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KRZYSZTOF SKUBISZEWSKI AND THE RIGHT TO SELF-DETERMINATION: PAST AND FUTURE

Abstract: *In 1995, Professor Krzysztof Skubiszewski added a Dissenting Opinion to the East Timor Judgment, wherein the ICJ declined jurisdiction in a proceeding started by Portugal against Australia for its having concluded the East Timor Gap treaty with Indonesia, in blatant violation of the East Timorese's right to self-determination. Ad-hoc Judge Skubiszewski posited that the Court should have accepted jurisdiction and he presented a series of convincing arguments for this proposition.*
In 2019 the ICJ rendered an Opinion in the Chagos Islands case. The fact that the ICJ accepted jurisdiction in this case demonstrates that an impressive development has taken place since 1995, one whereby many of Professor Skubiszewki's requests have been implemented. At the same time however, the Chagos Opinion is not fully satisfying as it neglects, to a considerable extent, the human rights issue. This contribution shows that Skubiszewski's Dissenting Opinion would have provided guidance also for these questions and that it remains as topical today as it was in 1995.

Keywords: Chagos Islands, East Timor, human rights, ICJ, International Court of Justice, self-determination, Skubiszewski

INTRODUCTION

It is a great honour for me to have been invited to this cycle of lectures commemorating the great Polish international lawyer Krzysztof Skubiszewski. I never met him personally, but I remember when I read his Dissenting Opinion in the *East Timor* case[1] back in 1995, which was rather at the beginning of my career,[2] that I was fascinated by the intellectual strength of his considerations, by their academic depth, by their persuasiveness, and not least of all by their inspiring humanity. In many ways, Krzysztof

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[1] ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 90.

[2] *See* P. Hilpold, *Der Osttimor-Fall*, Peter Lang, Frankfurt a. M.: 1996.

Skubiszewski anticipated what would later become fundamental mainstays of the human rights discussion in general and basic orientations in the field of self-determination in particular.

Of course, it is never possible to prove the long-term consequences of academic arguments with absolute assurance, but several considerations can be taken for granted here:

- Prof. Skubiszewski's Dissenting Opinion was much appreciated both in academia and in practice. It was widely cited and it opened a new perspective on the *East Timor* question.
- The ICJ Judgment in the *East Timor* case was commended for its *obiter dicta*, but at the same time much criticized for the pronouncements in its operative part. Prof. Skubiszewski's Dissenting Opinion, had it been adopted by the International Court of Justice (ICJ), would have provided the way out of this dilemma.
- Since 1995 the question of self-determination has continued to divide the international state community. In a series of highly delicate advisory cases (*Wall Opinion* of 2004,[3] *Kosovo Opinion* of 2010,[4] and now the *Chagos Islands Opinion* of 2019[5]) the ICJ would have had at its disposal an "easy way out" by denying the propriety of issuing an opinion. In all of these cases however the Court decided not to exercise its discretion to renounce its jurisdiction. While the underlying reasoning might not have been fully convincing in each of these situations,[6] in the most recent case – the *Chagos Islands* case – the stance taken by the Court was the most determined one. Prof. Skubiszewski's philosophy of self-determination, so masterly elaborated in his Dissenting Opinion in the *East Timor* case, seems to have influenced the *Chagos Islands* Opinion to a considerable extent. What in 1995 had been nothing more than a pious hope had become firm reality in 2019: Respect for self-determination is so important for the United Nations that the ICJ can accept jurisdiction for answering questions to the General Assembly even if at the backdrop there is a contentious case the parties are not willing to submit to the ICJ. In 1995 the ICJ had emphatically declared the right to self-determination to be an *erga omnes* obligation – but in an *obiter dictum* and without practical consequences. In 2019 this concept was filled with substance and life.

It can therefore be said that within a quarter of a century a revolutionary development had come full circle, with Professor Skubiszewski's Dissenting Opinion as the

[3] ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 1994, p. 136.

[4] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep 2010, p. 403

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

[6] In this regard, the *Kosovo* Opinion was particularly debatable. *See* P. Hilpold, *The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question*, 14 Austrian Review of International and European Law 259 (2009 (2013)), p. 278.

starting point, anticipating with a visionary perspective what later would become, at least to a large extent, a common accepted standard.

At the same time however, it has to be noted that Professor Skubiszewski's Dissenting Opinion goes far beyond the issue of self-determination in the classical sense. These aspects are a mere starting point. As is well known, the meaning of self-determination is still open to discussion and many issues of self-determination are intertwined with questions of international politics. Often questions of self-determination conflict with human rights issues. As will be shown, Professor Skubiszewski developed a vision that offers a key that could solve this conundrum. His Dissenting Opinion anticipated many of the subsequent developments and it remains as timely today as it was at the moment of its publication. In particular it refers to the relevance of human rights, which open up a new perspective for the interpretation of concepts like self-determination.[7]

1. THE EAST TIMOR CASE

But let's start first with the *East Timor* case itself. What were the particularities of this case that prompted Professor Skubiszewski to develop his far-sighted perspective on self-determination? For over two decades, *East Timor* had been a challenge to the conscience of mankind, a place of outrageous violations of human rights, casting blame not so much on the usual suspects of human rights abusers (which in the 1970s were much more numerous than these days) but, embarrassingly enough, on some of the most outspoken human rights champions within the international state community.[8]

East Timor had been colonized by the Portuguese since the sixteenth century. When, after 1945, colonialism came under rising criticism and pressure within the UN system, Portugal tried for a long period to resist this pressure both by force against resistance movements as well as through legislative measures that would formally transform the legal status of these territories from colonies into parts of the metropolitan territory.

The UN, however, continued its policy unswervingly. When Portugal itself was thrown into turmoil because of the "Carnation Revolution" of 25 April 1974, peoples

[7] On the relevance of human rights in general for modern day international law and in particular in relation to the writings by Professor Skubiszewski, *see* Ch. Tomuschat, *Individual and Collective Identity: Factual Givens and their Legal Reflection in International Law. Words in Commemoration of Krzysztof Skubiszewski*, 37 Polish Yearbook of International Law 11 (2017).

[8] For a detailed account of the *East Timor* case, *see* Hilpold (*Der Osttimor-Fall*), *supra* note 1, and R.S. Clark, *The „Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 The Yale Journal of World Public Order 2 (1980); C.M. Chinkin, *East Timor Moves into the World Court*, 4 European Journal of International Law 206 (1993); M.C. Maffei, *The Case of East Timor before the International Court of Justice – Some Tentative Comments*, 4 European Journal of International Law 223 (1993); A. Zimmermann, *Die Zuständigkeit des Internationalen Gerichtshofs zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten – Anmerkungen aus Anlaß der Entscheidung des IGH im Streitfall zwischen Portugal und Australien betreffend Ost-Timor*, 55(4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1051 (1995); K. Oellers-Frahm, *Rechtsfragen IGH: Portugal gegen Australien, in Sachen Osttimor*, 44(2) Vereinte Nationen 66 (1996), pp. 67-69.

under Portuguese colonial power realised that their time had come to claim their right to self-determination. While most of these people succeeded in this attempt, for the people of East Timor – who had not previously been engaged in a war of liberation – the situation changed from bad to worse and a real ordeal began. In fact, neighbouring Indonesia seized the opportunity of the power vacuum in its immediate neighbourhood and invaded East Timor on 7 December 1975. This outrageous and clearly illegal act cost the lives of over 100,000 people and even more people were driven from their homes. The international protest against and condemnation of this blatant violation of international law was stern and uncompromising, not only by single states but also by the UN General Assembly and by the Security Council.[9] In the aftermath, however, *realpolitik* soon set in, and in particular Western countries tried to come to terms with Indonesia, which was viewed as an important ally in their fight against the spread of communism. As a consequence, support for the cause of the East Timorese people within the UN institutions dwindled from year to year. Interestingly, much of the credit for the fact that the case of East Timor did not totally disappear from the international headlines goes to Portugal, a state which turned from a backward, brutal colonial state in the times before 1975 into a steadfast and upright advocate of the East Timorese people's rights in the period afterwards. As East Timor's decolonization process had not been brought to its natural end, Portugal continued to declare herself as this territory's "administering Power", and intended to ensure that the people of East Timor could complete the process of self-determination interrupted by Indonesia's invasion. This claim was recognized and supported by the UN[10] and by most states individually, though support for Portugal's mission was often hesitant and not very outspoken.[11]

After a massacre committed by Indonesian forces in 1991 in East Timor's capital Dili caused international outrage, world-wide attention to this people's cause flared up again, but Portugal had few options aside from political protest to turn this new solidarity into concrete action, as Indonesia had not accepted compulsory jurisdiction

[9] Starting with UN SC Resolution 384 (1975) and GA Resolution 3485 (XXX) and including a series of resolutions in the following years.

[10] *See, inter alia*, GA Resolution 35/27 (1980). On the whole, two resolutions of the Security Council and eight resolutions of the General Assembly supported the right to self-determination by East Timor. As to the Security Council, *see* resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and as to the General Assembly, *see* resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982. What is conspicuous in this list is the fact that support for the case of East Timor seemed to diminish over time, a sign that even for a right such as self-determination within the colonial context, a right uncontested in principle, broad and active support cannot automatically be taken for granted, especially not over a longer period of time.

[11] The most problematic attitudes were taken by Australia and the United States – the former being interested in good economic and political relations with its immediate neighbor, and the latter being above all interested in strengthening its ally Indonesia and preventing further expansion of communist influence in the Pacific. Australia accepted the incorporation of East Timor as part of Indonesia *de facto* on 20 January 1978 (ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 90, para. 17).

by the ICJ according to Art. 36(2) of the ICJ Statute and was, not surprisingly, unwilling to accept ICJ jurisdiction on an ad hoc basis in the East Timor case, which Indonesia considered as an internal affair.

Around the same time, a window of opportunity for Portugal to bring the East Timor issue before an international court had opened up in 1989 when Australia and Indonesia signed the so-called "Timor Gap Treaty", regulating the exploration and exploitation of the petroleum resources of parts of East Timor's continental shelf, to which both Australia and Indonesia had presented claims in the past.

In Portugal's view this treaty violated the East Timorese peoples' right to self-determination, as these resources pertained to East Timor while the revenue from these exploitation activities was not intended to go to the East Timorese. As Portugal was not involved in the negotiation of the Timor Gap Treaty, she regarded her rights as an administrative power to have been violated and intended therefore to act on behalf of the people of East Timor as part of her decolonization duties.

Being barred from acting against Indonesia because there was no jurisdiction against such a defendant, Portugal brought her claims against Australia. If any substantive value was to be given to the concept of *erga omnes* obligations, the ICJ should have accepted jurisdiction. As it turned out, in 1995 it was too early for such an endeavour: the ICJ preferred to fully uphold the principle of consent for the establishment of the ICJ's jurisdiction.

The ICJ took recourse to the so-called "Monetary-Gold principle";[12] i.e. that the Court could not rule on this case because to do so the Court would necessarily pass judgment concerning Indonesia's rights and obligations, which would be the "very subject-matter of such a judgment", and therefore Indonesia was to be considered a "necessary part" of such a proceeding.[13] As Indonesia had not given its consent to be involved, this whole endeavour was doomed from the beginning to fail on procedural grounds.

With great elegance, Krzysztof Skubiszewski laid open the weaknesses of the arguments presented by parties of the proceeding and of the judgment delivered by the Court.

2. KRZYSZTOF SKUBISZEWSKI'S DISSENTING OPINION IN THE *EAST TIMOR* CASE

Krzysztof Skubiszewski came to sit on the bench in this proceeding rather late in time. As there was no Portuguese judge on the bench (neither was there an Australian one), Portugal (like Australia) had the right to choose a judge ad hoc according to Art. 31(3) of the ICJ Statute.

[12] Developed in ICJ, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, 15 June 1954, ICJ Rep 1954, p. 19.

[13] ICJ, *East Timor*, para. 34.

In 1991 Portugal choose Antonio de Arruda Ferrer-Correia, but in 1994 he retired from this position and therefore he had to be replaced swiftly. The fact that Portugal did not choose a Portuguese national testifies to Professor Skubiszewski's extraordinary academic standing. Within a very short period of time he not only managed to become fully acquainted with this complex case but, as his Dissenting Opinion demonstrates, he developed a far more detailed and dogmatically challenging picture than the majority in the Court.

Professor Skubiszewski's Dissenting Opinion was more than just a masterfully written piece of dogmatic reasoning in international law. It was also conceived in a politically astute way, as Skubiszewski tried to provide evidence that the admittedly very progressive and innovative ideas developed in his Dissenting Opinion in reality coincided to a large extent with the basic philosophy propounded by his colleagues on the bench. He thereby managed to gently remind them of the missed opportunity to implement their visions in a case where humanitarian issues of enormous gravity were at stake.[14]

In this context Professor Skubiszewski, contrary to the majority of the Court, argued strongly against declining jurisdiction. He set out his argument that such a step was necessary not only on the basis of the rules governing jurisdiction and/or admissibility, but also "in accordance with the demands of justice,"[15] thereby introducing an argument based on natural law. And so he set out the following:

> A few years ago President Bedjaoui wrote that "it is through an awareness of the lines of force of [international] society, and of their articulations, that we can gain a better understanding … of [international law's] possible future conquests." In the opinion of the President the present phase of international law is that of a transition "[f]rom a law of co-ordination to a law of finalities." And the learned commentator states that "one of the essential finalities" is development, "true development, of a kind which will restore dignity to [the] peoples [of 'new States'] and put an end to relationships of domination."[16]

These references to previous statements by the ICJ President contain a series of strong pleas in favour of a new orientation in international law towards the restoration of the dignity of peoples by the termination of foreign domination. Thus traditional thinking in terms of an international law of coordination should be abandoned in favour of a "law of finalities."

At first sight this could be interpreted as an invitation to the Court to act courageously precisely in order to overcome the situations of injustice so strongly denounced by the ICJ's President. In fact, there could be no doubt that the situation in East Timor was one of foreign domination that impeded development and severely violated the

[14] *See also* S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing, Oxford – Portland (Oregon): 2007, pp. 194ss.

[15] Dissenting Opinion of Skubiszewski (*East Timor*), para. 43.

[16] *Ibidem*, para. 44, citing M. Bedjaoui, *Achievements and Prospect*, Martinus Nijhoff, Dordrecht: 1991, General Introduction, pp. 1, 14 and 15, respectively.

dignity of the people of East Timor. On the other hand, it was also clear that this was not exactly the situation Mohammed Bedjaoui had in mind when he called for a transition to a "law of finalities." As is well known, the then-ICJ President was a prominent representative of the "Third World Approach of International Law", an exponent of the first generation of this movement. This movement was first of all interested in examining, discovering and branding "traditional" situations of colonialism, while the East Timor case was rather a situation of "neo-colonialization" where a people under colonial domination was suddenly oppressed by a former colonial people, Indonesia, while the erstwhile colonial power, Portugal, had become the most committed advocate of the East Timorese people's rights.

Thus the content of this new "law of finalities" had to be defined in a somewhat different way, outside the perspectives of the traditional law of decolonization in order to be useful for the East Timorese.

To this avail, the second reference cited by Professor Skubiszewski, a statement by Judge ad hoc Lauterpacht in the case concerning the Application of the *Convention on the Prevention and Punishment of the Crime of Genocide*, seemed particularly useful:

> the Court should [not] approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element – albeit one of the greatest importance – in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organized.[17]

This was an early plea to put the individual at the centre of attention, a tendency that is often also epitomized by the slogan "humanization of international law."[18] Krzysztof Skubiszewski asked the Court nothing less than to have regard, first of all, to the needs of the individual as the "ultimate beneficiary" of the international legal system when a constructive solution in a contentious case is called for. A closer examination reveals that this is a revolutionary thought which, from the outset, can neither be dismissed nor accepted in full. In fact, States may be legal fictions and the well-being of the individuals forming their citizens, or even their residents, may be the ultimate goal of their creation. And it is nonetheless true that the primary subjects of International Law are still States, and their acts cannot be challenged automatically with the accusation that these measures would be contrary to the interests of the individuals forming this State.

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[17] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, ICJ Rep 1993, p. 408, para. 3

[18] For an early comprehensive study on this subject, *see* T. Meron, *The Humanization of International Law*, Brill/Martinus Nijhoff, Leiden/Boston: 2006. For a historical perspective on this development, *see* P. Hilpold, *R2P and Humanitarian Intervention in a Historical Perspective*, in: P. Hilpold (ed.), *The Responsibility to Protect*, Brill/Martinus Nijhoff, Leiden/Boston: 2015, pp. 60-122.

In the field of human rights, however, it is possible to put into question state behaviour before international courts and other controlling institutions.

And then there is the subject of self-determination, in relation to which the questions – What is its ultimate finality?; Who should be its ultimate beneficiary?; How are the rights of the individual related to those of the group?: and How should this right be balanced against possible countervailing rights such as state sovereignty? – are of pivotal importance.

Professor Skubiszewski argued for a bolder approach in this area, for tipping the balance in favour of the right of self-determination, interpreted as a right granted primarily for the benefit of the individual.

The Court was not prepared to follow him at that time, but neither did it want to definitively close the door to such an interpretation. Otherwise it would not have given so much conspicuous attention to the right to self-determination, accepting Portugal's qualification of this right as having an *erga omnes* character.[19] It further qualified this right as "one of the essential principles of contemporary international law",[20] only to declare immediately afterwards that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[21]

This statement is true, but at the same time it misses the essential points. What should be done in the case of a principle that is, according to the Court, at one hand of such an "essential" character, that is should apply *erga omnes* but which lacks, again according to the Court, sufficient specification as to its substantive content and which cannot be implemented if this would mean some sort of indirect reproach against a third party (in this case Indonesia) that has not accepted the Court's jurisdiction?[22]

Judge ad hoc Skubiszewski explained very well in his Dissenting Opinion that to speak of self-determination does have some minimum implications. He stated the following:

> I think that the Court can base itself on certain elementary assumptions: the interests of the people are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by the use of force; when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with

[19] "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes charac*ter, is irreproachable." ICJ, *East Timor*, para. 29.

[20] *Ibidem*.

[21] *Ibidem*.

[22] According to R. McCorquodale, *Group Rights*, in: Daniel Moeckli et al. (eds.), *International Human Rights Law*, Oxford University Press, Oxford: 2014, pp. 344-366 (350) the qualification of the right to self-determination as an obligation *erga omnes* signifies that this right "applies to peoples beyond the colonial context." This proposition is, however, not convincing, as the qualification as "*erga omnes*" refers to procedure and not to substance. It would be safer to say that reference to the "*erga omnes*" concept implies, first of all, that the right to colonial self-determination applies or is to be respected also outside the colonial context.

the exclusion of the people and/or the United Nations Member who accepted "the sacred trust" under Chapter XI of the Charter.[23]

If any value was to be attributed to the right to self-determination outside a strictly traditionalist meaning according to which colonies have the right to freely choose their political status, the Court could have made further specifications along the lines indicated by Professor Skubiszewski without infringing Indonesia's sovereign rights in any form whatsoever.

It is further interesting to note that the Court decided to qualify the right to self-determination as an "essential principle of contemporary international law." It is difficult to understand what the Court meant by this term, as there is no *terminus technicus* of such a kind in International Law. Arguably, the Court wanted thereby to highlight not only the political relevance of this right but also its status as a legal norm. No explanation or further help is provided in this regard by the Court. Professor Skubiszewski did not shy away from addressing this issue squarely: He sees a close relationship between this concept with that of "jus cogens", a term the Court wanted to avoid, as it seems, at any cost. He demonstrates how the same judges sitting in the bench in this case had previously emphasized the importance of the right to self-determination in terms that would be very much relevant for the East Timorese in the present case. In academic writings, Judge Bedjaoui qualified it as "a primary principle from which other principles governing international society follow", as "part of jus cogens" to which the "international community could not remain indifferent to its respect."[24] And according to Judge Ranjeva "[t]he inviolability of the rights of peoples means that they have an imperative and absolute character that the whole international order must observe."[25]

It is true that these citations related to writings that were framed against the background of typical situations of colonial self-determination. But should the nature of a right be differently interpreted depending on the situation to which it applies? As will be seen below in the context of the discussion of the Chagos case, the ICJ continues to have difficulties in addressing the question whether a *jus cogens* character is to be attributed to the right to self-determination even in typical cases of colonial self-determination, as the consequences would probably be disruptive.

Even more so than the concept of self-determination, the true meaning of an *erga omnes* obligation remains in the dark, even though, paradoxically, this concept is so emphatically highlighted by the Court. In substance, however, Professor Skubiszewski makes it clear that recourse to this concept is not even necessary to establish jurisdiction. The Portuguese claims against Australia could have been heard by the Court in any case: It would have sufficed for the Court to make a finding on the unilateral acts of Australia

[23] ICJ, *East Timor*, para. 52.

[24] Dissenting Opinion of Skubiszewski (*East Timor*), para. 135, with reference M. Bedjaoui, in: J.-P. Cot and A. Pellet (eds.), 2nd ed. 1991, pp. 1082-1083.

[25] *Ibidem*, with reference to Raymond Ranjevy, *Peoples and National Liberation Movements*, in: M. Bejaoui (ed.), *International Law: Achievements and Prospects*, 1991, p. 105, para. 16.

with respect to the conclusion of the Timor Gap treaty,[26] as Australia was obliged to respect the East Timorese right to self-determination. Judge Skubiszewski also made clear that otherwise we run the risk of using the concept of *erga omnes* obligations in a totally counter-productive way, in a way that was surely not in the mind of those who first introduced it and afterwards forcefully advocated it.[27] If in the presence of an *erga omnes* obligation each party affected by such a right would be a necessary party of any controversy concerning such right "the Court would practically be barred from deciding whenever the application of the *erga omnes* rule" was at stake.[28] This whole approach would turn out – and in practice has turned out – such that the Court winds up protecting not the East Timorese, but Indonesia!

In his Dissenting Opinion Krzysztof Skubiszewski also dealt extensively with the obligation of non-recognition.[29] He pointed out that non-recognition would be an obvious corollary of the use of force by Indonesia against East Timor, an obligation that should apply also to Australia. In the end, however, he remained cautious in this regard as he had to admit that the Court had not been asked to adjudicate on non-recognition,[30] even though he felt that this question could not be circumvented.

Judge Skubiszewski obviously could not ignore that he was in the minority, even though he had received strong support by Judge Weeramantry in an equally formidable Dissenting Opinion. Nonetheless, Professor Skubiszewski's Dissenting Opinion is permeated by a spirit of optimism, which was perhaps characteristic of his nature. And in this sense, his Dissenting Opinion ended on a positive note that could anticipate in many senses what afterwards should become reality.

He wrote in para. 123:

> We were told, in connection with East Timor, that "the realities of the situation would not be changed by our opposition to what had occurred" (the position of the United States, quoted in Rejoinder, para. 47). For the time being, that may be true. Yet we all know of instances where there was opposition and various "realities" proved to be less resistant to change than Governments might have thought.[31]

As is well known, this is exactly what happened. Only four years later, after Indonesia had ended up in a deep economic and political crisis, East Timor was again under UN administration and the way was opened for a true process of self-determination,

[26] *Ibidem*, para. 95.

[27] On the concept of *erga omnes* obligations *see* P. Picone, *Comunità internazionale e obblighi "erga omnes"*, (3th ed.), Jovene, Naples: 2013; P. Picone, *Gli obblighi erga omnes tra passato e futuro*, Questions of International Law 3 (2015), and C. Focarelli, *Le contromisure pacifiche collettive e la nozione di obblighi erga omnes*, 1 Rivista di diritto internazionale 52 (1993).

[28] *See* Dissenting Opinion of Skubiszewski (*East Timor*), para. 79.

[29] *Ibidem*, para. 122ss.

[30] *Ibidem*, para. 131.

[31] These statements resonate with much what in International law theory can be summarized by the concepts of "progress" or the "belief in progress." For more this concept, *see* R.A. Miller, R.M. Bratspies (eds.), *Progress in International Law*, Martinus Nijhoff, Leiden/Boston: 2008 and, fundamentally, M.O. Hudson, *Progress in International Organisation*, Stanford University Press, Stanford, CA: 1932.

eventually leading East Timor to independence. Thus it can be said that Krzysztof Skubiszewski had perspicaciously anticipated what would become reality in East Timor only shortly thereafter.

However, Skubiszewski's Dissenting Opinion goes far beyond the East Timor question, as it addresses the question of the nature of self-determination in a very innovative way, putting the individual at the centre of his interest. In this sense, Skubiszewski's vision still remains to be implemented.

At the same time we have to take note of the fact that Judge Skubiszewski's vision was a long-term one. In many ways his ideas were revolutionary and the recent *Chagos* Opinon by the ICJ offers a good opportunity for a stock-taking: What has been achieved in the quarter of century that has elapsed since the East Timor judgment, and which questions still remain open? What are the specific circumstances under which we should look to Professor Skubiszewski's Dissenting Opinion for advice on how to shape the right to self-determination further in such a way that it becomes even more attuned to the necessities of modern mankind?

To this avail let's now have a look at the *Chagos Islands* Opinion.

3. THE *CHAGOS ISLANDS* CASE

3.1. The origins of the *Chagos Islands* case

The *Chagos Islands* case is in one sense a "typical", "traditional" case of colonial self-determination which, however, presents very specific traits. They were in the end also decisive for this case and as a consequence the Chagos Islands were not affected by the wave of self-determination that brought independence to most colonies in the second half of the 20th century.

For a long time, between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius.[32] As soon as it became clear that the traditional colonial empires could no longer be upheld and that colonies would have to be granted independence, fears arose among Western nations that the resulting power vacuum would be filled by the Communist states, with the Soviet Union in particular entering into these new free spaces.[33] The Chagos Islands posed a particularly delicate challenge as this archipelago lies rather detached from Mauritius in the midst of the Indian Ocean, thus being extremely attractive as a military base. The United Kingdom (UK) took recourse to a sophisticated stratagem in order to come up with its imperative international law duties in the field of decolonization while at the same time preserving its strategic interests in cooperation with the United States. It decided that Mauritius should be granted independence, but at the same time

[32] *Ibidem*, para. 28.

[33] *See* S. Allen, *Self-Determination, the Chagos Advisory Opinion and the Chagossians*, 69 International & Comparative Law Quarterly 203 (2020).

the British government required the Mauritian government to accept the detachment of the Chagos Islands, which became a new British colony – the "British Indian Ocean Territory" (BIOT) and which should remain with the UK. In the so-called "Lancaster House Agreement" of 1965 Mauritius had to agree to this UK plan as a factual precondition for being granted independence in 1968, a right which would have pertained to Mauritius anyway.[34] In 1966 the UK concluded a treaty with the US for a 50-years-rental by the latter of Diego Garcia, the largest island of the Chagos archipelago for military use.[35] This had as a consequence that the Chagossians – mostly descendants of Afro-Madagascar slaves who were brought to these formerly uninhabited islands in the 18th and 19th centuries by French and British settlers[36] – were forcibly removed in the years between 1968 and 1973.[37] They and their descendants are now living in extreme poverty on the island of Mauritius and in other countries.

Starting in the 1980s, and also as a result of mounting protests by Mauritius, it became more and more clear that the Mauritius/Chagos process of self-determination had not been completed lawfully.

The decisive step leading to a turning point was undertaken on 23 June 2017, when the UN General Assembly, with the strong support of the African Union, adopted resolution 71/292, requesting an advisory opinion from the Court on the "Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965." This Opinion was eventually rendered on 25 February 2019, creating a considerable headache for the UK.

In fact, the ICJ stated in this case that the UK had not legally completed the decolonization process and that the continued administration of the Chagos Archipelago constituted a wrongful act. The Court stopped short of qualifying this situation a violation of *jus cogens*, but it referred to the *erga omnes* concept and asked all states to co-operate to ensure the completion of the decolonization process.

It qualified the right to self-determination as a "fundamental human right" but it left it to the General Assembly to look into the human rights situation of the Chagossians.

2.2. An analysis of the *Chagos* Advisory Opinion

Without doubt the *Chagos* Opinion was in a certain sense ground-breaking, as the ICJ was prepared to accept jurisdiction over a highly contentious case, while in the East Timor case it had refused to deal with a similar issue. By this Opinion, the right to self-determination was considerably strengthened on the international level, at least with regard to the colonial context.

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[34] *See* U. Demsar et al., *The Concept of Duress in the World of Decolonization*, 55 Questions of International Law 119 (2018), p. 119: "Mauritius was clearly under 'pressure' when the Lancaster House Agreement was concluded."

[35] This treaty expired on 30 December 2016 and was extended then for a further twenty years period. *See* ICJ, *Chagos*, para. 51.

[36] *See* D. Taylor, *Slavery in the Chagos Archipelago*, Chagos News, No. 14, 2000, pp. 1-4.

[37] *See* Allen, *supra* note 33, p. 205.

If we return again to Professor Krzystof Skubiszewski's Dissenting Opinion of 1995 we cannot but be impressed by his sharp-minded anticipation of the developments to come over the following years and decades. If the Court of 1995 had adopted the criteria applied by the Court of 2019 presiding over the *Chagos* case one might dare to speculate that it might also have accepted jurisdiction. And we can generally only speculate as to the effects the East Timor case had on the *Chagos* case. Without doubt, the former helped the Court to become further acquainted with specific self-determination issues that present particular elements of complexity. Furthermore, the East Timor case generated a certain amount of disappointment and criticism, which the Court from then on wanted to avoid. In this sense it could be argued that in the *Chagos* proceeding the Court showed the way for bringing to a closure an endeavour, decolonization, the United Nations had been occupied with for decades.

Yet nonetheless, the *Chagos* case also makes clear that this task is not yet fully completed. What about the plight of the Chagossians? Should we really care about whose flag is waving on the Chagos Islands? Or should international law (and international courts) rather look, first of all, for ways to overcome the human suffering caused by colonization, be it in its colonial, post-colonial, or neo-colonial dimension?

Once again the Dissenting Opinion by Professor Skubiszewski demonstrates in a very lucid way what is still missing – we are still waiting for the interpretation of the right to self-determination in a fully human rights-based perspective.

It is striking that Prof. Skubiszewski in his Dissenting Opinion of 1995 pointed out that what really counts in any discussion about the right to self-determination are the actual wishes of the people, the individuals concerned.[38] In 1995 it was the wishes of the East Timorese that were disregarded, and in 2019 the interests of the Chagossians. Today, the search for a "law of finalities"[39] has become even more important than it was in 1995, and there can be no doubt that these "finalities" have to put the individual at the forefront. As it seems, in 2019 the ICJ was still not yet willing to take this decisive step forward. This might appear to be disappointing, but again we can refer to Professor Skubiszewski's Dissenting Opinion for a glimmer of hope.

It was mentioned above that Professor Skubiszewski wisely foresaw that often realities which might see immutable at one time can rapidly change if opposition becomes too strong.[40] And he added the following: "[e]ven in apparently hopeless situations respect for the law is called for. In such circumstances that respect should not mean taking an unrealistic posture. History gives us surprise."[41]

Krzysztof Skubiszewski did not explicitly state it, but with elegant understatement he managed to demonstrate that the majority on the bench had missed an extraordinary opportunity to translate theory into practice, to act in a way coherent with one's own proclaimed ideals, and to take an important step forward in the development of International Law.

[38] Dissenting Opinion of Skubiszewski (*East Timor*), para. 52.
[39] *Ibidem*, para. 44.
[40] *Ibidem*, para. 123.
[41] *Ibidem*, para. 133.

CONCLUSIONS

As we know, Professor Skubiszewski's vision with respect to East Timor came true when the East Timorese got the opportunity to exercise right to self-determination only a few years later. And there is hope that the same might happen with the Chagos Islands, where the East Timorese not a territorial claim by Mauritius should be seen as the pre-eminent objective to realize at least an improvement of the lot of the Chagossians as well as the attribution to them of a true right to self-determination wherever they are now living (as a consequence of the violation of their rights). If this takes place, it would also constitute a decisive contribution for the further development of the right to self-determination in accordance with the "present finalities" of international law as a legal order now firmly premised on respect for human rights.

Of course this would not mean a total re-definition of the right to self-determination as it was originally conceived by US President Woodrow Wilson towards the end of World War I. For the foreseeable future, the right to self-determination will most probably maintain a prevailingly collective connotation. Attempts to conceive an individual right to self-determination have obtained broad support in political philosophy, but it is not realistic to pretend their implementation may come any time soon, and perhaps such a development would not even be desirable. [42]

It appears to be utopian (or perhaps more accurately dystopian) to think that the individual will – aggregated into smaller or larger collectivities that can be formed and changed spontaneously – should be able to determine the shape of national boundaries. Most probably, such a rule would heighten instability and weaken the degree of protection that an individual can expect from the state of which he or she is a citizen or resides.[43]

What can be expected however, and what seems to be overdue, is a broadening of the perspective when it comes to assessing claims of self-determination and their implementation. In a certain sense, the legal theory on self-determination has remained

[42] Individualistic self-determination as a way to complete freedom might have considerable political appeal, but even on a psychological level it is doubtful whether such freedom is achievable, let alone desirable. *See* B. Schwartz, *Self-determination: The Tyranny of Freedom*, 55(1) American Psychologist 79 (2000). As to the difficult – and in many ways still unexplored – relationship between (mainly individualistic) human rights and the (mainly collective) right to self-determination, *see* A. Etinson, *Human Rights: Moral or Political?*, Oxford Scholarship Online 2018.

The individualistic perspective of self-determination is more known to political science than to legal theory. Unfortunately, however, political science and legal theory, when dealing with issues of self-determination, are mostly speaking on totally different levels and there is little communication between these levels and little reciprocal exchanges of knowledge. Christian Tomuschat has offered the following rather critical words about the philosophical approach to self-determination: "[…] most of these reflections remain to an astonishingly narrow framework of abstract ideas." *See* Ch. Tomuschat, *Secession and Self-determination*, in: M.G. Kohen (ed.), *Secession*, Cambridge University Press, Cambridge: 2006, pp. 23-45 (26).

[43] For more on this important function *see* Christian Tomuschat (*ibidem*) who espouses a balanced attribution of rights to individuals and states in international law in order to maximize the protection and the benefit of the individual.

stuck in the "state only" perspective typical for International Law prior to WWII.[44] The human rights aspect of self-determination should no longer be diminished, and certainly not neglected. Considering the right to self-determination purely as an instrument to regulate claims between existing or aspiring states omits the fact that in the meantime human rights constitute, next to states and international organizations as expressions of the traditional subjects of international law, the second pillar on which this whole legal order is grounded. In academia it is widely-discussed whether the individual should have – in the formation, interpretation and application of international law – at least some participatory rights, albeit to a lesser or narrower extent.[45] At least with regard to self-determination the participation of individuals seems to be essential if this concept is to have any meaning in the 21st century. Considering self-determination issues merely from a traditional, statist perspective may lead to interesting statements of principle, but at the same time runs the risk of missing out on pivotal aspects that undergird our international legal order of values or, to again couch it in the words of Professor Skubiszewski, of the new "International Law of finalities."[46]

[44] For more on this perspective, *see* A. Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*, Oxford University Press, Oxford: 2018, pp. 17ss, citing inter alia Heinrich Triepel, Dionisio Anzilotti and Lassa Oppenheim. The latter wrote the following: "The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilized States consider legally binding in their intercourse, every State which belongs to the civilized States, and is, therefore, a member of the family of Nations, is an International Person. Sovereign States are exclusively International Persons – i.e. subjects of international law." (*see* L. Oppenheim, *International Law: A Treatise – Peace*, 1905, p. 44, cited according to Kjeldgaard-Pedersen, p. 17).

[45] *See* K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, Cambridge: 2011, pp. 352ss, with further references.

[46] *See* W. Friedmann, who already in 1964 saw the necessity to head towards a "law of cooperation", in: *The Changing Structure of International Law*. For more on the new value-orientation in International Law, *see also* P. Hilpold, *Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union*, 34 Yearbook of European Law 257 (2015).