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Was There Something Missing in the Decolonization Process in Africa?: The Territorial Dimension

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Abstract
Five decades after the wave of independence of the 1960s, have all African territories been decolonized in accordance with international law? On the basis of the General Assembly and state practice, this study argues that only the continuing possession of African territories by colonial powers is contrary to the obligation to decolonize under international law. Thus, colonialism is still persisting in Africa with regard to the Glorious Islands, Mayotte, the Chagos, Ceuta and Melilla, the islands Alhucemas, Chafarinas, Leïla, and Peñon de Vélez de la Gomera. These territories belong respectively to Madagascar, the Comoros Islands, Mauritius, and Morocco. However, the obligation to decolonize under international law, which is premised on the existence of a colonial possession, does not provide any legal basis to claims directed against independent African states. Besides, the maintenance of boundaries existing upon the achievement of African countries to independence is not a case of enduring colonialism.

Key words
Africa; boundaries; decolonization; self-determination; territorial disputes

1. INTRODUCTION

Decolonization is one of the major achievements of the United Nations since its creation in 1945.[1] The majority of African countries were created as a result of decolonization, with the exception of Ethiopia, Liberia, and the Union of South Africa (Republic of South Africa) – which were never colonized, Egypt – which became independent in 1922, South-Sudan and Eritrea – which became independent by separating themselves from respectively Sudan and Ethiopia. However, claims that colonialism is continuing in Africa are now and then voiced in different spheres.

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1 B. Boutros-Ghali, *United Nations Achievements in the Field of Decolonization and the Task Ahead* (1993).

Admittedly, the concept of colonialism and its derivatives are often used loosely to describe certain relations of dependence between European and African countries in these discussions. Decisions of the International Court of Justice in disputes involving African countries have also been analysed under the prism of the continued relevance of colonialism in Africa.[2]

Beyond colloquialism, puns, and rhetorical use of the word colonialism and its derivatives, international law has dealt with the phenomenon of colonialism through the principle of self-determination. However, the right of self-determination exceeds decolonization in scope. While it is obvious that decolonization applies only to colonial territories, Article 1 of the 1966 International Covenant on Civil and Political Rights clarifies that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. With specific reference to colonial peoples, the International Court of Justice explains:

> [d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.[3]

However, independence was only a possibility among the choices available to colonial peoples. They could also freely choose association or integration with an existing state or any other status they found desirable.[4]

Self-determination was established as a right for all peoples under colonial rule to determine their status under international law, including independence, only after the adoption of the UN Charter. Article 76(b) of the UN Charter was selective in foreseeing the possibility of 'independence' and of 'autonomy' only for territories under the trusteeship regime. None of the provisions of the Charter envisioned that non-self-governing territories would ever accede to independence. Regarding these territories, Article 73(e) of the UN Charter merely imposes reporting obligations on colonial powers. It has therefore been rightly considered that the UN Charter assumed the legality of colonial possessions, albeit submitting them to a few regulations of a limited scope.[5] Thus, the International Court of Justice recalled that 'the subsequent development of international law in regard to non-self-governing

2 See, e.g., G. F. Sinclair, '"The Ghosts of Colonialism in Africa": Silences and Shortcomings in the ICJ's 2005 Armed Activities Decision', (2007) 14 *ILSA Journal of International and Comparative Law* 121–43; N. J. Udombana, 'The Ghost of Berlin still haunts Africa!: The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria', (2004) 10 *African Yearbook of International Law* 13–61.

3 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, at 436, para. 79.

4 UN Doc. A/RES/ 1541 (XV); UN Doc. A/RES/2625 (XXX).

5 H. Gilchrist, 'Colonial Questions at the San Francisco Conference', (1945) 39 *American Political Science Review* 982, at 987; A. Pellet, 'Quel avenir pour le droit des peuples à disposer d'eux-mêmes', in *International Law in an Evolving World: Liber Amicorum Eduardo Jiménez de Aréchaga*, (1994), Vol. I, 255, at 256; D. K. Amenyo and T. Traoré, 'Essai de réflexion sur la genèse, l'évolution et l'état actuel du droit des peuples à disposer d'eux-mêmes et sa signification actuelle dans le contexte africain', (1992) 4 *ASICL Proc.* 49, at 54–55; M. Mushkat, 'The Process of African Decolonization', (1966) 6 *Indian Journal of International Law* 483, at 490; H. Hannum, 'The Right of Self-Determination in the Twenty-First Century', (1998) 55 *Washington and Lee Law Review* 773, at 775; M. Virally, 'Droit international et décolonisation devant les Nations Unies', (1963) 9 AFDI 508, at 509.

territories, as enshrined in the UN Charter, made the principle of self-determination applicable to all of them', embracing therefore all 'territories under a colonial regime'.[6]

The importance of the resolutions of the General Assembly to the process that shaped the perception that the continued possession of colonial territories was contradictory to international law cannot be overstated.[7] Under the UN Charter, however, General Assembly resolutions are merely recommendations and are therefore not legally binding, as states are not obliged to comply with their terms. Nonetheless, similarly to any other resolution of the General Assembly, those addressed to administering powers are not deprived of all legal effects:

> The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision.[8]

The resolutions of the General Assembly, in conjunction with international practice arising in relation to them, created the framework, from within which a social consensus imposing decolonization as an obligation under international law crystallized.[9] The individual practice of colonial powers, outside the United Nations, strengthened the multilateral practice that was simultaneously taking place within the UN. In a discretionary manner and in accordance with their domestic law, colonial powers selectively granted independence to some of their colonial territories, even before the adoption of Resolution 1514.[10] In 1960, when Resolution 1514 was adopted, colonial powers were aware that decolonization was now an 'irresistible and irreversible' phenomenon. Thus they did not oppose, but merely abstained, to vote in favour of the General Assembly Resolution 1514 the objective of which was the decolonization through independence of all colonial countries and peoples on the basis of international law. Furthermore, colonial powers participated in the establishment and activities of the 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples', also known as the 'Committee of the 24'.[11]

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6 *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 31, para. 52.

7 Before Resolutions 1514 and 1541, Resolution 742 (VIII) was the most significant turning point in the process of decolonization. On the one hand, Resolution 742 (VIII) updates the criteria established in previous resolutions for determining whether a territory is non-self-governing and subject to Art. 73(e) of the Charter. On the other hand, it confers to the General Assembly the power to *decide* when a territory is no longer non-self-governing.

8 *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1955, [1955] ICJ Rep. 67, at 118–19 (Judge Lauterpacht, Separate Opinion).

9 Virally, *supra* note 5, at 533 and 541 (emphasizing that this opposition was based on marginal issues, and did not aim at contesting the 'general inspiration' of the text).

10 This is the case of the referendum organized in 1958 for the colonies of French West Africa to decide of their status under international law. Guinea, which rejected to be part of the *Communauté française*, became immediately independent on 2 October 1958. On the decolonization of French colonial territories, see M. M. Mbengue, 'Decolonization: French Territories', *Max Planck Encyclopedia of Public International Law*, (available at <http://opil.ouplaw.com/home/EPIL>).

11 UN Doc. A/RES/1654 (XVI) (The United Kingdom, the United States of America and Australia were among the members of the first Committee of 17 (at that time)).

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Resolution 1514 is the last stage of the crystallization process that led to the emergence of a customary rule of international law imposing decolonization. Its preamble stresses the 'important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories', recognizing 'that the peoples of the world ardently desire the end of colonialism in all its manifestations'. Accordingly, the General Assembly proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. Since 1960, the right of self-determination, as a right of all colonial territories to be decolonized, is no longer a political principle applied on an ad hoc basis and as a matter of convenience. The right of self-determination, in general, and its decolonization aspect, in particular, is nowadays 'one of the essential principles of contemporary international law'.[12] It is also one of the clearest examples of *jus cogens* norms.[13]

The obligation to decolonize 'colonial territories', that is to say 'bringing to a speedy and unconditional end to colonialism in all its forms and manifestations', is interpreted as granting to 'colonial peoples and territories', including those located in Africa, the right to determine their status under international law (section 2). It also implies recovering territories qualified as 'colonial' under international law from colonial powers (section 3). Yet, limits were assigned to its scope. The right to decolonization and independence is neither conceived as justifying a dismissal of boundaries inherited from colonialism nor as providing a basis for the exercise of a right to independence against independent African states (section 4).

2. The right of peoples under colonial rule to determine their own status: An African success story

Despite the recognition that self-determination entitles colonial peoples to choose between independence, free association, or integration to an independent state, the practice of the General Assembly consecrated independence as the most desirable outcome of the decolonization of a territory. This institutional bias towards independence drew some criticisms. On its face, it seems to unduly restrict the freedom of peoples to determine their status.[14] However, its rationale lies in the firm commitment of the General Assembly to eradicate colonialism in all its forms, and has

12 *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 102, para. 29. In the same decision, the Court considered that it was uncontroversial that the principle of self-determination had an *erga omnes* character.

13 Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal), 20 UNRIAA 119, at 135–6, paras 40–43 (1989); See also 'Conférence pour la paix en Yougoslavie, avis no. 1 de la Commission d'arbitrage', 29 novembre 1991, (1992) 96 *Revue générale de droit international public* 264, at 265.

14 S. K. N. Blay, *Self-Determination: Its Evolution in International Law and Prescriptions for its Application in the Post-Colonial Context*, (1985), at 43; See also M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine of the United Nations*, (1982), at 28; F. Constantin, *L'Organisation des Nations-Unies et les territoires non-autonomes: Contribution à l'histoire de la décolonisation et à l'étude du processus décisionnel dans les organisations internationales*, (1970), Vol. 1, at 223; ibid., 243–4; J. F. Dobelle, 'Article 1 paragraphe 20', in J. P. Cot and A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article* (2005), 337, at 353; J. Charpentier, 'Autodétermination et décolonisation', in *Mélanges offerts à Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes: Méthodes d'analyse du droit international* (1984), 117, at 124; See also, R. E. Gorelick, 'Self-Determination and the Absurd: the Case of the Pitcairn', (1983) 23 *Indian Journal of International Law* 17, 17–37.

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since been restated by successive resolutions of the General Assembly dealing with this topic.[15]

Fifty-five years after the adoption of Resolution 1514, almost all non-self-governing African territories have exercised their right to self-determination through decolonization. The General Assembly readily ratified the results of self-determination referenda, organized in Africa. African colonial peoples largely chose independence, and, in few cases involving trust territories, integration to an existing independent African country.[16] On the wake of their independence, the newly independent African countries acceded to the United Nations. As Resolution 742 clarifies, membership to the United Nations is the unmistakable evidence of the end of colonial rule.[17] Nowadays, all African countries are UN Members. Except the special case of Western Sahara, no African territory appears on the list of non-self-governing territories of the Committee of 24. On its face, colonialism seems therefore to have effectively ended in Africa. However, two clarifications, relating respectively to the status of Western Sahara and claims of neo-colonialism in the African continent, are in order.

On 26 February 1976, Spain resigned from its duties as the administering power of Western Sahara and subsequently withdrew from it. Yet, a referendum of self-determination is to be organized to decide on the fate of this territory. However, it is doubtful whether the legal status of Western Sahara is one of enduring colonialism, notwithstanding the assertion of the General Assembly in its Resolution 45/21 that 'the question of Western Sahara *is a question of decolonization* which remains to be completed on the basis of the exercise by the people of Western Sahara of their inalienable right to self-determination and independence'.[18] Actually, the implementation of the right of Sahraoui people to determine their political status seems frustrated more by Moroccan military occupation than by the existence of colonial rule. Although military occupation, like colonialism, may violate and impede the implementation of the right of self-determination, these two regimes are not identical under international law.[19]

The relinquishment by Spain of its obligations as the administering power of Western Sahara distinguishes the legal situation from that of Portugal regarding East Timor. Despite the invasion by Indonesia of East Timor in 1975 and its purported annexation of this non-self-governing territory, Portugal claimed and was recognized by the General Assembly as the administering power of East Timor.[20] Thus, in its application in the *East Timor (Portugal* v. *Australia)* case, Portugal invoked its status

15 For the most recent example, see UNGA Resolution A/RES/67/134 (LXVII).

16 Thus, Togoland (under British administration) united with the Gold Coast (Colony and Protectorate) in 1957 to form Ghana; Somaliland (under Italian administration) united with British Somaliland Protectorate in 1960 to form Somalia; Northern and Southern Cameroons (under British administration) joined respectively Nigeria and Cameroon in 1961.

17 UN Doc. A/RES/742 (VIII).

18 UN Doc. A/RES/ 45/21 (XLV); UN Doc. A/RES/ 67/129 (LVIII) (emphasis added).

19 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep. 136, at 184, para. 122; *R. Congo v. Burundi, Rwanda and Uganda*, African Commission on Human and Peoples' Rights, Communication No. 227/99 (2003), para. 77.

20 See UN Doc. A/RES/3485 (XXX) and UN Doc. A/RES/27 (XXXV).

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as an administering power to justify its legal standing in submitting an application against Australia for the conclusion of the 1989 Timor Gap Treaty with Indonesia.[21] The International Court of Justice did not directly address Australia's preliminary objection which denied Portugal any locus standi on the matter. However, the Court noted that the relevant resolutions of the General Assembly and of the Security Council either expressly identify Portugal as the administering power of East Timor or cross-reference other resolutions which do so.[22] Therefore, the Court decided to focus on the main objection Australia had formulated against its jurisdiction which was based on the absence of Indonesia in the proceedings. Similarly to the case of East Timor, which became independent in 2002, colonial peoples under military occupation and colonial rule still enjoy under international law their right to freely determine their political status. They will exercise it when these obstacles are removed. In these circumstances, their right of self-determination is equally opposable to the administering power – with respect to the duty to decolonize, and to the occupying power – with respect to the obligation to respect the territorial sovereignty and integrity of a colonial people.

Regarding claims of neo-colonialism, the practice of the General Assembly goes in two directions. On the one hand, the General Assembly condemned and rejected sham exercises of the right of self-determination, especially when the referenda did not lead to the independence of the colonial territory concerned.[23] The General Assembly rejected the 1957 referendum that France organized in French Somaliland for the determination of its status. In this case, France had opposed any international supervision by refusing to grant UN observers access to French Somaliland.[24] In the case regarding the British colony of Aden, the General Assembly held that granting independence to an 'unrepresentative regime' established by an administering power was contradictory to the obligation to decolonize under international law. The General Assembly deplored

> the attempts of the administering Power to set up an unrepresentative regime in the Territory [the British colony of Aden], with a view to granting it independence contrary to General Assembly Resolutions 1514 (XV) and 1949 (XVIII), and appeal to all States not to recognize any independence which is not based on the wishes of the people of the Territory freely expressed through elections held under universal adult suffrage.[25]

In the same vein, the General Assembly second-guessed the allegations of colonial powers that certain territories were self-governing. In the case regarding the British protectorate of Oman, Great Britain argued that the sultanate was self-governing and therefore deemed any obligation to decolonize it as moot. However, a UN ad hoc committee reported that Oman was still subordinated to Great Britain in key areas such as the military, political and economic affairs. Accordingly, the General Assembly qualified British presence in Oman as 'colonial' and kept Oman on the list

21 *East Timor (Portugal v. Australia)*, application instituting proceedings, 22 February 1991, at 9, para. 14.
22 *East Timor (Portugal v. Australia)* case, *supra* note 12, at 97, para. 15.
23 Y. El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (1971), 191.
24 UN Doc. A/RES/2356 (XXII).
25 UN Doc. A/RES/2023 (XX).

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of non-self-governing territories until its complete independence in 1971.[26] Drawing inferences from the case regarding Oman, Blay highlights that:

> In a way, it established a precedent for the General Assembly to "lift the veil" and examine the relationships between one territory and another in endorsing its independence. Where the relationship manifests a situation of political subordination, the General Assembly is most likely to reject any purported exercise of self-determination.[27]

On the other hand, the General Assembly refused to examine economic subordination in the framework of the prohibition of colonialism under international law.[28] Yet, economic subordination is at the core of allegations of neo-colonialism. Tellingly, the multitude of resolutions addressing neo-colonialism, especially General Assembly Resolutions 3281 and 38/197, failed to equate economic subordination to a breach of the duty to decolonize under international law.[29] Instead, these resolutions reasserted the permanent sovereignty of peoples and states over their natural resources.[30] Facts evidencing neo-colonialism may however breach other rules of international law such as the principle of non-interference in domestic affairs or the principle of permanent sovereignty over natural resources. They can also impact the validity of legal acts, such as treaties, that embody the neo-colonialist mentality. Still, neo-colonialism and colonialism belong to different legal regimes under international law. Neo-colonialism will violate the right of self-determination only when it deprives the entire population of a state of its capacity to determine its own political, economic, social, and cultural status, placing it therefore in a relation of dependence similar to that existing during colonial times. The *Omani* precedent could serve as a test in this respect. Actually, the accession of the large majority of African countries to independence does not mean that the principle of self-determination, understood as granting a right to political independence, ceases to be applicable to them. While circumstances relevant for its application may have disappeared, the principle of self-determination still remains applicable if ever and when colonial situations revert.[31] Hence, self-determination would justify the right of African peoples to independence, should calls to a re-colonization of the Continent ever be successful.[32]

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26 See in this regard UN Doc. A/RES/2973 (XX).

27 See Blay, *supra* note 14, at 43.

28 See H. Gros Espiell, The Right of Self-Determination – Implementation of UN Resolution, UN Doc. E/CN.4/Sub.2/405/Rev.1, 1980, 6 ff. notes 18, 19, 20, and 21.

29 A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, (1995), 93. For Ermacora, '[n]eo-colonialism is a political concept; the colony, however, involves a status under international law'. F. Ermacora, 'Colonies and Colonial Regime', in R. Bernhardt (ed.), *Encyclopedia of International Law*, (1992), 662, at 662. Strangely enough, Mushkat considers that Resolution 1514 aimed at fighting against neo-colonialism. See Mushkat, *supra* note 5, at 495.

30 Instead of considering this and other principles as autonomous, Umozorike considers them as being part of a general concept of self-determination. See U. O. Umozorike, 'International Law and Neo-Colonialism in Africa', (1978) 18 *Indian Journal of International Law* 353, at 358.

31 In this regard, see J. Klabbers and R. Lefeber, 'Africa: Lost between Uti Possidetis and Self-Determination', in C. Brölmann, R. Lefeber, and M. Zieck (eds.), *Peoples and Minorities in International Law*, (1982), 37, at 41.

32 See, e.g., P. Johnson, 'The Case for a Return of Colonialism', *Sacramento Bee*, 25 April 1993, Forums 1 and 2; W. Pfaff, 'A New Colonialism?: Europe must go back to Africa', (1995) 74 *Foreign Affairs* 2–6. Mazrui has advocated for an Inter-African colonization. See A. Mazrui, 'Decaying Parts of Africa need Benign Colonialism', (1995) *Codestria Bulletin* 2, at 22. See also C. J. D Dakas, 'The Role of International Law in the Colonization of Africa:

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3. A RIGHT OF AFRICAN PEOPLES AND STATES TO THEIR ENTIRE TERRITORIES

From the consecration of the duty to decolonize as a consequence of the right of self-determination, colonial territories are reputed to have a 'distinct and separate legal status from that of the metropolitan State' under international law.[33] By virtue of the principle of intertemporal law,[34] the titles of protectorate and of sovereignty over colonial territories lapse because of their contradiction with the right of self-determination, despite their validity at the moment of their acquisition.[35] As a consequence, the General Assembly denied colonial powers the right to represent their colonies before the UN.[36] Regarding Portugal, the Resolution 180 of the Security Council determined that

> policies of Portugal in claiming the Territories under its administration as 'overseas territories' and as integral parts of metropolitan Portugal are contrary to the principles of the Charter and the relevant resolutions of the General Assembly and of the Security Council.[37]

Thus, colonialism should be considered as lasting if colonial powers still held possession of African territories (sub-section 3.1), as well as in situations where colonial powers relinquished only partial control of territories, impeding therefore independent African countries from exercising sovereignty over their entire territories (sub-section 3.2).

3.1. A right applicable to all colonies, including to the Spanish enclaves in Morocco, Ceuta/Sebta and Melilla?

Under the international consensus crystallized by Resolution 1514, self-determination through decolonization applies to territories qualified as colonial. This covers both trust territories and those considered as non-self-governing. Identifying trust territories was not as such difficult. Placing a territory under the trusteeship regime required an agreement between the interested parties that was normally to be approved by the General Assembly, and by the Security Council concerning 'strategic areas'.[38] Togoland, the Somaliland, Northern and Southern Cameroons, Tanganyika, and Ruanda-Urundi were the African territories which were placed under the trusteeship system. Determining non-self-governing territories was slightly harder. For the purposes of its chapter XI on non-self-governing territories, the UN Charter distinguishes between metropolitan and 'overseas territories'. At first sight, all non-metropolitan territories, which did not fall under the trusteeship regime

A Review in Light of Recent Calls for Re-colonization', (1999) 7 *African Yearbook of International Law* 85, at 87 and 118 (doubting about the sincerity of these 'apostles of re-colonization').

33 UN Doc. RES/A/2625 (XXV).

34 Palmas Island (Netherlands/United States), arbitral award, [1928] UNRIAA, vol. 2, 829, at 845.

35 M. Bedjaoui, 'Article 73', in J.-P. Cot, A. Pellet and M. Forteau (ed.), *La Charte des Nations Unies: Commentaire article par article* (2005), Vol. 2, 1760.

36 See on this issue, Blay, *supra* note 14, at 50; See also UN Doc. A/RES/3061 (XXVIII).

37 UN Doc. S/RES/180 (XVIII) (1963).

38 See Arts. 79, 83, and 85 UN Charter.

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of Chapters XII and XIII fall within the scope of Chapter XI of the Charter.[39] On the basis of the *travaux préparatoires* of the Charter, Mushkat notes that chapter XI provisions applied 'to all the countries, yet to be made independent, which were at the moment subjected to the colonial system or to some other type of dependence, including Protectorates, Mandates, and so on'.[40]

In 1945, at a moment when no one foresaw independence for non-self-governing territories, and perhaps because of that, all colonial powers provided information or promised to do so under Article 73(e) of the Charter with regard to specific territories they considered as non-self-governing. Only Spain and Portugal, which were not members of the United Nations at that time, did not list their possessions they considered as non-self-governing. The General Assembly took note of the individual list of non-self-governing territories that each colonial power submitted and consolidated them in its Resolution 66 (I).[41] The list of territories considered as non-self-governing confirms the original understanding of UN Members that non-self-governing territories were the overseas possessions of colonial powers.[42] As apparent from the list of territories included in Resolution 66, colonial powers did not define colonial territories on the basis of the means through which or the period of colonial expansion within which, they were acquired. They also considered as colonial, their overseas possessions which were predominantly inhabited by their own population, such as colonial enclaves.[43] Later, UN members provided an authoritative interpretation of the scope of Chapter XI in Resolution 1541:

> The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to *territories which were then known to be of the colonial type.* An obligation exists to transmit information under Article 73e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.[44]

According to Resolution 1541, a territory is presumed to be non-self-governing, and hence colonial, when it is geographically separate from and ethnically or culturally distinct from the metropolitan state and is also subordinated to the metropolitan state. Resolution 1541 was adopted in the context of the dispute between the UN and Portugal with respect to the reluctance of the latter to provide information regarding territories under its administration as required under Article 73(e) of the Charter. The subsequent resolution of the General Assembly, Resolution 1542, confirms this point, as it lists authoritatively Portuguese overseas possessions considered as 'colonies' under international law, irrespective of their qualification under Portugal's domestic legal order. Tailored to fit Portuguese colonial territories as reflected by the discussions in the Fourth Commission,[45] Resolution 1541 establishes

39 See Constantin, *supra* note 14, vol. 1, at 224.
40 See Mushkat, *supra* note 5, at 498–9.
41 UN Doc. A/RES/66 (I).
42 See Constantin, *supra* note 14, at 179; A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of the United Nations Practice* (1973), 102; See also R. Aldrich and J. Connell, *The Last Colonies* (1998), 6.
43 However, Spain invoked these as legal arguments to oppose to Morocco's request to list Ceuta and Melilla as non-self-governing. See Lettre du 12 février 1975, adressée au Président du Comité spécial par le représentant permanent de l'Espagne auprès de l'Organisation des Nations Unies, UN Doc. A/AC. 109/477.
44 UN Doc. A/RES/1541 (XV).
45 See UN. Doc. A/C.4/SR. 1043, para. 43 (M. Nogueira, Portugal); A. C.4/SR.1042, para. 31 (M. Zuloaga, Venezuela).

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the ethnical and cultural difference of the population of a territory from that of a metropolitan territory as a factor indicating *prima facie* that the former is non-self-governing. However, these references were not meant to exempt colonial enclaves from the obligation of decolonization. No state argued during the discussion in the Fourth Commission that when the population of a territory had the same culture and ethnical component than that of the metropolitan state it should not be decolonized. Portugal considered the reference to ethnicity and culture to be of no value for defining a colony,[46] whereas Spain criticized that the definition of colonies in Resolution 1541 was a threat to the independence, freedom and sovereignty of states.[47]

The reference to ethnicity and culture was rather intended to deny to the exported population of metropolitan states the right to decide of the status of a colonial territory under international law.[48] The General Assembly considered as irrelevant the presence of an 'exported' metropolitan population on a colonial territory for the purpose of decolonization. Accordingly, it did not consider that the British population inhabiting Gibraltar and the Falkland/Malvinas islands had the right to decide of the legal status of these territories. Great Britain was thus called to decolonize both territories by returning Gibraltar to Spain and the Falkland/Malvinas islands to Argentina.[49]

The presence of Spain in Melilla and Ceuta/Sebta dates back from respectively 1580 and 1497. Ceuta was first conquered by Henry the Navigator in 1415, and administered by Spain during the union of the crowns of Portugal and Spain from 1580 to 1640. In the treaty of Lisbon of 1 January 1668, Portugal ceded the sovereignty over Ceuta to Spain. As for Melilla, it was conquered in 1497 by Isabel and Alfonso, kings of Spain, and has remained since under Spain's sovereignty. Determining whether Ceuta/Sebta and Melilla are to be decolonized requires, first, examining whether they are 'colonial territories' under international law and, second, assessing the practice of the General Assembly with respect to them. With regard to the former, both Ceuta/Sebta and Melilla fall squarely within the definition of 'overseas territories', as opposed to metropolitan territories according to the distinction established under Article 74 of the Charter.[50] Such is the perception of their colonial character, that they are colloquially characterized as the 'last vestiges of colonial empires'.[51]

However, neither Ceuta/Sebta nor Melilla was ever qualified as non-self-governing in the practice of the Committee of 24 and of the General Assembly. During the dis-

46 See A/C.4/SR./SR. 1041, para. 3 (M. Nogueira, Portugal).
47 See A/C.4/SR./SR. 1038, paras. 23–24 (M. Aznar, Spain).
48 M. Kohen, 'Sur quelques vicissitudes du droit des peuples à disposer d'eux-mêmes', in *Droit du pouvoir: Pouvoir du droit. Mélanges offerts à Jean Salmon*, (2007), 961, at 968 note 12. See also ibid., at 970.
49 See, e.g., UN Doc. A/RES/2353 (XXII); UN Doc. A/RES/2065 (XX).
50 G. O'Reilly, 'Ceuta and the Spanish Sovereign Territories: Spanish and Moroccan Claims', (1994) 1 (2) *Boundary & Territory Briefing* 1, at 25.
51 P. Isoart, 'Les Nations Unies et la décolonisation', in R. J. Dupuy, *Manuel sur les organisations internationales* (1998), 604, at 632; See also D. W. Wainhouse, *Remnants of Empire: The United Nations and the End of Colonialism* (1964), 44 (emphasizing that Spain was contemplating ceding Ifni and Western Sahara to Morocco in exchange of this country's renunciation to its claims to Ceuta/Sebta and Melilla); Aldrich and Connell, *supra* note 42, at 3 (considering that these islands exhibit 'indelible imprint of a colonial past' from a non-legal perspective).

cussions of Resolution 1541 before the Fourth Committee, the representative of Spain took the solemn undertaking to co-operate with the UN and provide information regarding its non-self-governing territories.[52] The Committee of 24 and the General Assembly took note of this commitment with satisfaction, and decided to presume the good faith of Spain. Thus, it did not enlist authoritatively the colonial possessions of Spain as it did with Portugal which had refused any cooperation on the matter.[53] Yet, the representative of Morocco expressed his government's views that Ceuta and Melilla were non-self-governing during these discussions.[54] However, Spain listed only Fernando Póo, Rio Muni, and Western Sahara as non-self-governing when it delivered on its promise in 1962, omitting in the process Ifni, Ceuta, and Melilla.[55] Later, Spain accepted to list Ifni as non-self-governing,[56] still refusing to do the same for Ceuta and Melilla and its other North African possessions. On 27 January 1975, Morocco requested that the Committee of 24 enlist both territories as non-self-governing territories, along with the islands of Alhucemas, Islas Chafarinas, and Peñon de Vélez de la Gomera.[57] The Committee of 24 postponed its decision on this issue to its next session.[58] To this date, no such a session has been held.

The absence of Ceuta/Sebta and Melilla from the list of non-self-governing territories of the Committee of 24 does not preclude their qualification as colonial territories under international law. Decolonization was a process involving both co-operation and confrontation between colonial powers and the rest of the Members of the United Nations. Thus, the implementation of the obligation to decolonize was neither systematically nor simultaneously applied to all territories falling under its scope at a given time. Accordingly, the Committee of 24 never established an exhaustive list of all the territories that have to be decolonized. Thus, the Committee of 24 can still identify new colonial territories, or consider that territories which it considered as self-governing, such as La Réunion, have reverted to a status of colonial domination and must be decolonized. Confirming this view, French Polynesia was included in the list of the Committee of the 24 on 18 May 2013, more than 50 years after France has ceased to transmit information with respect to it under Article 73(e) of the UN Charter.[59] In his study on the activity of the Committee of the 24, Maurice Barbier stresses that:

> La liste des territoires dépendants n'est pas définitivement close et le Comité peut étendre son champ d'action en y ajoutant de nouveaux territoires. En fait, les demandes d'inscription sont venues non du Comité lui-même, mais de l'extérieur: les pays arabes

52 See A/C.4/SR.1048, para. 1 (M. De Lequerica, Spain); see also, A/C.4/SR.1038, para. 27 (M. Aznar, Spain).
53 See the discussions in A/C.4/SR.1046, A/C.4/SR.1047; A/C.4/SR.1048.
54 See UN Doc. A/C.4/SR. 1046, para. 39 (M. Skalli, Maroc); UN Doc. A/C.4/SR. 1184, para. 14 (M. Skalli, Maroc).
55 See Annex V, Exposé du représentant de l'Espagne sur la situation dans les territoires de Fernando Poo, du Río Muni et du Sahara espagnol, UN Doc. A/4785.
56 See on the decolonization of Ifni, *Western Sahara*, Advisory Opinion, 16 October 1975, [1975] ICJ Rep. 12, at 34–35, paras. 60–65.
57 Lettre du 27 janvier 1975 adressée au Président du Comité spécial par le représentant permanent du Maroc auprès de l'Organisation des Nations Unies, UN Doc. A/AC. 109–475.
58 See Report of The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples, Vol. 1, UN Doc. 30th Session, Supp. No. 23 (A/10023/Rev.1), New York, 1977, at 28, paras. 66–68.
59 UN Doc. A/RES/68/93 (LXVII).

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> pour Oman, la Somalie pour la Côte française des Somalis, Cuba pour Porto Rico, et l'OUA pour les Comores. Jusqu'à présent, le Comité n'a retenu que les deux premières de ces demandes, se contentant d'ajourner régulièrement les deux autres, sans pour autant les rejeter.[60]

However, the question remains whether a territory can be considered as colonial and subjected to the obligation of decolonization under international law outside the framework of the Committee of the 24. Clearly, the practice of the General Assembly and that of the Committee of 24 were important for the emergence of a rule of international law imposing decolonization. Whereas the resolutions of the General Assembly acted as a catalyst for the emergence of an international consensus imposing decolonization, the Committee of 24 provided the institutional machinery necessary to constrain colonial powers towards compliance.[61] In addition, a decision of the General Assembly determining that a territory is colonial has a persuasive authority under international law. Certainly, a qualification by the General Assembly of a territory as colonial could be not in conformity with international law. This would be the case if the General Assembly qualified the city of Paris as colonial and required its decolonization. Nevertheless, a claim that a territory is or not colonial in contradiction to a legal determination of the General Assembly has little chance to succeed in practice. Thus, the Philippines and Cameroon failed in their attempt to claim respectively North Borneo and Northern Cameroons, which were recognized as separate units enjoying the right to self-determination.

However, the mere inaction or silence of the General Assembly with regard to a territory cannot be construed as an *authoritative determination* that a territory is not colonial. Actually, many colonial peoples exercised their right of self-determination through decolonization outside the framework established by the General Assembly. The decolonization of French West Africa is but one example.[62] Discussions before the Fourth Committee entrusted with decolonization matters in the UN show that no representative questioned the 1958 referendum, except for USSR.[63] In such hypotheses, the General Assembly often contested the results of referenda of self-determination organized without its participation, especially when they did not lead to full independence of the colonial territory. In other cases, the General Assembly endorsed the results. Whether the General Assembly participated or not in

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60 M. Barbier, *Le Comité de décolonisation des Nations Unies*, (1974), 170 (translation: 'The list of non-self-governing territories is not once and for all closed. The Committee can extend its field of action by including new territories in the list. In fact, the requests for listing certain territories came not from the Committee itself, but from external sources: from Arabic countries for Oman; from Somalia for the French Coast of the Somalis, from Cuba for Porto Rico, and from the OAU for the Comoros. So far, the Committee has accepted the first two requests and was satisfied with postponing regularly the two others, without however rejecting them').

61 Georges Abi-Saab identifies three elements which influence compliance with the terms of a resolution of the General Assembly: (i) the level of consensus on the resolution (ii) the degree of specificity of its normative content and (iii) its mechanism of implementation. G. Abi-Saab, 'Cours Général de Droit International', (1987) 207 *Recueil des cours à l'Académie de droit international* 15, at 160–1.

62 Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal), *supra* note 13, at 103, para. 19; ibid., at 156–7, paras. 5–6 (Dissenting Opinion of Judge M. Bedjaoui); *Frontier Dispute (Burkina Faso/Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554, at 663 (Separate Opinion Judge Luchaire).

63 See, A/C.4/SR.826, par. 27 (M. Bendrychev, USSR). China praised the organization of the referendum. See (A/C.4/SR.826, para. 40 (M. Yang, Chine).

the process of decolonization of a given territory, it claimed 'the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter'.[64] However, the General Assembly never claimed an exclusive competence to determine all the territories that have to be decolonized under general international law.

As a matter of theory of law, in order to recognize the obligation to decolonize as a principle of general international law, one should be able to determine '*who* owes *what* to *whom*' in its implementation. If any of these three elements is not at least determinable but by reference to a prior determination of a third party, decolonization should be viewed merely as a political principle which turns legal only when the third party makes the specific determination. Actually, it is theoretically impossible to consider the duty to decolonize as a rule of general international law and to maintain, at the same time, that it is not applicable without a prior legal finding of the General Assembly or of the Committee of 24. At least, an international consensus should impose the exercise of the right of self-determination through decolonization only and exclusively through the vehicle of the General Assembly and the Committee of 24.[65] The fact that some territories were able to exercise their right to self-determination through decolonization outside the framework of the General Assembly, without any objection, proves that such a consensus never existed.

Therefore, one should not read too much into either the failure of the General Assembly and the Committee of 24 to list a territory as non-self-governing or the cessation by the General Assembly to call for the decolonization of a colonial territory.[66] As the Court emphasized in the *Western Sahara* advisory opinion, '[t]he right of self-determination leaves the General Assembly a measure of discretion with respect *to the forms and procedures* by which that right is to be realized'.[67] Although the General Assembly enjoys a margin of discretion as to the forms and procedures for the realization of the right of self-determination in specific cases, its actions do not create this right nor are they capable of depriving a people of its right to self-determination through decolonization. In fact, the General Assembly and the Committee of 24, or even the UN, could disappear one day, suffering a fate similar to that of the League of Nations. It is also possible that a change in the UN Charter might deprive these organs of their capacity to exercise any function with respect to decolonization. Even then, the right of self-determination will survive the machinery created to implement it and continue to require the decolonization of colonial territories in

64 *East Timor (Portugal v. Australia)* case, *supra* note 12, at 103, para. 31.

65 Without ruling out the possibility that procedural rules and institutions established by treaty may upgrade to the status of rules of customary international law, this is not to be presumed lightly. As the ICJ emphasizes in the *North Sea Continental Shelf* case, recourse to these mechanisms and procedures should 'be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'. *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 41–42, para. 72.

66 In the *East Timor* case, the Court noted in 1995 that the General Assembly had not taken any resolution on East Timor since 1982, despite the continued occupation of this territory by Indonesia (*East Timor (Portugal v. Australia)* case, *supra* note 12, at 97, para. 16). Yet, the Court held that East Timor remained a non-self-governing territory (at 103, para. 31), using as evidence to support this conclusion the fact that subsidiary organs of the General Assembly continued to treat East Timor as a non-self-governing territory.

67 *Western Sahara*, Advisory Opinion, *supra* note 56, at 36, para. 71 (emphasis added).

the same manner that obligations regarding territories under mandate survived the demise of the League of Nations. The dictum of the International Court of Justice in the advisory opinion on the *International status of South-West Africa* regarding the consequence of the demise of the League of Nations on the obligations of mandatory powers should be easily remembered in these circumstances:

> These obligations represent the very essence of the sacred trust of civilization. Their raison d'être and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.[68]

Many reasons justify the absence of a territory from the list of non-self-governing territories of the Committee of 24, without prejudice to its status as a colonial territory under international law. Beyond territories that colonial powers notified as non-self-governing at one time or another, the General Assembly and the Committee of 24 listed territories as non-self-governing only upon request and not *ex officio*. This was the case with Resolution 1542 which listed Portuguese territories considered to be non-self-governing. Recently, Nauru, Tuvalu, and Solomon Island requested the inclusion of French Polynesia in the list.

Just after requesting the inscription of Ceuta and Melilla on the list of non-self-governing territories, Morocco militarily occupied Western Sahara in the aftermath of the advisory opinion of 16 October 1975 and hindered the exercise by Western Sahara of its right of self-determination. This may have undermined the international support that its claims to Ceuta/Sebta and Melilla and the other *Plazas de soberanía/Présides* could have gained, especially from the Organization of African Unity (OAU) and Latin-American and Caribbean countries.[69]

International practice regarding colonial enclaves confirms that Ceuta/Sebta and Melilla are colonies under international law and must be decolonized accordingly. Consistently, the General Assembly acknowledged the colonial character of enclaves in non-self-governing territories and called for their reintegration in the territory of the enclaving state.[70] Conversely, the General Assembly never authorized a colonial power to keep possession of a colonial enclave.[71] Examples of this practice include the reintegration of Goa to India in 1961. Although the use of force by India to recover possession of its territories was contested before the Security Council, its territorial sovereignty over Goa was never questioned.[72] The restitution of French enclaves to India also proves that enclaves have been generally considered as colonial

68 *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128, at 133.

69 On recognition of the claims of Morocco to Ceuta/Sebta and Melilla, see O'Reilly, *supra* note 50, at 14–18; R. Rezette, *Les enclaves espagnoles au Maroc* (1976), 160.

70 S. K. N. Blay, 'Self-Determination versus Territorial Integrity in Decolonization', (1985–1986) 18 *NYU J. Int'l L. & Pol.* 441, at 457; Rigo Sureda, *supra* note 42, at 177; M. Shaw, *Title to Territory in Africa: International Legal Issues* (1978), at 134–5.

71 Thus, Belize and East Timor cannot be deemed to undermine the consistency of the practice of the General Assembly regarding the *decolonization* of colonial enclaves. See however, J. Trinidad, 'An Evaluation of Morocco's claims to Spain's remaining Territories in Africa', (2012) 61 ICLQ 961, at 967.

72 See in this regard, see Wainhouse, *supra* note 51, 19.

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situations that should be decolonized.[73] In the African context, Dahomey occupied São-João-Batista de Ajuda, a Portuguese enclave in its territory in 1962. Dahomey invoked the sixth paragraph of Resolution 1514 to justify recovering the possession of São-João-Batista de Ajuda. Neither the General Assembly nor the Security Council protested against what should otherwise be qualified as a violation of Portugal's territorial integrity.[74] Specifically concerning Spanish-Moroccan relations, Ifni was also a colonial enclave which eventually was decolonized against the will of Spain.[75] The general aversion to colonialism justified the extension of the obligation to decolonize even to an inter-European colonial vestige like Gibraltar. It would take a convoluted exercise of logic to qualify Ifni and Gibraltar as colonial enclaves and to deny this status to Ceuta/Sebta and Melilla. Thus, Morocco made the strategic choice to support Spain's claim over Gibraltar against Great Britain.[76]

The obligation to decolonize colonial enclaves has been organized around two pillars. According to the first pillar, the population of enclaves were denied the status of 'people' having a right to self-determination. Therefore, they are not entitled to choose between independence and, more likely in this context, association or any other status allowing thus the colonial power to keep possession of the territory they inhabit. Neither the population of Gibraltar, Goa, Ifni, the Chagos Islands, São-João-Batista de Ajuda or Ceuta/Sebta and Melilla have ever been considered as 'peoples' under international law and in the practice of the United Nations. By virtue of the second pillar, the right of the enclaving country to integrate the colonial enclave into its national territory was systematically recognized. Examples include the reintegration of Ifni, São-João-Batista de Ajuda, and of Portuguese and French colonial enclaves to respectively Morocco, Dahomey, and India. Blay summarizes this practice as follows:

> In the process of decolonization, it is not uncommon for the enclaving state to lay claim to the enclave for one reason or another. In such instances, the practice of the General Assembly has been to dispose of the territory not as a self-determination unit. The views of the residents are consequently not considered relevant and the territory may be awarded to the enclaving state.[77]

In light of this practice, Ceuta/Sebta and Melilla are colonial territories that should be reintegrated to the territory of Morocco according to the principle of self-determination. Their lasting possession by Spain proves that colonialism is not completely over in Africa. The same claim can be made with respect to cases of incomplete decolonization where a colonial power dismembered a colonial territory prior to independence and kept control of parts of it after independence.

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73 On this, see D. Mathy, 'L'autodétermination des petits territoires revendiqués par des États tiers', (1974) 10 *Revue belge de droit international* 167, at 177–80.

74 On this case, see 'Dahomey et Portugal: Occupation de l'enclave portugaise de São-João-Batista de Ajuda par le Dahomey. Chronique des faits internationaux', (1962) 56 *Revue générale de droit international public* 152, at 152–5.

75 See *Western Sahara*, Advisory Opinion, *supra* note 56, at 34–35, paras 60–63.

76 See UN Doc. A/AC-109–475, 31 January 1975.

77 See Blay, *supra* note 14, at 96. Ibid., at 98.

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3.2. The right of African peoples to territorial integrity and cases of partial decolonization

From the emergence of the principle of self-determination as a norm of international law,[78] the titles of sovereignty of the colonial powers on colonial territories were transformed into mere titles of administration. Contrarily to what is sometimes held in literature, before the accession to independence, sovereignty over colonial territories is not in abeyance.[79] The practice of the General Assembly and states in the decolonization process reveals that entities recognized as peoples possess territorial sovereignty, even before their accession to independence.[80] However, the exact scope of the territories belonging to each colonial people is hardly determined in the resolutions of the Security Council or the General Assembly on this topic.

The question of the boundaries of colonial peoples' territory is not exactly identical with that of the identification of a people under international law. Even when one adopts a territorial approach to the notion of people, that is to say defining the people by reference to a territory and not on the basis of subjective criteria such as race, ethnicity, or culture, the precise scope of the territory at stake remains to be determined. Reference to *uti possidetis* only imperfectly addresses this issue. *Uti possidetis* postulates that a state possesses upon achievement of independence the same boundaries as the administrative boundaries it had during colonial time.[81] However, *uti possidetis* is silent regarding the validity or the choice of the relevant administrative limits to be taken into account. In addition, it does not provide an authoritative answer as to the opposability of domestic administrative divisions at the international level. The marginal role given to boundaries established under the domestic law of colonial powers flows out of logic. Almost all colonial powers either refused to decolonize, or did so only in parts of their colonial possessions, by considering that their domestic law was the only law applicable to the decolonization process. This argument failed to convince as the General Assembly reaffirmed the primacy of the right of self-determination under international law over territorial regimes that colonial powers established under their domestic law. In other cases, such as regarding Northern Cameroons, the General Assembly condoned the choice of Great Britain to use the internal divisions of a colony over the limits of the colony itself to determine the territorial basis for a referendum implementing the right of self-determination.[82]

We submit that the identification of an entity as a 'colonial people' entails a more or less precise determination of the territorial scope over which it will exercise

78 Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau/Senegal), *supra* note 13, at 139, para. 152 (not from the moment of the beginning of the war of liberation).

79 O. Corten, 'Droit des peuples à disposer d'eux-mêmes et *uti possidetis*: Deux faces d'une même médaille', (1998) 1 *Revue belge de droit international* 161, at 172; In the same vein, Shaw, *supra* note 70, at 141 and 150; Cassese, *Self-Determination of Peoples*, *supra* note 29, at 186–7; J. Crawford, *The Creation of States in International Law* (2007), at 615.

80 See also J. G. Starke, 'The Acquisition of Title to Territory by Newly Emerged States', (1965–1966) 41 *British Yearbook of International Law* 411, at 415.

81 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 566, para. 23.

82 Emphasizing these elements, Corten, *supra* note 79, at 172.

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self-determination. This is the case even when it is not mentioned in the relevant resolutions of the General Assembly. In fact, the General Assembly rarely engaged in the task of delimitating the precise scope of colonial territories in cases when it was involved in the process. However, when a colonial power attempted to fraudulently keep under its possession a part of a colonial territory after its accession to independence, the General Assembly condemned those acts and reaffirmed the right of colonial peoples to the totality of their territories. The principle of territorial integrity acts as a 'guarantor of the territorial basis of self-determination'[83] in these circumstances.

Resolution 1514 reflects the shared consensus in the international community that peoples have a right to territorial sovereignty and to territorial integrity under international law. From the outset, its title specifies that it aims at granting independence to 'colonial *countries* and people'. Its preamble recalls, at several occasions, the commitment of the international community to end 'colonialism and all its manifestations'. Undoubtedly, the possession by a colonial power of parts of a colonial territory after its independence is one of the clearest manifestations of colonialism. This appears from Resolution 1514 whereby the General Assembly reasserted its conviction 'that *all peoples have an inalienable right* to complete freedom, the exercise of their sovereignty and *the integrity of their national territory*'. Consequently, principle IV of Resolution 1514 stipulates that 'the integrity of [colonial peoples'] national territory shall be respected'. As for principle VI, it establishes 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'.[84] By referring to the territorial integrity of a *country*, the General Assembly clarified its understanding that the territorial integrity of peoples should be respected under current international law.[85] Accordingly, principle VII of Resolution 1514 provides that all states shall discharge their international obligations, including those under the UN Charter and Resolution 1514 itself, in complete 'respect for the sovereign rights of all peoples and *their* territorial integrity'. Even those scholars, who argue that colonial powers still hold titles of sovereignty over their colonial territories before their accession to independence, concede that after the right of self-determination as a principle of international law emerged, they do not have the capacity to disrupt or to cede the sovereignty over these territories.[86]

From this practice, it emerges that colonial peoples are uncontroversial holders of titles of territorial sovereignty.[87] Their right to territorial integrity is guaranteed under international law, even before their accession to independence. UN resolutions condemned the violations of the right of colonial peoples to territorial integrity before their accession to independence in cases of military occupation as contrary

83 See Shaw, *supra* note 70, at 141.
84 UN Doc. A/RES/1514 (XV).
85 Amenyo and Traoré, *supra* note 5, at 61.
86 See, e.g., H. J. Richardson III, 'Self-Determination, International Law and the South African Bantustan Policy', (1978) 17 *Columbia Journal of Transnational Law* 185, at 199.
87 See M. Kohen, 'L'autodétermination et l'avis consultatif sur le "mur"', in P.-M. Dupuy (ed.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 961, at 970.

to international law.[88] The same condemnation was expressed with respect to the construction of a wall in Palestinian territory.[89] The conferral of independence to a colonial territory while keeping parts of its territory constitutes a similar violation of the right to territorial integrity of peoples under international law.[90] Such is the adherence of the General Assembly to the protection of colonial peoples' right to territorial integrity that it lauded the measures undertaken by administering powers to resist the attempts of secessionist movements to separate parts of colonial territories prior to independence,[91] long before the current debates on the opposability of territorial integrity to non-state actors under general international law.[92]

The reactions of the General Assembly to the violations of the territorial integrity of people by colonial powers are even more important. Outside the African context, the General Assembly sanctioned the attempts of Great Britain to keep some islands of its colony of Aden under its possession by specifically listing them and reaffirming the application of Resolution 1514 to all of them, whether they were inhabited or not.[93] It can be inferred from this practice that the obligation to decolonize applies to colonial territories, irrespective of their size or the presence of a human habitation.[94] In the African context, the General Assembly persistently called Portugal to relinquish parts of Guinea-Bissau it still held under its control after the beginning of the war of liberation. It also denied Portugal the capacity to represent Guinea-Bissau before the UN.[95] This practice confirms the obsolescence of colonial titles to sovereignty, as well as the unlawful character of possessing colonial territories under contemporary international law.

In accordance with the right of peoples to territorial integrity, the General Assembly condemned the attempts of France and Great Britain to disrupt the territorial integrity of the peoples of Madagascar and Mauritius. When Great Britain planned the separation of the Chagos islands from Mauritius, ahead of the independence of the latter, the General Assembly recalled that 'any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof'.[96] After the separation, the General Assembly adopted a resolution sanctioning the conduct of Great Britain. It reiterated that:

> any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and

88 See UN Doc. A/RES/3485 (XXX); UN Doc S/RES/384 (XXX) (regarding East Timor).
89 UN Doc. A/RES/58/292 (2004) (regarding Palestine).
90 See also M. Kohen, *Possession contestée et souveraineté territoriale* (1997), at 374.
91 See UN Doc. A/RES/3109 (XXVIII).
92 Compare this practice with the view of the Court on this issue in the Kosovo advisory opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *supra* note 3, at 437, para. 80.
93 UN Doc. A/RES/2023 (XX); UN Doc. A/RES/2183 (XXI).
94 UN Doc. A/RES/1514 (XV); Kohen, *supra* note 90, at 421.
95 UN Doc. A/RES/3061 (XXVIII).
96 UN Doc. A/RES/2066 (XX).

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> installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly Resolution 1514 (XV).[97]

France disrupted the territorial integrity of the Comoros Islands by keeping control of Mayotte after its independence. In this case, France had reluctantly organized a referendum on self-determination addressing the question of independence or any other political status to the four islands of the Comoros as a single unit. In contradiction with this treatment of the four islands as a single unit, France gave effect to the referendum on the basis of the majority vote in each island. Unlike Mohéli, the Grande Comores, and Anjouan, Mayotte voted in favour of remaining under French sovereignty. On the basis of this choice, which was contrary to the majority vote in all four islands, France kept possession of Mayotte. The General Assembly considered that the dismemberment of Mayotte was contradictory to the territorial integrity of the Comoros which was asserted both before and after the referendum. Interestingly in this context, the General Assembly made the legal determination that Mayotte belonged to the Comoros Islands.[98] Since then, several resolutions of the General Assembly[99] and of other international organizations, including the African Union (AU)[100] and the Organization of the Islamic Conference,[101] reaffirmed the sovereignty of the Comoros Islands over the island of Mayotte.

The dispute between France and Madagascar regarding the Glorious Islands are another instance of 'incomplete decolonization'.[102] In its Resolution 34/91, the General Assembly reaffirmed 'the necessity of scrupulously respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence'.[103] In the same resolution, the General Assembly invited 'the Government of France to initiate negotiations without further delay with the Government of Madagascar for the reintegration of the aforementioned islands, which were arbitrarily separated from Madagascar'.[104] Several resolutions of the AU also reaffirmed Malagasy sovereignty over the Glorious Islands.[105] The island of Tromelin, which was also separated from Madagascar at the same time as the Glorious Islands, is not specifically mentioned in these resolutions. In January 1978, Madagascar abandoned all of its rights and claims regarding Tromelin to Mauritius, which concluded three

97 UN Doc. A/RES/2430 (XXIII); UN Doc. A/RES/43 (XXXV); UN Doc. A/RES/34/91 (XXXIV). The resolutions of the African Union supporting the claim of Mauritius over the Chagos Islands include, Decision Assembly/AU/Res.1 (XVI) 2011; Decision Assembly/AU/Dec.331(XV) of July 2010; Decision AHG/Dec.159 (XXXVI) of July 2000; Resolution AHG/Res.99 (XVII) of July 1980.

98 UN Doc. A/RES/35/43 (XXXV).

99 See among others, UN Doc. A/RES/49/18 (XLIV).

100 See among others, Point 11, Doc. Assembly/AU/5 (XXI).

101 See for instance, Resolution No.8/39-POL on the Question of the Comoros island of Mayotte adopted by the thirty-nine session of the Islamic Conference of Foreign Ministers, Republic of Djibouti 15–17 November 2012.

102 On this point, see Kohen, *supra* note 48, at 977; A. Oraison, 'À propos du différend franco-malgache sur les Îles Éparses du Canal du Mozambique (La succession d'États sur les Îles Glorieuses, Juan de Nova et Bassa da India)', (1981) 85 *Revue générale de droit international public* 465, at 502.

103 UN Doc. A/RES/34/91 (XXXIV).

104 Ibid.

105 See, among others, the Council of Ministers of the Organization of African Unity, Resolution 732 (XXXIII) of July 1979; the Organization of African Unity Council of Ministers 'Resolution on the Glorious, Juan de Nova, Europa and Bassa da India Islands' [18–28 June 1980], CM/Res 784 [XXXV]).

agreements with France with respect to the joint economic, scientific, and environmental exploitation of the island of Tromelin and its related maritime spaces on 7 January 2010. These treaties were concluded without prejudice to the respective claims of the parties to sovereignty over this island.[106] Negotiations are under way regarding a similar agreement between France and Madagascar with respect to the Glorious (Malagasy) Islands.[107]

The statements of the General Assembly with respect to the Chagos Islands, Mayotte and the Glorious islands, including Tromelin, clarify that these islands are cases of 'incomplete decolonization'. The numerous resolutions of the General Assembly calling for their reintegration to the African country from which they were separated stand as evidence of their persisting colonial status five decades after the emergence of the obligation to decolonize in international law. With respect to these islands, colonialism is clearly not over in Africa. The Chagos, Mayotte, and Glorious islands/Îles Éparses share the same status as other uninhabited Spanish *plazas de soberanía*, that is to say the uninhabited *Islas Alhucemas*, *Islas Chafarinas*, *Peñon de Vélez de la Gomera* and the island *Leïla/Perejil*, that Spain did not relinquish to Morocco after the latter's independence. These islands have never been listed on the list of territories to be decolonized nor benefitted from specific determinations of the General Assembly requesting their integration to Morocco.[108] Yet, the international law and practice of decolonization that we have examined above supports the claims of Morocco to sovereignty over them.[109]

In 2004, the AU Commission released a strategic plan, the Annex 3 of which established a 'List of African Countries/Territories under Foreign Occupation'. The list was composed of the Chagos Islands and St. Helena Island under the 'foreign domination' of the United Kingdom, the Canary Islands, Ceuta and Melilla under that of Spain, the Azores and Madera under the 'foreign domination' of Portugal and, finally, La Réunion and Mayotte under that of France.[110] We have established that the Glorious Islands, the Chagos Islands, Ceuta and Melilla, and Mayotte are cases of incomplete decolonization. However, we have not yet made any similar claim with respect to St. Helena, the Canary Islands, the Azores and Madera. As far as St. Helena

106 Accord-cadre entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur la cogestion économique, scientifique et environnementale relative à l'île de Tromelin et à ses espaces maritimes environnants (ensemble deux annexes et trois conventions d'application), signé à Port-Louis le 7 juin 2010 (available at <www.senat.fr/leg/pjl11–299-conv.pdf> (accessed 21 December 2014)).

107 See, in this respect, 'Îles Eparses: Madagascar, vers une cogestion avec la France?', *Radio France International*, 23 September 2014, (<http://www.rfi.fr/afrique/20140923-madagascar-france-iles-eparses-cogestion-communique-hery-rajaonarimampianina-franco/> (accessed 4 May 2015)).

108 At best, one can infer from Resolution 1542 that all the territories considered at that time as Spanish 'overseas territories' were covered. As we already explained, it is because of this commitment that the General Assembly did not list authoritatively the colonial territories of Spain, as it did with respect to Portuguese territories. The General Assembly simply noted with satisfaction the commitment of Spain to transmit information under Article 73(e) UN Charter and called the Secretary-General to act upon the unilateral commitment of Spain and take measures for its implementation.

109 Morocco claimed these islands in 1975 when it requested the inscription of Ceuta/Sebta and Melilla as non-self-governing territories on the list of the Committee 24. See Lettre du 27 janvier 1975 adressée au Président du Comité spécial par le représentant permanent du Maroc auprès de l'Organisation des Nations Unies, UN Doc. A/AC. 109–475.

110 *Strategic Plan of the African Union Commission*, vol. 1 (Vision and Mission of the African Union), May 2004, Ann. 3, at 43.

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is concerned, it is without a doubt a colonial territory. St. Helena has been on the list of the Committee of 24, since Great Britain notified it as a non-self-governing territory in 1946. The only remaining question pertains to whether St. Helena is a part of Africa. Whereas the AU Commission claims that St. Helena belongs to Africa, the Committee of 24 classifies it as part of the 'Atlantic and Caribbean'.[111]

France listed La Réunion as a non-self-governing territory in 1946. However, the same year, France stopped providing information under Article 73(e) of the Charter with respect to this territory, following the adoption of a statute on 19 March 1946 which erected La Réunion as a French *département d'outre-mer*, along with Martinique, la Guyane, and la Guadeloupe.[112] Since then, the General Assembly did not take any further action to subject La Réunion and the other three islands to decolonization. The Committee of 24 simply noted that the status of these territories has changed, endorsing apparently the view that they are no longer under a colonial regime. The absence of competing claims over La Réunion, especially from Madagascar and Mauritius, as well as the inexistence of a national liberation movement in La Réunion,[113] suggest that the relevant stakeholders do not view this territory as under a colonial regime.[114] However, should a colonial regime ever revert in La Réunion, or in Martinique, Guyane and Guadeloupe, these islands will be entitled to exercise their right to self-determination under international law through decolonization.

As far as the Azores and Madera are concerned, the Strategic Plan of the AU Commission is rather confusing. Although the AU Executive Council took note of the strategic plan of 2004 and commended the Commission for its study,[115] no subsequent action, especially resolutions calling for the decolonization of these territories, was since adopted. The object of the strategic plan of 2004 and the purpose of its Annex 3 shed light on its legal significance regarding the international law on decolonization. The strategic plan of 2004 was viewed as the 'necessary roadmap' to achieve the AU objectives of a successful and prosperous Africa. It did not aim at expressing the views of the AU or its member states on which African territories were still under foreign occupation. In fact, Annex 3 was inserted alongside other annexes of minor importance such as Annex 1 listing AU members, Annex 2 on the 'Basic Data on African Countries and Dates of their Accession to the United Nations and the OAU/AU', and Annex 4 on the 'List of African Union Summit Observers'.

111 See <http://www.un.org/en/decolonization/nonselfgovterritories.shtml> (accessed 20 December 2014).

112 Loi n° 46–451 du 19 mars 1946 tendant au classement comme départements français de la Guadeloupe, de la Martinique, de la Réunion et de la Guyane française (available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000868445>, accessed 20 December 2014). See also A/C.4/SR.1191, para 50 (M. Koscziusko-Morizet, France) (arguing that the General Assembly did not protest against the decision of France not to provide information in 1947).

113 Houbert reports that Muammar Khadafi, the president of Libya, raised the question of the status of La Réunion in 1973, calling for supporting any liberation movement that would be created in this territory. The OAU Liberation Committee endorsed a project of declaration declaring that La Réunion was part of the African continent. However, the Council of Ministers of the OAU refused to adopt it. See J. Houbert, 'Décolonisation en pays créole: l'île Maurice et la Réunion', (1983) 10 *Politique Africaine* 78, at 93.

114 See A. Oraison, 'Réflexions générales sur la présence de la France dans l'océan Indien et le canal de Mozambique', (2000) 78 *Revue de droit international de sciences diplomatiques et politiques* 73, at 80–81.

115 Decision on the Vision and Mission of the African Union and Strategic Plan, Programme and Budget of the Commission, EX.CL/Dec.93 (V).

Not surprisingly, the AU Commission 2009–2012 strategic plan does not list African territories still under foreign occupation.[116]

From our perspective, it is doubtful whether the Azores and Madera were viewed as 'colonial' according to the definition of this term in 1945. In fact, Madera and the Azores have never been considered as colonial territories subject to the obligation of decolonization, neither at the regional level, in the OAU/UA nor at the universal level, in the UN. Madera and the Azores are both missing in the General Assembly Resolution 1542, which listed exhaustively and *ex officio* Portuguese non-self-governing territories.[117] No individual state, including Morocco, seems to have ever requested their decolonization on the basis of international law.[118]

4. Issues falling outside the scope of the obligation to decolonize

In addition to cases of partial or incomplete decolonization, allegations of enduring colonialism are often made in relation to three territorial situations in Africa. The maintenance of boundaries inherited from colonization is the most obvious one (sub-section 4.3). In addition, it is often alleged that African countries did not exercise their right of self-determination against African states, such as Ethiopia, which participated in colonialism alongside colonial powers. It is also often maintained, colloquially it is submitted, that colonial relations exist between African countries and parts of their domestic constituencies, justifying a right to secession. These two assertions revolve around the *rationae personae* scope of the right of self-determination (sub-section 4.1). Annulling the effects of colonialism is also used as a rhetorical device by certain African countries to claim territories they alleged belonged to them in a distant past, prior to the establishment of colonial rule (sub-section 4.2).

4.1. The impossibility of colonialism in the relation between an African country and its internal constituencies

The application of an obligation to decolonize is predicated upon the existence of a colonial territory.[119] During the discussions regarding the scope of Article 73(e) of the Charter, the General Assembly rejected the 'Belgian thesis' arguing for the extension of the notion of non-self-governing territories to all instances of domination, irrespective of the place of their occurrence and of the identity of the subjugating power.[120] A 'functionalist definition of colonialism'[121] was thus available to the

116 African Union Commission, *Strategic Plan 2009–2012*, 19 May 2009.
117 UN Doc. A/RES/1542 (XXV). Resolution 1542 listed as non-self-governing: '(a) The Cape Verde Archipelago; (b) Guinea, called Portuguese Guinea; (c) Sao Tome and Principe, and their dependencies; (d) Sao Joao Batista de Ajuda; (e) Angola, including the enclave of Cabinda; (f) Mozambique'.
118 K. E. Wiegand, *Enduring Territorial Disputes: Strategies of Bargaining, Coercive Diplomacy* (2011), 184.
119 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *supra* note 3, at 436, para. 79.
120 Se AG (VII) A/C-4/SR 253 and 259. See also, Constantin, *supra* note 14, Vol. 1, at 109–13.
121 Arguing for this approach, A. Yusuf, 'The Anglo-Abyssinian Treaty of 1897 and the Somali-Ethiopian Dispute', (1980) 3 *The Horn of Africa* 38, at 42.

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General Assembly, but it chose to ignore it. Fifteen years after the adoption of the Charter, Resolution 1514 stuck to this approach and held that the decolonization aspect of the right of self-determination applies only to colonial territories, defined in contradistinction to metropolitan territories.[122] Accordingly, only the overseas possessions of European powers were considered to be colonial, without delving into the question whether some forms of non-European domination could evidence a similar degree of subordination.[123] In the *Kosovo* advisory opinion, the ICJ emphasized the difference between these two legal frameworks by distinguishing, on the one hand, declarations of independence made in the context of 'a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation', on the other, declarations of independence made outside this context.[124]

The accession of African countries to independence implies that they are no longer colonies under the technical sense that international law on decolonization attaches to this term. Although these countries and peoples enjoy the right of self-determination, they are no longer subject to an obligation to decolonize. The General Assembly never listed an independent African country as an administering power for the purposes of the law of decolonization, except South Africa, which was not legally speaking a colonial power. This negative practice of the General Assembly proves that the colonial status of a people or a colonial territory ends when it chooses one of the three options available under Resolution 1541, especially when it leads to independence from a colonial power and to membership in the United Nations.[125] Thus, the Ogaden region, which was acquired through a colonial treaty between Ethiopia and Great Britain in 1897,[126] is not a territorial unit entitled to the exercise of the right of self-determination. Consequently, the claim of Somalia on the Ogaden region[127] has not been endorsed either at the regional level by the OAU/AU or at the universal level by the United Nations.

The UN practice regarding decolonization did not recognize a right of independence to infra-statal entities from colonial territories or newly decolonized states. With respect to the actions of the Netherlands in Papua New Guinea, the General Assembly declared that it strongly endorses 'the policies of the administering Power

122 R. Gorelick, *The Right of Self-Determination in Practice of the Universal and Regional Organizations* (1982), 99.

123 See Rigo Sureda, *supra* note 42, at 237; Pomerance, *supra* note 14, at 15; T. Franck, 'Post-Modern Tribalism and the Right to Secession', in C. Bröhlmann, R. Lefeber, and M. Zieck (eds.), *Peoples and Minorities in International Law* (1993), 3, at 16; Gorelick, *The Right of Self-Determination in Practice of the Universal and Regional Organizations*, *supra* note 122, at 85.

124 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* note 3, at 436, para. 79.

125 *Western Sahara*, Advisory Opinion, *supra* note 56, at 33, para. 59 (explaining that cases when the General Assembly did not organize a referendum of self-determination were based either on the fact that 'that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances').

126 See Treaty between Great Britain and Ethiopia, May 14, 1897, in Command Papers [C-8715], Treaty Series. No. 2. 1898, at 1–12.

127 Somalia claims that 'the situation in the Somali territory under Ethiopian domination represents a typical colonial case. Today, the Somali people under Ethiopian control are subject to constant tyranny and oppression. There is therefore justification on grounds of justice and fundamental human rights to permit these people to determine their political future and shape their own destiny.' See Government Publications, Somali Democratic Republic, *The Portion of Somali Territory Under Ethiopian Colonization* (1974) at 11.

and of the Government of Papua New Guinea aimed at discouraging separatist movements and at promoting national unity'.[128] In the African context, Resolution 16 (I) of the Organisation of African Unity, establishing the principle of intangibility of boundaries existing upon the achievement of independence, was also interpreted as prohibiting secession.[129] Accordingly, '[s]ecession is anathema to the Organisation'.[130] The stance of the OAU in the Katanga, Biafra, and Anjouan crises,[131] as well as the case law of the African Commission of Human and Peoples' Rights on Article 20 paragraph 1 of the African Charter of Peoples and Human Rights, also lends support to this view.[132]

4.2. Reconstituting pre-colonial territorial integrity in the exercise of the right of self-determination

Decolonization has not been interpreted as authorizing claims to sovereignty over territories on which the right of self-determination of another people is already recognized. A territory recognized as a political unit entitled to the right of self-determination can only exercise this right within the boundaries of its territorial scope. Its claims to territory and to territorial integrity are not valid regarding territories located beyond this scope.[133] Accordingly, the claim of Morocco to Western Sahara, as well as that of Somalia over territories inhabited by Somalis belonging to its neighbouring countries, did not and cannot prosper. In these instances, pre-colonial titles of territorial sovereignty avail little, as the right of self-determination of people turns both colonial and non-colonial contradictory titles of sovereignty obsolete.[134] Thus, the ICJ found in the *Western Sahara* advisory opinion, that the existence of precolonial ties of sovereignty between Western Sahara and other North African countries would not affect the right of self-determination of Sahraoui people under contemporary international law.[135]

Even more, the adoption of the principle of intangibility of the boundaries existing upon the achievement of independence by the OAU limits the capacity of newly independent states to successfully claim territories they did not inherit from their colonial power, irrespective of the legality or the lawfulness of their alleged titles.[136] In the *Northern Cameroons* preliminary objections decision, Cameroon challenged

128 UN Doc. A/RES/3109 (XXVIII).

129 See R. Petkovic, 'Integrité territoriale et droit d'autodétermination en Afrique', (1969) 20-II *Revue de la Politique Internationale* 19, at 20 (deploring this fact). R. Yakemtchouk, 'Les frontières africaines', (1970) 74 *Revue générale de droit international public* 27, at 61.

130 A. O. Cukwurah, 'The Organization of African Unity and African Territorial and Boundary Problems: 1963–1973', (1973) 13 *Indian Journal of International Law* 176, at 178.

131 On secession in Africa, see F. Ouguergouz and D. Tehindrazanarivelo, 'The Question of Secession in Africa', in M. Kohen (eds.), *Secession: International Law Perspectives* (2006), 257–96.

132 M. Hébié, 'Article 20 alinéa 1', in M. Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples: Commentaire article par article* (2011), at 480–3.

133 See Corten, *supra* note 79, at 173–4.

134 Separate Opinion Judge Thomas Franck in *Sovereignty over Pulau Ligitan und Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment of 23 October 2001, [2001] ICJ Rep., at 657, para. 15; Blay, *Self-Determination*, *supra* note 14, at 76.

135 *Western Sahara*, Advisory Opinion, *supra* note 56, at 36, para. 70.

136 A. Benmessaoud Tredano, *Intangibilité des frontières coloniales et espaces étatique en Afrique* (1989), at 90. See also, I. Brownlie, *African Boundaries. A Legal and Diplomatic Encyclopaedia* (1979), at 11.

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the designation of Northern Cameroons as a relevant unit for the exercise of self-determination. The Court declared the application of Cameroon inadmissible on the basis of judicial propriety.[137] On the merits of the case, Cameroon did not have any right over this territory after the finding of the General Assembly that Northern Cameroon enjoyed the right of self-determination.

4.3. African boundaries, succession to colonial powers and the 'colonial legacy' argument

As early as 1958, during the All-African Peoples Conference in Accra, a resolution on 'Frontiers, boundaries and federations' declared that 'artificial barriers and frontiers drawn by imperialists to divide African peoples operate to the detriment of Africans and should therefore be abolished or adjusted'. A call was therefore made for the 'abolition and adjustment of such frontiers at an early date'.[138] At the same period, pan Africanist leaders such as Kwame N'Krumah, predicted that upon the creation of a United States of Africa 'territorial boundaries which are the relics of colonialism will become obsolete and superfluous'.[139] Regarding the 1958 Conference, its non-governmental character suggests downplaying the legal value of its decisions under international law, notwithstanding the fact that many African leaders, who eventually led their countries to independence, were in attendance.[140] As for the dream of Kwame N'Krumah of a 'United States of Africa', it is still to be achieved.

During the 1964 Cairo Conference, African states, through the OAU, rejected the idea that colonial boundaries could be considered as non-existent, acknowledging them as constituting a 'tangible reality' in Resolution AHG 16 (I). Accordingly, all members of the OAU pledged 'to respect the borders existing on their achievement of national independence'.[141] It is noteworthy that not a single line of Resolution AHG 16 (I) refers to colonialism or to the colonial origins of African boundaries. Those boundaries are rather euphemistically referred to as existing on the achievement of African countries to independence. Despite its popularity, the qualification of African boundaries as inherited from colonialism does not arise as such from official documents of the OAU or of the UA.

In the *Frontier Dispute (Burkina Faso/Mali)*, the ICJ explained the rationale behind the decision of African countries to respect 'borders existing on their achievement of independence' as follows:

> 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

137 *Case concerning the Northern Cameroons (Cameroon v. Great Britain)*, Preliminary Objections, 2 December 1963, [1963] ICJ Rep. 15, at 34, para. 38.

138 'Resolution 2: Frontiers, Boundaries and Federations adopted by the All-African Peoples Conference, Accra 5–13–1958,' in G. C. M. Mutiso and S. W. Rohio (eds.), *Readings in African Political Thought* (1975) 361, at 364–5.

139 N. N'Krumah, 'Continental Government for Africa', ibid. 344, at 346.

140 Klabbers and Lefeber, *supra* note 31, at 57.

141 AHG/Res. 16 (I): Border Disputes among African States. The fear that it may be said that 'the Addis Ababa Charter was an explicit ratification of the Treaty of Berlin' may have justified the absence of an express reference to the principle of *uti possidetis*. B. Boutros-Ghali, 'The Addis Ababa Charter', (1964) 3 *International Conciliation* 5, at 29.

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> 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.[142]

Nonetheless, calls for redrawing African boundaries have persisted, growing even louder following the numerous internal armed conflicts in African countries.[143] It is often suggested that these conflicts are attributable to the artificial nature of African boundaries and to the fact that their drawing did not take into account the tribal component.[144] It is not our purpose to assess empirically the veracity of these propositions. It suffices to underline that the large majority of internal conflicts in Africa are rather designed to gain control over the political power of states and natural resources. Conversely, secessionist conflicts have been rare since the accession of African countries to independence.[145]

Whatever may be the relevance of this discussion with respect to the practicality of African boundaries, the issue addressed here is whether the maintenance of these boundaries clashes against the obligation to decolonize under international law. In the *Frontier Dispute (Burkina Faso/Mali)* case, the ICJ perceived a possible tension between the maintenance of boundaries deriving from colonialism and colonialism as such. It distinguished between using colonial boundaries as a fact, among others, to determine the boundary between two independent states and endorsing colonialism as an institution. For the Court:

> One clarification is, however, necessary as concerns the application of French *droit d'outre-mer*. International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any *renvoi* to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law – especially legislation enacted by France for its colonies and territoires d'outre-mer – may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the "colonial heritage", ie., the "photograph of the territory" at the critical date.[146]

Judge ad hoc Abi-Saab interpreted this reference to the absence of a '*renvoi*', or a sort of '*continuum juris*', to the colonial law to mean that 'there can therefore be no question of even circuitously finding in contemporary international law any retroactive

142 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 567, para. 25; Umozorike clarifies that this would have opened the 'Pandora box'. O. Umozorike, *International Law and Colonialism in Africa* (1979), 105 (contrarily to the terminology used by OAU resolutions, Umozorike qualifies African boundaries as 'colonial legacies').

143 See, e.g., M. Wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', (1994–1995) 16 *Michigan Journal of International Law* 1113.

144 *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994 [1994] ICJ Rep. 6, at 52–54, paras. 7–12 (Separate Opinion of Judge Ajibola); H. Jimenez, 'International Boundaries in Africa', (1985) 14 *Thesaurus Acroasium* 757, at 757; See, e.g., Yakemtchouk, *supra* note 129, at 27 (arguing that 8/10 of African boundaries are unrelated to traditional and ethnic boundaries).

145 J.-F. Bayart, *Paradoxes africains*, Le Temps – Genève, 1 October 2013.

146 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 568, para. 30; G. Abi-Saab, 'Le principe de l'*uti possidetis:* son rôle et ses limites dans le contentieux territorial international', in M. Kohen (ed.), *Promoting Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflish* (2006), 657, at 660.

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legitimation whatever of colonialism as an institution'.[147] Actually, the General Assembly often discarded colonial administrative boundaries when applying self-determination to some territorial units.[148] Therefore, the subsistence of boundaries, arising from colonialism, is not as such due to a persistence of a form of colonialism. Instead, it rests upon a legal determination that these boundaries represent the scope of the territory of independent states created thanks to decolonization under international law.[149]

African countries subscribed to the principle of inheriting boundaries existing on the achievement of their independence when they adopted Resolution 16 (I) of the OAU. As recalled by the Court, in the *Frontier Dispute (Burkina Faso/Mali)* case:

> The elements of *uti possidetis* were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions. The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/Res. 16 (1)), adopted in Cairo in July 1964, deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization.[150]

Therefore, the Court stressed that 'it was by deliberate choice that African states selected, among all the classic principles, that of *uti possidetis*'.[151] Indeed, the application of *uti possidetis* and its corollary, the reliance on colonial administrative divisions, when consistent with the right of self-determination, is not a *jus cogens* norm of international law.[152] At any moment, African countries can readjust their boundaries upon the conclusion of bilateral or multilateral agreements.[153] However, the 2007 Declaration on the African Union Border Programme and its Implementation Modalities showed complete adherence to Resolution AHG/Res.16 (I). African states

147 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 109, para. 4 (Separate Opinion Judge Abi-Saab). See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002 [2002] ICJ Rep., at 471 (Separate Opinion Judge Ranjeva). However, in his separate opinion appended to the *Burkina Faso/Niger* judgment, Judge Yusuf seems to consider that applying *uti possidetis* means necessarily 'an acceptance of colonial law as a title to territory'. *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 9, at para. 32 (Separate Opinion Judge Yusuf).

148 See the Northern Cameroons case mentioned above.

149 However, Udombana considers that the maintenance of these boundaries means that '*the ghost of Berlin has refused to rest; it still haunts Africa forty years after independence.*' Udombana, *supra* note 2, at 56 (italics in the original).

150 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at para. 22.

151 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 567, para. 6; See also A. C. McEwen, *International Boundaries of East Africa* (1971), at 23–24.

152 *Frontier Dispute (Burkina Faso/Mali)*, *supra* note 62, at 566, para. 24 and 568, para. 30: 'By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession'. See also S. Touval, 'The Sources of *Status Quo* and Irredentist Policies', in C. G. Widstrand (ed.), *African Boundary Problems* (1969), 101, at 103.

153 See Cukwurah, 'The Organization of African Unity and African Territorial and Boundary Problems: 1963–1973', *supra* note 130, at 182; A. A. Gromyko, 'Colonialism and Territorial Conflicts in Africa: Some Comments', in Widstrand (ed.), *supra* note 152, 168, at 168.

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reaffirmed that their border programme is guided by 'the principle of the respect of borders existing on achievement of national independence' once again.[154] The 'colonial origin' of African borders, which Resolution AHG/Res. 16 (I) ignored, was once again omitted. In this regard, it is doubtful whether the emphasis on the colonial character of African boundaries is not merely rhetorical. Samuel Chime notices:

> In the past it has been fashionable for Africans, as if to excuse themselves, merely to point out repeatedly that it was the colonial powers who perpetrated these boundaries. However, it is close upon a decade [and now five decades] since the Africans began actively to manage their own states. And yet these boundaries have remained.[155]

5. Conclusion

Fifty-five years after the adoption of Resolution 1514, the great majority of African territories have been decolonized in conformity with their right to self-determination. The most 'revolutionary' principle of the contemporary legal order has ushered a number of independent states into international life. In Africa, only Western Sahara is left to exercise its right of self-determination and choose between independence, association, or integration with an existing state or any other status. However, the Western Sahara case is not one of colonialism strictly speaking but of military occupation. Colonialism still exists in other respects in Africa. As this study has established, the Glorious Islands (Madagascar), Mayotte (Comoros), the Chagos (Mauritius), Leila, Ceuta/Sebta, and Melilla, and other small Spanish possessions along North African coasts are still to be decolonized in accordance with international law. Unsurprisingly, the argumentation of colonial powers has therefore shifted from Article 2 paragraph 7 of the UN Charter to a reliance on the acquiescence of the newly independent states. However, bilateralism is not controlling in relations of this kind, as evidenced by the insistence of the General Assembly and other international organizations on the decolonization of these territories.[156] This is a matter of principle. Any tolerance will not only weaken the commitment of the international community to end colonialism in all its forms, but will also undermine the ideal of justice that inspired the new international order established on the basis of the UN Charter. Nevertheless, African countries should direct their focus to using their acquired independence to address their peoples' needs of peace, justice, and development. The fight against colonialism was essentially motivated by the intolerable exploitation of colonial territories and peoples by colonial powers. Similar exploitation or the ignorance of the needs of African peoples by their leaders is equally condemnable. Only a strong commitment and concrete actions for development and peace in the Continent will quench the shameful calls for its recolonization or a misplaced nostalgia of the colonial rule.

154 Declaration on the African Union Border Programme and its Implementation Modalities, Addis-Ababa, 7 June 2007, BP/MIN/Decl. (II).

155 S. Chime, 'The Organization of African Unity and African Boundaries', in Widstrand (ed.), *supra* note 152, 65, at 65.

156 See Shaw, *supra* note 70, at 142.

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