJ's restrictive formulation regarding the peremptory nature of the law, limited to foreign occupation, as well as to the identification of the constituent elements of self-determination, which raises questions about whether these elements might also be considered *jus cogens*. The article argues that, although the Opinion represents a significant advance in recognizing the peremptory nature of self-determination, it simultaneously introduces new uncertainties regarding its scope, conditions of application, and practical consequences, which remain unresolved by the Court.

Keywords: International Court of Justice; International Law Commission; *Jus Cogens*; Self-determination of peoples.

Resumo: A Este artigo analisa como a Corte Internacional de Justiça (CIJ) abordou o direito dos povos à autodeterminação em seu Parecer Consultivo de 2024 sobre o Território Palestino Ocupado, no qual a Corte reconheceu, pela primeira vez, a natureza peremptória desse direito em contextos de ocupação estrangeira. O estudo examina a evolução jurisprudencial da Corte, destacando a mudança em relação a decisões anteriores, que haviam reconhecido a autodeterminação apenas como uma obrigação *erga omnes*, e não como *jus cogens*, para a posição inovadora adotada no Parecer de 2024. Também se considera a contribuição dos trabalhos da Comissão de Direito Internacional e sua influência no raciocínio da Corte. Dá-se especial atenção à formulação restritiva da CIJ quanto à natureza peremptória da norma, limitada à ocupação estrangeira, bem como à identificação dos elementos constitutivos da autodeterminação, o que suscita questionamentos sobre se tais elementos também

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poderiam ser considerados *jus cogens*. O artigo sustenta que, embora o Parecer represente um avanço significativo no reconhecimento da natureza peremptória da autodeterminação, ele simultaneamente introduz novas incertezas quanto ao seu alcance, às condições de aplicação e às suas consequências práticas, que permanecem sem solução pela Corte.

Palavras-chave: Autodeterminação dos povos; Comissão de Direito Internacional; Corte Internacional de Justiça; *Jus cogens*.

INTRODUCTION

On July 19, 2024, the International Court of Justice (‘ICJ’ or ‘Court’) issued the Advisory Opinion Legal Consequences of the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. In the Opinion, the Court, *inter alia*, observed that the continued presence of the State of Israel in the Occupied Palestinian Territory is illegal and that, consequently, Israel has an obligation to put an end, as soon as possible, to its illegal presence in this territory. Furthermore, the Court recognized Israel’s obligation to make reparations for the damage caused to all persons, whether natural or legal, affected in the Occupied Palestinian Territory. Although these are the Court’s main conclusions regarding the questions posed to it by the General Assembly of the United Nations (‘UNGA’), the UN’s main judicial body took the opportunity to address the principle of self-determination of peoples in relation to the Palestinian people. In this specific context, which regarded a situation of foreign occupation, the Court recognized that the right to self-determination is a peremptory norm of general international law (*jus cogens*).³

There is a certain historical caution in the International Court of Justice’s case law on recognition, interpretation, and application of peremptory norms, particularly with regard to the principle of self-determination of peoples. The Court’s inclination to address the issue of the peremptory nature of the right to self-determination suggests a shift in position regarding the 1965 Advisory Opinion on the Legal Consequences of the Separation of the Chagos

³ According to the traditional definition in Article 53 of the 1969 Vienna Convention on the Law of Treaties, 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 and which can be modified only by a subsequent norm of general international law of the same nature.” This definition echoes the definition in the 2022 work of the International Law Commission, which in its first Conclusion determined that “Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and have a higher hierarchy than other rules of international law.” International Law Commission (ILC). See: Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), Yearbook of the International Law Commission, 2022, vol. II, Part II.

Archipelago from Mauritius, in which, despite recognizing the erga omnes nature of the right to self-determination, it did not go so far as to identify it as a peremptory norm.

However, although it recognized the peremptory nature of the right to self-determination in the recent opinion, the Court appears to have formulated its text in a manner strictly limited to cases of “foreign occupation,” failing to recognize a general peremptory nature of the principle and, consequently, of the obligations that would arise from it. This restrictive formulation leaves room for questions regarding the existence and limits of other factual conditions under which self-determination would still constitute jus cogens.

In addition, the analysis of Israel’s policies through the lens of the elements constituting self-determination, developed by the Court in the decision, does not clarify whether all listed corollaries would have a peremptory character, even in situations of foreign occupation, where, as established, the right to self-determination itself would be a peremptory norm.

Thus, this paper assesses the implications of the scope, in terms of circumstances and conditions, conferred by the Court on the classification of self-determination as jus cogens. It also aims to understand whether the elements comprising this norm would also be of a peremptory nature. We start from the hypothesis that, despite the advances, the reasoning developed in the opinion and the formulation given to it raise new uncertainties regarding the issue, which have not yet been resolved by the Court. In other words, it is argued that the decision introduces new elements into the discussion on the peremptory nature of the principle of obligation while simultaneously raising new questions about it.

To conduce the proposed analysis, this study is divided into three main sections. First, we review the ICJ’s treatment of peremptory norms of international law in general, notably regarding the recognition of self-determination as jus cogens, demonstrating how the Court’s customarily avoided pronouncing itself on this topic. In the second part, we analyze the International Law Commission’s approach to self-determination and jus cogens, with the aim of examining developments in legal scholarship regarding the nature and consequences of this kind of rules in international law. In the third section, we address the research problem in light of the elements articulated in the two previous sections, exploring the legal implications of the 2024 Advisory Opinion regarding the self-determination of the Palestinian people and its

classification as a peremptory norm.⁴

1 THE RIGHT TO SELF-DETERMINATION IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE: BETWEEN ADVISORY AND CONTENTIOUS PROCEEDINGS

Despite the groundbreaking recognition of the imperative nature of peoples' right to self-determination in contexts of foreign occupation in the Advisory Opinion on Palestine, the ICJ's previous case law regarding this principle encompassed both its identification as such and the recognition of its erga omnes character. Special emphasis is placed on the recent *Chagos* case from 2019, in which, unlike its position in 2024, the Court refrained from recognizing self-determination as jus cogens.⁵

Self-determination was first characterized as a principle of international law in the 1970 *Advisory Opinion on Namibia*, which recognized its applicability to peoples subjected to colonial regimes. In the Court's words, "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."⁶ Thus, in that opinion, the Court invoked General Assembly Resolution 1514 to support this possibility of self-determination for peoples applied to non-autonomous territories as prescribed by the Charter. The same resolution was also highlighted by the ICJ as containing the principle of self-determination as a right of peoples in colonial contexts in the 1975 Advisory Opinion on *Western Sahara*.⁷ According to the Court:

⁴ The establishment of a correspondence between the concept of peremptory norms of international law and the terminology "jus cogens" aligns with the approach adopted by the International Law Commission in its 2022 work on the subject. See: International Law Commission (ILC). Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), Yearbook of the International Law Commission, 2022, vol. II, Part II.

⁵ According to Ki-Gab Park, the Court's case law on the matter could be divided into three main categories: decisions confirming the characterization of self-determination as a principle of general international law, those attributing an erga omnes character to it, and those discussing the relationship between self-determination and other principles of international law. See: PARK, Ki-Gab. The Right to Self-Determination and Peremptory Norms. In TLADI, Dire (Ed.). Peremptory norms of general international law (Jus Cogens): Disquisitions and disputations. Brill, 2021.

⁶ ICJ. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion. ICJ Reports 1971, p. 16, para. 52.

⁷ ICJ. Western Sahara. Advisory Opinion. ICJ Reports 1975, p. 12, paras. 31–33 and 55.

The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV).⁸

It should thus be noted that, on the first two occasions when the Court ruled on the right to self-determination, it did so through its advisory jurisdiction, in specific response to inquiries made by UN bodies, which seems to justify the Court's greater freedom to refer to the principle that was taking shape within the General Assembly's debates as a right applicable to the discussed matter on these occasions.⁹

Nevertheless, when the analysis turned to contentious jurisdiction, examples of the direct interpretation and applicability of the right to self-determination are rarer. In this regard, the Court provided an additional interpretation in the *1986 Border Dispute (Burkina Faso v. Mali)* case by linking the rule to another principle: that of *uti possidetis*. In that case, the ICJ held that the need to preserve the territorial integrity achieved by African countries after their independence conferred a new dimension to self-determination through these States' consent to respect colonial borders.¹⁰ At the time, it observed that:

The essential requirement of stability in order to survive, to develop, and gradually to consolidate their independence in all fields has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.¹¹

Therefore, in this dispute, despite the contentious nature of its jurisdiction, the Court appears to have applied the principle less to the specific case and instead offered a perspective on its impact on the interpretation of other norms relating to territorial delimitation.

⁸ *Ibid.*, para. 55.

⁹ On the topic of jurisdiction and applicable law, see: LIMA, Lucas Carlos. Problemas e Distinções Relativos a Jurisdição, Admissibilidade e Direito Aplicável em Tribunais Internacionais. *Revista de Direito Internacional*, vol. 21, no. 2, 2024.

¹⁰ ICJ. *Frontier Dispute (Burkina Faso v. Republic of Mali)*. Judgment. ICJ Reports 1986, p. 554, para. 25.

¹¹ *Ibid.*

In the 1995 *East Timor (Portugal v. Australia)* case, which also concerned a colonial context, the Court advanced its jurisprudence on the principle of self-determination by establishing its erga omnes character.¹² On that occasion, the ICJ recognized the right to self-determination of the people of East Timor as a non-self-governing territory as well as its broad enforceability against the international community.¹³

Similar reasoning was presented in the 2004 *Advisory Opinion on the Wall*, in which the Court emphasized the erga omnes nature of the obligation to respect self-determination and the legal interest of all States in protecting this right of the Palestinian people in occupied territory.¹⁴ Citing the 1970 *Barcelona Traction case*, the Court emphasized that these obligations would be, “by their nature, a matter of concern to all States,” such that all would have a legal interest in their protection “in view of the importance of the rights involved.”¹⁵ More specifically, it listed such erga omnes obligations violated by Israel as “the obligation to respect the Palestinian people’s right to self-determination and some of its obligations under international humanitarian law.”¹⁶

In the 2010 Kosovo Advisory Opinion, the ICJ reaffirmed its position regarding the existence of a right to independence for peoples in non-autonomous territories, arising from the application of the principle of self-determination in cases of colonial domination or foreign occupation.¹⁷ It considered, however, that the question posed to it in the case did not require a discussion of the limits of self-determination, so no further discussions on the subject were developed.¹⁸ Thus, the Court did not take advantage of the opportunity presented in Kosovo to

¹² ICJ. *East Timor (Portugal v. Australia)*. Judgment. ICJ Reports 1995, p. 90, para. 26.

¹³ Being a “non-self-governing territory” would trigger the application of Chapter XI of the UN Charter, concerning International Economic and Social Cooperation, and whose Article 55 invokes the principle of self-determination. See: ICJ. *East Timor (Portugal v. Australia)*. Judgment. ICJ Reports 1995, p. 90, para. 31.

¹⁴ ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion. ICJ Reports 2004, p. 136, paras. 156 and 159.

¹⁵ *Ibid.*, para. 155. See also: ICJ. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. Second Phase. Judgment. ICJ Reports 1970, p. 32, para. 33).

¹⁶ *Ibid.*

¹⁷ ICJ. *The Conformity with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion. ICJ Reports 2010, p. 403, para. 79.

¹⁸ *Ibid.*, para. 83.

discuss in detail the application of this right in contexts other than decolonization and to take a position on elements such as external self-determination or the possibility of secession.¹⁹

It is thus observed that, although the ICJ's treatment of self-determination initially focused on cases of decolonization, the *Wall case* and the *Kosovo case* extended the applicability of the principle and the corresponding erga omnes obligation to situations of occupation. The Court, however, in all the cases cited, considered the context in which self-determination occurs for the purpose of determining the principle's applicability. The existence of the right of peoples to self-determination was therefore recognized only in cases of decolonization or foreign occupation, which is due both to the opportunities afforded to the ICJ by the cases brought before it and the advisory opinions requested of it (always pertaining to one of these two contexts) as to the refusal to discuss the possibility of self-determination in other situations given the lack of relevance of this matter to the central issue of the *Kosovo case*.

This reasoning appears to still hold and was employed by the Court in its 2024 Opinion, in which it limited the peremptory nature of the norm to contexts of foreign occupation.

Until the *2024 Advisory Opinion*, the ICJ had not explicitly and specifically characterized the self-determination of peoples as a peremptory norm. However, it is arguable that its prior jurisprudence already contained elements that allowed one to infer the relationship between the principle and the characteristics of peremptory norms.

Also in the *Namibia Opinion*, the Court appeared to suggest the peremptory nature of self-determination by emphasizing the duty, based on general international law, of non-recognition of the continued South African presence in the Namibian region by both members and non-members of the United Nations,²⁰ a consequence inherent in jus cogens norms.²¹

¹⁹ On the weakness of the Court's contribution regarding the right of peoples to self-determination and other matters, see: VRTKOVA, Petra; ARCARI, Maurizio, and BALMOND, Louis, eds., *Questions de Droit International Autour de l'Avis Consultatif de la Cour Internationale de Justice sur le Kosovo*. Rev. Quebécoise de Droit Int'l. Milan: Giuffrè Publishers, 2011, vol. 25, p. 245, 2012.

²⁰ ICJ. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion. ICJ Reports 1971, p. 16, paras. 119-121 and 126. See: SEBUTINDE, JULIA. *Is the Right to Self-Determination Jus Cogens? Reflections on the Chagos Advisory Opinion*. In TLADI, Dire (Ed.). *Peremptory norms of general international law (Jus Cogens): Disquisitions and disputations*. Brill, 2021, p. 402.

²¹ The obligations of non-recognition and non-assistance are provided for in conclusion 19(2) of the CD's conclusions on jus cogens and follow the wording already contained in Article 41(2) of the ARSIWA. In the commentary on conclusion 19, the Commission itself cites the Court's decision in *Namibia* to support the customary nature of the obligation of non-recognition of violations of peremptory norms. See: ILC. *Draft*

Also in the *Wall Opinion*, the ICJ upheld the obligation of non-recognition arising from the “nature and importance of the rights and obligations involved” in Israel’s construction of the wall in the occupied territory.²² Although this passage refers to “rights and obligations” in a broad sense, explicit reference is made to self-determination in the same paragraph of the opinion, which emphasizes the need for all States to act to put an end to the impediment to the exercise of this right by the Palestinian people.²³ Thus, the Court highlights that it attributes, as a consequence of the violation of the principle of self-determination of peoples, the erga omnes obligation to cooperate put to an end the unlawful act, similar to that provided by the ICJ in 2001 and 2022 for cases of serious violations of peremptory norms of general international law.²⁴

In addition, in the East Timor case, the ICJ recognized self-determination as one of the “essential principles of contemporary international law,”²⁵ which, although it does not immediately imply its classification as jus cogens, suggests the norm’s high standing in the international system.²⁶

Finally, although the Court had been reluctant to recognize the peremptory nature of the principle in its rulings prior to 2024, this argument had already been explicitly defended in dissenting and separate opinions by its judges.²⁷ This situation was particularly relevant in the controversial *Chagos opinion* of 2019.

conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), Yearbook of the International Law Commission, 2022, vol. II, Part II, conclusion 19, p. 62.

²² ICJ. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. ICJ Reports 2004, p. 136, para. 159.

²³ Ibid., para. 159.

²⁴ ICJ. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries. Yearbook of the International Law Commission, 2001, vol. II, Part II, art. 41; ILC. Draft conclusions on the identification and legal consequences of peremptory norms of general international law (jus cogens), Yearbook of the International Law Commission, 2022, vol. II, Part II, conclusion 19.

²⁵ ICJ. East Timor (Portugal v. Australia). Judgment. ICJ Reports 1995, p. 90, para. 29.

²⁶ ICJ. Draft conclusions on the identification and legal consequences of peremptory norms of general international law (jus cogens), Yearbook of the International Law Commission, 2022, vol. II, Part II. Conclusion 2.

²⁷ ICJ. East Timor (Portugal v. Australia). Judgment. ICJ Reports 1995, p. 90. Dissenting Opinion of Judge Skubiszewski, para. 135; Separate Opinion of Judge Ranjeva, para. 129; Dissenting Opinion of Judge Weeramantry, para. 203.

2.1. The Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago

In its 2019 Advisory Opinion on the *Chagos Archipelago*,²⁸ the ICJ was reluctant to recognize the peremptory nature of the principle of self-determination. In this opinion, despite acknowledging that the decolonization of the Chagos Islands by the United Kingdom had been inconsistent with the right of peoples to self-determination and attributing *erga omnes* character to this norm,²⁹ the Court made no mention of the obligation of non-recognition on the part of third States as a consequence of this violation. This omission confirms the ICJ's reluctance to recognize the peremptory nature of the norm, suggesting a more conservative approach to the issue than that taken in cases such as *Namibia* and *Wall*, in which such consequences were expressly recognized.³⁰

This impression is confirmed by the fact that the Advisory Opinion in question was the subject of dissenting and separate opinions by the judges,³¹ such as that of Judge Cançado Trindade, who argued for the international community's broad recognition of self-determination as a *jus cogens* norm, once there would be “no reason or justification” for the Court not to declare it as such in that Advisory Opinion.³² According to Judge Cançado Trindade, characterizing this and other norms as peremptory would promote the humanization of international law, whose conceptual advances include the recognition of *jus cogens* and the *erga omnes* obligations of protection arising therefrom. To this end, Cançado advocated for the ICJ to undertake “its own jurisprudential construction of *jus cogens*” through a more flexible interpretation of the primacy it grants to state consent and its strictly inter-state approach to law.³³

²⁸ LIMA, Lucas Carlos. 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*, no. 75, pp. 281–302, 2019.

²⁹ ICJ. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion. ICJ Reports 2019, p. 95, paras. 177 and 180.

³⁰ See: SEBUTINDE, JULIA. Is the Right to Self-Determination *Jus Cogens*? Reflections on the Chagos Advisory Opinion. In TLADI, Dire (Ed.). *Peremptory norms of general international law (Jus Cogens): Disquisitions and disputations*. Brill, 2021, p. 410.

³¹ ICJ. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion. ICJ Reports 2019, p. 95. Separate Opinion of Judge Robinson, paras. 71–73.

³² *Ibid.* Separate Opinion of Judge Cançado Trindade, para. 118.

³³ *Ibid.*, paras. 191–193 (our translation). See also: para. 169.

In a more restrictive approach, yet convergent with that of Judge Cançado Trindade, Judge Sebutinde’s opinion advocated for the recognition of self-determination as *jus cogens* in the context of decolonization, coupled with the attribution of the same character to respect for the territorial integrity of a self-determining entity in such contexts. Regarding this second rule, she emphasized that its derogation would allow for the continued perpetuation of colonial domination, thereby rendering the right to self-determination ineffective.³⁴

Thus, the judge identified, beyond the peremptory nature of the self-determination of peoples, an element that constitutes such a norm and which, being indispensable to its full effectiveness, is also imbued with peremptory force, at least in colonial contexts. This element was the territorial integrity of the self-determining unit. In this sense, the separate opinion appears to introduce a line of reasoning that would become the majority view at the ICJ in its *2024 Opinion*, by highlighting the elements of self-determination and recognizing them as *jus cogens*.³⁵

In light of the opinions presented, it is observed that, although the Court had been reluctant to recognize the peremptory nature of self-determination in the *Chagos Opinion*, this position was no longer shared by some of the judges, who defended – whether for humanitarian reasons or based on its widespread acceptance in practice – the characterization of the norm as *jus cogens* and the consequent application to the case of the specific obligations arising from the violation of peremptory norms.

2 THE CONSOLIDATION OF JURISPRUDENTIAL STANDARDS: THE WORK OF THE INTERNATIONAL LAW COMMISSION ON *JUS COGENS*

In 2015, the International Law Commission included the topic of “*jus cogens*” in its work plan; the title was later changed to Peremptory Norms of International Law (*jus cogens*). Following five reports by Special Rapporteur Dire Tladi, the Commission adopted in 2022 the Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of

³⁴ Ibid., Separate Opinion of Judge Sebutinde, para. 31. See also UNGA Resolution 35/118, cited by the judge in her opinion as grounds for recognizing the element of territorial integrity of a unit of self-determination (UN General Assembly. Question of Namibia. UNGA Doc. 35th Session, Res. 35/188, adopted on Dec. 10, 1980.)

³⁵ Ibid., paras. 191–193 (our translation). See also: para. 169.

General International Law (*jus cogens*) (hereinafter referred to as the “Conclusions”) with comments.³⁶ In its Conclusion 23, the ILC identifies the “right to self-determination” in the non-exhaustive list of peremptory norms to which the International Law Commission has previously referred as possessing this status. In the Comments on the Conclusions, the primary source for recognizing this status is the decisions of the International Court of Justice, without further details regarding the exact content of the right and its scope of application.

The reliance on ICJ case law for the drafting of the illustrative list of *jus cogens* norms could already be seen in the special rapporteur’s first report on the subject, which highlighted, in addition to the explicit mentions in the Court’s decisions, the numerous references to *jus cogens* in the individual opinions of the judges, which included the characterization of self-determination as such.³⁷ This dialogue between minority opinions and the work of the ILC is of particular relevance when considering the advancement of theses not yet held by a majority of judges in decisions such as *Chagos*, in which the peremptory nature of self-determination had already been defended and had some of its elements identified, despite the absence of this discussion in the Court’s Opinion. It is noteworthy, from this perspective, that the 2024 Opinion was also the subject of numerous dissenting and separate opinions, which points to the possibility of further development of the matter based on the arguments introduced by the majority in that case.

In his second report, the Special Rapporteur highlights the relevance of treaties and resolutions of international organizations as evidence of the acceptance and recognition of the peremptory nature of norms and includes in his argumentation in this regard the practice related to self-determination.³⁸ This reasoning is consistent with the one that had been previously advanced by the ICJ in opinions such as *Namibia* and *Western Sahara*, which relied on General Assembly resolutions to identify the principle of self-determination. Similar views had also

³⁶ 6 International Law Commission (ILC). Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), Yearbook of the International Law Commission, 2022, vol. II, Part Two.

³⁷ According to the rapporteur, there were 78 such norms at the time the report was drafted in 2016. See: ILC. First report on *jus cogens* by Mr. Dire Tladi, Special Rapporteur. General Assembly Official Records (A/CN.4/693), 2016, para. 47.

³⁸ ILC. Second report on *jus cogens* by Mr. Dire Tladi, Special Rapporteur. General Assembly Official Records (A/CN.4/706), 2017, para. 84.

been presented by the judges in the *Chagos opinion*, in which the resolutions were used as evidence of acceptance of the peremptory nature of the norm.³⁹

The third report also engages with the ICJ, first by addressing the consequences of non-compliance with jus cogens norms, insofar as it refers to the emergence of an erga omnes obligation to cooperate in the face of a violation of self-determination in the *Wall case*.⁴⁰ In addition, the report upholds the erga omnes effect of peremptory norms based on the Court's judgments in this regard, including the *East Timor case*, in which the norm to which such a characteristic was attributed was the self-determination of peoples.⁴¹

In the first three reports, therefore, the rapporteur relies on the principle of self-determination and, more specifically, on the treatment given to it by the International Court of Justice as one of the foundations for inferring the characteristics and consequences of jus cogens norms. He thus appears depart from the premise that such a norm is peremptory, consequently, to use its application and interpretation as evidence of how this type of rule is implemented in international practice, notably in the ICJ's case law.

Finally, the fourth report⁴² specifically addresses the composition of the non-exhaustive list of norms to be included in ICLC Conclusion 23. To this end, the Special Rapporteur draws upon debates within the Commission itself, General Assembly resolutions, state practice, doctrinal positions, and decisions of national and international courts to support the inclusion of self-determination.⁴³ However, this report, like the previous ones, does not discuss the characteristics and definition of the principle of self-determination, nor does it seek to discuss the contexts in which it applies and in which of them its imperativeness would be verified, limiting itself to verifying the broad recognition of the principle as jus cogens.⁴⁴

³⁹ See op. cit., notes 4, 5, and 25. See also: ICJ. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion. ICJ Reports 2019, p. 95. Separate Opinion of Judge Cançado Trindade, para. 118.

⁴⁰ 1 ICJ. Third report on jus cogens by Mr. Dire Tladi, Special Rapporteur. General Assembly Official Records (A/CN.4/714), 2018, para. 97.

⁴¹ Ibid., para. 115

⁴² Although the fifth report also mentions the self-determination of peoples, it does so in relation to state immunity, which is not relevant to the approach of this paper. See: ILC. Fifth report on jus cogens by Mr. Dire Tladi, Special Rapporteur. General Assembly Official Records (A/CN.4/727), 2019, para. 212.

⁴³ ICJ. Fourth report on jus cogens by Mr. Dire Tladi, Special Rapporteur. General Assembly Official Records (A/CN.4/747), 2022, paras. 108–114.

⁴⁴ Ibid., para. 115.

Furthermore, neither do the reports also mention the elements of self-determination, a central point of the discussion held in the Opinion, such that the reasoning and approach employed by the Court in that judgment appear to be an innovation not only in relation to its previous case law, but also to the work of the ILC.

3 A STEP FORWARD? THE ADVISORY OPINION ON THE LEGAL CONSEQUENCES OF ACTIVITIES IN THE OCCUPIED PALESTINIAN TERRITORY

Published on July 19, 2024, the *Advisory Opinion on The Legal Consequences of Israeli Policies and Practices in the Occupied Palestinian Territory, Including East Jerusalem*, addresses a wide range of legal consequences of Israeli actions in the region. This paper, however, focuses on the self-determination of the Palestinian people, notably its classification as *jus cogens*.

In this case, the Court recognized the peremptory nature of self-determination in contexts of foreign occupation and defined the four corollary elements of this principle: territorial integrity, the protection of the people, the sovereignty over natural resources, and the right of the people to determine their political status.

First, the Court states that “the right to territorial integrity is recognized under customary international law as a corollary of self-determination,” such that, in the situation at hand, “Israel, as the occupying power, has an obligation not to impede the exercise of the Palestinian people’s right to self-determination, including their right to an independent and sovereign State, throughout the entire occupied Palestinian territory.”⁴⁵

In addition, it recognizes that ““by virtue of the right to self-determination, a people is protected against acts aimed at dispersing the population and undermining its integrity as a people,” a corollary that has been impacted because “Israel’s construction of the wall, along with other measures, contributed to the departure of Palestinian populations from certain areas, thus risking a change in the demographic composition of the Occupied Palestinian Territory.”⁴⁶

⁴⁵ Ibid., para. 237.

⁴⁶ Ibid., para. 239.

It further states that “a third element of the right to self-determination is the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law,” which had been affected because “Israel has been exploiting the natural resources in the Occupied Palestinian Territory for its own benefit and for the benefit of settlements, in breach of its obligation to respect the Palestinian people’s permanent sovereignty over natural resources”.⁴⁷

Finally, the ICJ also emphasizes that:

“a key element of the right to self-determination is the right of a people freely to determine its political status and to pursue its economic, social, and cultural development. This right is reflected in resolutions 1514 (XV) and 2625 (XXV), and it is enshrined in common Article 1 of the ICCPR and the ICESCR.”⁴⁸

In view of the characteristics and elements of self-determination enumerated by the Court, the present work aims is to discuss, first, the restriction imposed on the recognition of the norm as *jus cogens* based on the explicit limitation to cases of occupation and, in addition, the breakdown of the principle into three elements and the inclusion of these in the peremptory nature of the rule. In this section of the text, three arguments are analyzed: the manner in which the Court classified the right to self-determination as a *jus cogens* norm (4.1.); the delimitation of the scope of the norm to contexts of occupation (4.2.); and finally, the elements of the self-determination norm identified by the ICJ (4.1.3).

4.1. Classification as *jus cogens*

In its decision, the ICJ proceeds from the premise of the existence of the Palestinian people’s right to self-determination, which had already been recognized by the 2004 Advisory Opinion on the Wall. The Court held that it had “already affirmed the existence of the Palestinian people’s right to self-determination,” and that it was appropriate, on this occasion, to “determine the scope of this right and then to examine the effects, if any, that Israel’s policies

⁴⁷ Ibid., para. 240.

⁴⁸ Ibid., para. 241.

and practices have on its exercise.”⁴⁹ In addition, it recalls the erga omnes nature of the obligation of States to protect such a right and concludes that: “in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law”.⁵⁰

One may first note a certain brevity in the legal reasoning set forth in the decision. In just four paragraphs, the Court establishes the Palestinian people’s right to self-determination, recalls its erga omnes nature, emphasizes its relevance to international law, and concludes that it is a peremptory norm. Thus, the classification of self-determination as a jus cogens norm appears to stem merely from the recognition of the importance and centrality of this right in international law,⁵¹ without a specific procedure for identifying this type of rule - as theoretically formulated by the ILC - being explicitly set forth in the Opinion. Thus, it is not possible to ascertain, based on the text of the decision, which of the characteristics of the right to self-determination make it a jus cogens norm or the methodology employed to recognize the rule as such. It appears to be a matter of declaring the right, rather than reconstructing. Obviously, this declaration is based on a jurisprudential reconstruction, but the Court limited itself to this assessment without further elaboration on the reasons for the declaration beyond a reference to its importance.

In light of this declaration of peremptory nature by the Court, judge Gómez Robledo noted in his separate opinion that, although the Court had not previously recognized self-determination as a peremptory norm, it had already attributed to its violation consequences inherent to liability for violation of jus cogens.⁵² Thus, the judge considered that the rule in question would be peremptory not because of its relevance and its erga omnes character, but because of the specific consequences arising from its non-compliance, notably the obligations of non-recognition and cooperation.⁵³ According to Judge Tladi in his statement, however, the Court, despite partially abandoning its reluctance to recognize self-determination as jus cogens,

⁴⁹ ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024, para. 230.

⁵⁰ Ibid., para. 233.

⁵¹ Ibid.

⁵² ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024. Separate Opinion of Judge Gómez Robledo, para. 22.

⁵³ Ibid., para. 26.

was ambiguous regarding the consequences of its violation, since, in referring to the obligations created for third States, it appears to refer to the violation of erga omnes rules, not of jus cogens.⁵⁴ The two opinions are interesting when contrasted. For the first judge, the consequences of the rule make the right to self-determination a jus cogens norm; while for the other, the Court is unclear regarding these consequences, confusing them with another category of international norms.

Judge Cleveland's opinion appears to align with Judge Tladi's position, since, in her view, the consequences identified would in fact stem from the erga omnes nature of the obligation, not from jus cogens. Judge Cleveland suggested that emphasizing the erga omnes obligations would be an approach more consistent with the Court's jurisprudence. Consequently - and contrasting with the aforementioned opinions - she considered it unnecessary for the Court to rule on the classification of self-determination as a peremptory norm in the absence of practical consequences.⁵⁵

In this context, the interpretation of judges Gómez Robledo and Tladi, to the effect that the obligations of cooperation, non-recognition, and non-assistance apply to jus cogens, appears more consistent with the formulation presented by the ILC in its Articles on Responsibility. That due to the fact that these consequences are enumerated in Article 41, which, in turn, appears in the section of the document on the violation of peremptory norms.⁵⁶ As these individual opinions reveal, the Court's classification of self-determination as jus cogens has implications related to its practical consequences, even though the relationship between these and the peremptory nature of the norm was not explicitly addressed in the *Advisory Opinion*. It is true that the International Court of Justice does not engage in doctrinal debates when it is not necessary. However, it is also true that, given the gravity of the case and the significance of the norm's application, greater clarity from the ICJ regarding the consequences of peremptoriness - and especially whether other consequences would or could exist - would have been a contribution that would transcend the theoretical debate, offering guidance to States precisely on the issue requested by the General Assembly.

⁵⁴ Ibid., Statement by Judge Tladi, paras. 28 and 29.

⁵⁵ Ibid. Separate Opinion of Judge Cleveland, para. 35.

⁵⁶ ICJ. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries. Yearbook of the International Law Commission, 2001, vol. II, Part II, art. 41.

3.2 The Context of Occupation

Beyond the lack of clarity regarding the methodology employed for the recognition of peremptory norms and the establishment of their consequences, the ICJ also appears to devote little effort to justifying the choice to limit the attribution of peremptory character to situations of foreign occupation. In the opinion, the Court merely refers to “cases of foreign occupation such as the present one” as a condition for the recognition of jus cogens, without explaining why it chose this explicit reference to the factual context in which jus cogens is situated or discussing whether there might be other situations in which it could also be considered a peremptory norm.⁵⁷

On this point, Judge Gómez Robledo states that the reference to the situation of occupation dates back to General Assembly Resolution 1514 (XV), titled “Declaration on the Granting of Independence to Colonial Countries and Peoples.” For the judge, the persistence of the occupation in question constitutes foreign domination under the Resolution’s definition, thereby constituting a violation of fundamental rights that would prevent the promotion of world peace and cooperation, thus justifying the elevation of self-determination to the status of a peremptory norm.⁵⁸

With this ruling, the question arises as to whether the right to self-determination of peoples is a peremptory norm only in cases of foreign domination or whether this character could be extended to other contexts, a question not addressed by the Advisory Opinion. This debate is notably developed in the opinions of judges Cleveland and Xue.

For judge Cleveland, by describing “foreign occupation such as the present case,” the Court intended to highlight that the specific circumstances of the Israeli occupation of Palestinian territory equate it to a situation of foreign domination, thereby conferring the status of jus cogens to self-determination.⁵⁹ The judge thus appears to suggest that the context of

⁵⁷ ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024, para. 233.

⁵⁸ ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024. Separate Opinion of Judge Gómez Robledo, para. 26.

⁵⁹ Ibid. Separate Opinion of Judge Cleveland, para. 33.

domination is decisive for characterizing the rule as peremptory and, furthermore, that recognition of its peremptory nature depends on the specific characteristics of the occupation in question, being assessable on a case-by-case basis.

In contrast, the statement made by Judge Xue emphasizes that the peremptory nature of the Palestinian people's right to self-determination stems from "solid foundations of international law," which recognize that this right applies to "all peoples under colonialism, alien subjugation, foreign domination, and exploitation."⁶⁰ From this perspective, the jus cogens nature is independent of the specific circumstances of the Israeli occupation, a point that, according to the judge, should have been further developed by the Court.⁶¹ Thus, the opinion seems to support the possibility of extending the peremptory nature to contexts other than the specific foreign domination established by Israel in Palestine.

By mentioning "exploitation," Judge Xue's opinion appears to open the door to categories other than the traditional ones which international practice and doctrine use to define the scope of the norm, normally centered on decolonization and foreign occupation or domination as done by the ICJ itself in its jurisprudence from *Namibia* to *Chagos*.⁶² Thus, judge Xue's opinion advocates for broadening the contexts of application of self-determination, without, however, characterizing of situations of "exploitation" that would justify the existence of the right. Both Judge Cleveland and Judge Xue, despite agreeing that contexts of occupation imply the peremptory nature of the right to self-determination, disagree on the scope of this finding. Thus, questions remain unresolved by the majority regarding what the requirements would be for an occupation to permit the recognition of the rule as jus cogens and, furthermore, whether such characterization could be extended to other cases not involving foreign domination.

3.3 The Elements of Self-Determination

⁶⁰ Ibid. Statement by Judge Xue, para. 3.

⁶¹ Ibid., para. 5.

⁶² See: CASESSE, Antonio. *Self-determination of peoples: a legal reappraisal*. Cambridge: Cambridge University Press, 1995.

Immediately after identifying self-determination as a *jus cogens* norm, the Opinion proceeds to address the question posed to the Court: whether Israel's actions, as an occupying power, impede the Palestinian people's right to self-determination.⁶³ To this end, it identifies the elements that comprise this rule, namely: the right to territorial integrity; the protection of the people against acts that threaten their integrity; permanent sovereignty over natural resources; and the right of the people to freely determine their political status and to pursue their economic, social, and cultural development.⁶⁴ Noting that these corollaries of self-determination had been negatively impacted by Israel's policies in the region, the Court therefore concluded that Israel had violated its obligation to respect the self-determination of the Palestinian people.

First, it should be noted that the explicit mention of elements included in the principle of self-determination represents an innovation in relation to the ICJ's jurisprudence and establishes a line of reasoning that is also absent from the ILC's conclusions on *jus cogens*. As logical consequence of enumerating these components, the Court includes them in the right to self-determination of peoples, so that it transcends its dimension as a human right, as provided for in Article 1 of the 1966 Covenants,⁶⁵ to encompass elements related to territory, sovereignty, and internal self-determination.

The elements of self-determination, previously debated in legal doctrine, notably regarding territorial integrity and the definition of political status,⁶⁶ were particularly relevant due to the peculiarities of the specific case, which justified their incorporation into the ICJ's practice on the matter, especially given the multiplicity of Israeli policies and practices in the region.

This idea was reinforced by the separate opinion of Judge Iwasawa, who emphasizes that the mere existence of a foreign occupation would not be sufficient to characterize a breach

⁶³ ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024, para. 234.

⁶⁴ *Ibid.*, paras. 237–241.

⁶⁵ UN. International Covenant on Civil and Political Rights. Adopted on Dec. 16, 1966, entered into force on Mar. 23, 1973. United Nations Treaty Series, vol. 999, p. 171, Art. 1.

⁶⁶ 7 For territorial integrity as an element, see: McWhinney, Edward. *Self-determination of peoples and plural ethnic states in contemporary international law: failed states, nation-building, and the alternative, federal option*. Leiden: Martinus Nijhoff Publishers, 2007, Chapter 4; For the right to determine one's political status and to pursue one's development, see: JOSEPH, Sarah, and CASTAN, Melissa. *The International Covenant on Civil and Political Rights: cases, materials, and commentary*. 3rd ed. Oxford: Oxford University Press, 2013, Chapter 7.

of the right to self-determination. This would depend on verifying, in the specific case, the impacts of the occupation on the four elements that constitute the right, as done by the Advisory Opinion.⁶⁷ In the event of a violation of these elements, self-determination would be violated.

Furthermore, the enumeration of these elements highlights the aspects to be considered in remedying the violated norm, whose relevance is underscored by its characterization as *jus cogens*. Thus, the elements of self-determination, to the extent that they are impacted by Israel's actions, must be the subject of restitution when implementing accountability for the violations committed. It then follows that Israel has breached this peremptory norm through its actions in the occupied Palestinian territory to the extent that, in practice, such conduct has negatively affected the corollaries of self-determination, which must therefore be included in any reparation for the wrongful act. The Court, however, fails to clarify whether harm to some, but not to all of these elements would constitute a breach of the norm as a whole.

Neither does the ICJ address whether all elements comprising self-determination would be equally encompassed by its peremptory nature in cases of foreign occupation. The non-derogability of the norm as a whole, reflected in its classification as *jus cogens*, however, points to the impossibility of derogating from just one or a few of its elements, lest its superior position in the international legal system be undermined. Thus, the logical consequence of the peremptory nature of self-determination would be the extension of this characteristic to its corollaries.

This issue is directly addressed by Judge Tladi, who argues that the reference to the context of occupation indicates that the peremptory character should be attributed to a specific corollary of self-determination, namely, the “right of the Palestinian people not to have their right to self-determination impeded by the current foreign occupation by Israel.” Consequently, the Court's conclusion would be limited to recognizing this element of self-determination as *jus cogens*, which does not preclude the other elements from also having this character, an aspect that was simply not at issue in this Advisory Opinion.⁶⁸

Judge Tladi's position thus appears to shift the focus regarding the restriction on the peremptory nature of the norm from cases of occupation. Hence, it which ceases to be a

⁶⁷ ICJ. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Advisory Opinion. ICJ Reports, 2024, Separate Opinion of Judge Iwasawa, para. 16.

⁶⁸ Ibid. Statement by Judge Tladi, para. 14.

reference to the factual context that would render the rule jus cogens to indicate which element of that rule possesses such a characteristic. As a consequence, the relevance of having an ongoing foreign occupation would refer to the manner in which this type of domination affects the exercise of a people's right to self-determination through its impacts on its corollaries. These, when affected, collectively or individually, constitute a violation of a jus cogens norm, to which specific consequences — such as non-recognition, non-cooperation, and non-assistance — must be attributed, in addition to the requirement for reparation for the wrongful act, which applies to each of the violated corollaries.

CONCLUSIONS

Throughout its jurisprudence, the International Court of Justice has shown itself to be reluctant to explicitly recognize the peremptory nature of specific rules of international law, including self-determination. In spite of that, it had already recognized the erga omnes character of this norm and attributed consequences to its violation that were consistent with the identification of its peremptory nature.

Furthermore, the ICJ's jurisprudence, even if reluctant, as well as the opinions of its judges — which are at times more progressive - have been widely utilized by the International Law Commission in drafting its conclusions on peremptory norms of general international law, as notably demonstrated by the reports of the special rapporteur on the subject. That said, among the rules recognized as jus cogens by the conclusions is the self-determination of peoples, whose treatment by the Court was taken into account as evidence of the characterization of peremptory norms and the consequences of their violation.

In this context, the Advisory Opinion issued by the Court in 2024 represented, to a certain extent, a step forward in recognizing the peremptory nature of the right to self-determination in contexts of foreign occupation, especially given the Court's previous reluctance to do so explicitly. Nevertheless, the reasoning underlying this decision leaves some interpretive gaps regarding the methodology used to identify the peremptory nature of the norm and the practical implications of this recognition. Furthermore, the limits and conditions for restricting this recognition to situations of foreign occupation are not clarified. Finally, despite explicitly and definitively establishing the elements that comprise the right to self-

determination — an innovation both in relation to its own jurisprudence and to the work of the ILC — the Court does not determine whether the peremptory nature of the norm would apply to each and every one of these corollaries.

Thus, the Court seems to have chosen to enumerate these elements due to their relevance in light of the multiple policies implemented by Israel in the occupied territory, so that these aspects would be taken into account in any accountability and consequent reparations arising from the violation of peoples' self-determination. It also seems that its choice not to explicitly characterize each corollary as peremptory is merely due to the scope of the question posed for the Advisory Opinion, without prejudice to their full inclusion in the *jus cogens* norm as a logical consequence of its relevance to the international legal order. In conclusion, the ICJ's decision puts to an end the long-debated and avoided issue regarding the classification of the right to self-determination as *jus cogens*. However, this jurisprudential advance, due to the manner in which it was conducted by the Advisory Opinion, raises new questions regarding the circumstances, limits, elements, and consequences of the norm's peremptory nature, which may be addressed by future state, institutional, and judicial practice, in accordance with discussions already initiated by the opinions presented by the Court's own judges upon the publication of the judgment.

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