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ICJ Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago From Mauritius in 1965 (Chagos Advisory Opinion): A Critical Analysis

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Abstract: *The Chagos AO is a milestone in the history of decolonization which certainly added some narratives to the jurisprudence of the right to self-determination, rules of identification of customary international law, and the practice of the ICJ in relation to its jurisdiction on an advisory opinion. Similarly, ICJ had missed dealing with the human rights of the inhabitants of Chagos Archipelago which was the subject matter of the opinion, whether the right to self-determination qualifies as peremptory norms or not, etc. This paper critically discusses the approach taken by the World Court in this case in five sections, e.g., the judicial propriety in the AO, the territorial aspect of the right to self-determination, the right to self-determination and customary international law, the right to self-determination and jus cogens, and human rights of the Chagossians.*

1. Introduction

The subject matter of the advisory opinion, the Chagos Archipelago, is located in the Indian Ocean and consists of a number of islands and atolls.[1] Between 1814 and 1965, it was a distant dependency of the non-self-governing territory (NSGT) of Mauritius which was administered by the UK.[2] On 23 September 1965, the UK entered into an agreement (the Lancaster Agreement) with the representative of the colony of Mauritius which contained a provision to detach the archipelago from Mauritius.[3] With the detached area, the UK established a new colony called British Indian Ocean Territory (BIOT) on 8 November 1965.[4] The UNGA expressed deep concern about such detachment.[5] In 1966, the UK and the USA

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[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para. 26 [hereinafter *Chagos AO*].

[2] Ibid., para 28.

[3] Ibid, para 32.

[4] Ibid, para 33.

[5] Ibid, para 34.

concluded an agreement on the use of BIOT.[6] The inhabitants of the island were forcefully removed thereafter and prevented from returning.[7]

Mauritius became an independent State on 12 March 1968 and was admitted to the membership of the UN on 26 April 1968.[8] Just after the independence, Mauritius started demanding the return of the islands. On June 22, 2017, the UNGA adopted resolution 71/292[9] by which it requested ICJ for an advisory opinion on two questions: (a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law [….]?" and (b) "What are the consequences under international law [……..] arising from the continued administration by the United Kingdom[……] of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"[10]

On February 25, 2019, ICJ delivered its advisory opinion on the above two questions.[11] The Court opined that "the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence" and that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible".[12] In reaching such conclusions, the Court analyzed or could analyze a couple of issues. Delving into the Chagos Archipelago advisory opinion, this article scrutinizes the International Court of Justice's (ICJ) treatment of related critical issues. A comprehensive narrative uncovers the Court's approach to judicial propriety, the significance of territorial self-determination, interpretations of customary international law and jus cogens principles, and evaluation of human rights for the Chagossians.

In doing so, this paper will address the questions of how did the ICJ address issues of judicial propriety, how did it interpret the right to self-determination in relation to customary international law and *jus cogens* norms, what was the ICJ's approach to assessing the human rights of the Chagossians, and what is the

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[6] Ibid, para 36.

[7] Ibid, para 44.

[8] Ibid, para 42.

[9] UNGA Res 71/292 (22 June 2017) UN Doc A/RES/71/292.

[10] 'Request for Advisory Opinion Transmitted to the Court pursuant to General Assembly Resolution 71/292 (A/71/L.73) of 22 June 2017' (2019) 2 <https://www.icj-cij.org/public/files/case-related/169/169-20170623-REQ-01-00-EN.pdf> accessed 25 May 2022 [hereinafter *Request for an Advisory Opinion*]

[11] *Chagos AO* (n 1) para 183.

[12] Ibid, paras 174 and 182.

significance of the territorial aspect of the right to self-determination in the ICJ's decision? This paper will address all the questions in separate chapters and will employ a qualitative research approach involving a comprehensive analysis of the ICJ's advisory opinion on the *Chagos Archipelago,* the separate statements of judges, pleadings of interested states, etc.

2. Judicial Propriety in Chagos AO

The jurisdiction of the ICJ in the *Chagos AO* was largely uncontested; the court unanimously favored its jurisdiction on the basis of Article 65(1) of the ICJ Statute.[13] The determination of whether the court has jurisdiction or not is different from whether the court will exercise the jurisdiction or refuse it. Because Article 65 of the Statute, the constitutional basis of the ICJ advisory function, uses permissive language as it provides that "the Court may give an advisory opinion". Such a permissive language empowers ICJ to refuse to give an opinion even if the requirements of the jurisdiction are met.[14] These two preliminary issues are divided into "jurisdiction" and "judicial propriety".[15] In *Chagos AO*, the Court decided to exercise its jurisdiction by twelve votes to two.[16]

Court's affirmative or negative decision to respond to requests depend on the principle "to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations"[17] Despite the permissive language in Article 65 of the Statute, the Court usually has a strict standard for declining to give an opinion, emphasizing that its response is meant for the requesting body, and it sees itself as a part of the United Nations' activities, so it generally shouldn't refuse"[18] Practice shows that only the "compelling reasons" lead the court to refuse an opinion.[19] Lack of consent may constitute the "compelling reasons" to refuse a request, as the Court observed in *Western Sahara AO* that "lack of

[13] Ibid, para 183.

[14] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, para 44 [hereinafter *Wall AO*]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, para 29 [hereinafter *Kosovo AO*].

[15] *Wall AO* (n 14) para. 2.

[16] Judges Tomka and Donoghue voted against this position. See, *Chagos AO* (n 1), para 183.

[17] See, for example, *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (Advisory Opinion)* [1950] ICJ Rep 65, at 71 *[Interpretation of Peace Treaties AO*]; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62, at 78-79, para. 29; *Wall AO* (n 14) para. 44.

[18] See, for example, *Interpretation of Peace Treaties, Ibid*; *Reservation to the Convention on the Prevention and Punishment of the Crime against Humanity (*Advisory Opinion) [1951] ICJ Rep 15, at 19.

[19] See, for example, *Wall AO* (n 14) para 44; *Kosovo AO* (n 14) para 30.

consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion."[20] A careful reading of this statement shows that refusal on the ground of "lack of consent" is not absolute because it contains one qualified phrase "in the circumstances of a given case".

The role of consent in the context of judicial propriety was first discussed in the *Eastern Carelia Advisory Opinion* of the PCIJ, the predecessor of ICJ, in which the Court observed that "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement"[21]. The ICJ interprets the role of consent in deciding the propriety of an AO narrowly, as Polonskaya observed "(1) by rhetorically characterizing existing legal disputes between two States as "legal controversies"; (2) by referring to "context" as a relevant factor in assessing lack of consent; (3) by focusing on the "effect" of giving an opinion; and (4) by repeatedly distinguishing the application of the *Eastern Carelia case* on the facts."[22]

In the *Chagos AO*, most States opposing the AO challenged it on the ground of "propriety".[23] Israel, for instance, in its written statement claimed that the two questions placed before the Court goes to the heart of the bilateral dispute pending before the UK and Mauritius and involved the matters of territorial sovereignty and thus it should preclude the court from delivering the Opinion.[24] France emphasized the importance of State-consent in the settlement of the dispute and then it requested the Court to avoid the "advisory proceedings being used, improperly, as an alternative means of bringing an action when one of the parties to the dispute does not consent to the Court's jurisdiction."[25] In contrast to the approach, some other States emphasized balancing consent with the Court's role as the legal advisor of the UN and as the principal judicial organ of the UN system. Argentina, for instance, emphasized decolonization which is the subject matter of the request and which is within the duties of the UNGA.[26]

[20] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 para 32.

[21] *Request for Advisory Opinion concerning Eastern Carelia,* PICJ Series B No 5, page 17.

[22] Ksenia Polonskaya, 'International Court of Justice: The Role of Consent in the Context of Judicial Propriety Deconstructed in Light of Chagos Archipelago' (2019) 18 The Law & Practice of International Courts and Tribunals 189, at 200.

[23] *Chagos AO* (n 1)*,* paras 63-93.

[24] Ibid, Written Statement of Israel, para 3.1 <https://www.icj-cij.org/public/files/case-related/169/169-20180227-WRI-04-00-EN.pdf> accessed 25 May 2022.

[25] Ibid, Written statement of French Republic, para 19 *sic,* <https://www.icj-cij.org/public/files/case-related/169/169-20180227-WRI-03-00-EN.pdf> accessed 25 May 2022.

[26] Ibid, Written Statement of Argentine Republic, para 23-30, <https://www.icj-cij.org/public/files/case-related/169/169-20180301-WRI-09-00-EN.pdf> accessed 25 May 2022.

The majority of judges in the *Chagos AO* took a narrow approach to interpreting the relevance of consent so as not to circumvent its role as the principal judicial organ and as the legal advisor of the UN on providing guidance to the UNGA. The Court followed its practices in the earlier AOs in interpreting consent narrowly. Firstly, the Court noted that the views expressed by Mauritius and the UK were "differences of views on legal questions" or "divergent views" which does not mean that the Court is dealing with a bilateral dispute by replying to these questions.[27] Secondly, it noted that the questions brought by the UNGA were related to the decolonization of Mauritius (context) which is the "particular concern of the UN", and not "to resolve the territorial dispute between two States".[28] Thirdly, the purpose of the request by the UNGA was to "receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius"[29]. It is mention-worthy here that questions put by UNGA were cleverly drafted which did not use "sovereignty" and thus distinguished this dispute from being a bilateral one.

Judge Donoghue, in her separate opinion, expressed her view that the "Advisory Opinion has the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court's judicial function" and thus the Court should have refrained from providing opinion at least in respect of Question (b).[30] She opined that although the question did not use the term "sovereignty", there is an existing dispute between the UK and Mauritius concerning the sovereignty over the Chagos Archipelago which lies at the heart of the request.[31]

In a similar tone, Judge Tomka criticized the majority opinion.[32] The aftermath of the AO shows that the concerns of the dissenting judges had merits. On 22 May 2019, the UNGA adopted resolution 73/295 with 116 votes in favor, 6 against, and 56 abstentions, by which it welcomed the AO and urged the UK to withdraw its colonial administration within 6 months and to cooperate with Mauritius in the resettlement of its nationals in the Chagos Archipelago.[33] Such adoption of the resolution suggests the *de facto* law-making effects of the AO though limited.[34]

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[27] *Chagos AO,* (n 1) para 89.

[28] Ibid, paras 86 and 88.

[29] Ibid*,* para 86.

[30] Ibid (Dissenting Opinion of Judge Donoghue) paras 1, 22 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-06-EN.pdf > accessed 25 May 2022.

[31] Ibid, paras 5-9, 12-19.

[32] *Chagos AO* (n 1) (Declaration of Judge Tomka) para 8 <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-02-EN.pdf> accessed 25 May 2022.

[33] UNGA Resolution 73/295 UNDoc A/RES/**73**/295.

[34] See for details, Giulia Bernabei, 'The Law-Making Effect of ICJ Advisory Opinions: A Survey of

Both the opinion of the court and the dissenting judges are, I believe, legally sound. The Court's approach to limiting the consent clearly demonstrates its departure from a state-centric approach to a community-oriented approach. On the other hand, the dissenting judges supported the state-centric approach. They took two separate approaches to reach their conclusion and both approaches are correct with having sound juridical reasons. Judge Parra-Aranguren noted in his separate opinion in *Malayasia vs Singapore* case that "juridical reasons can always be found to support any conclusion".[35] The permissive language of Article 65 (1) of the Statute allowed the Court to choose any one of the alternative options. Such a juridical discretion, as Barak defined it, is "the power the law gives the judge to choose among several alternatives, each of them being lawful"[36]. Judge Bedjaoui illustrated it as "when a legal norm gives courts the choice between two or more solutions, all of them legal ones therefore, it gives them latitude or freedom of decision, whence comes what is termed their discretion or discretionary power".[37]

Such an idea that the court chooses from two equally plausible legal solutions led the Court to take shelter of doctrines, labels, principles, etc. to reach the ends they view as desirable from the perspective of their judicial policy.[38] The "community-oriented" and "state-oriented" approaches as undertaken by the Court and dissenting judges in the *Chagos AO* are nothing but how they choose to view judicial propriety. The *Chagos AO* underscored the intricate interplay between ICJ jurisdiction and propriety in advisory opinions. Despite unanimous jurisdiction affirmation, the Court exercised it prudently, prioritizing its UN organ role. The high threshold for opinion refusal is crucial. Balancing state-centric and community-oriented stances, the ICJ's discretion in a complex legal landscape is vital for its advisory function's integrity.

3. A Territorial Aspect of the Right to Self-Determination

To avoid the impression that the AO was a bilateral dispute concerning territorial sovereignty, Mauritius chose not to argue with title to territory.[39] Rather,

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the Chagos Opinion' in Patrícia Galvão Teles and Manuel Almeida Ribeiro (eds), *Case-Law and the Development of International Law* (BRILL NIJHOP 2021).

[35] *Case concerning Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 *(Separate Opinion of Judge Parra-Aranguren)* 107, para 1 < https://www.icj-cij.org/public/files/case-related/130/130-20080523-JUD-01-02-EN.pdf> accessed 25 May 2022.

[36] Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 7.

[37] M Bedjaoui, 'Expediency in the Decisions of the International Court of Justice' (2001) 71 British Yearbook of International Law 1, at 5.

[38] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 97.

[39] Stephen Allen, 'SELF-DETERMINATION, the CHAGOS ADVISORY OPINION and the CHAGOSSIANS' (2019) 69 International and Comparative Law Quarterly 203, at 210.

it emphasized on right to territorial integrity via the route of the right to self-determination. Mauritius in its written statement argued that the "legal corollary was that self-determination should be exercised on the part of the entirety of the population within the existing limits of the territory concerned".[40] In support of its position, it quoted jurists like Malcolm Shaw and Raic as Raic commented:

> "In sum, the right of self-determination, which in this context has been referred to as "a right to decolonization" was applied to all inhabitants of the colonial territory and not to minority groups or segments of the population within that territory. … Therefore, as a general rule, self-determination had to be granted to Trust Territories and Non-Self-Governing Territories as a whole."[41]

The United Kingdom in its written comments opposed this view and claimed that "[t]erritorial integrity and self-determination are not neat corollaries. The principles can pull in different directions: a claim to self-determination may be a claim against territorial integrity".[42] The ICJ supported Mauritius in this regard and reaffirmed that "[…] respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law".[43]

Such a territorial aspect of the right to self-determination is further reiterated in the court's approach to determining "peoplehood" as the holder of the right to self-determination. The Court's treatment of the relationship between Mauritians and Chagossians is worth mentioning here. Here, the Court did not consider the distinctiveness of Chagossians as inhabitants of the islands separate from Mauritius and their distinct traditions, culture, language, ethnicity, etc. The Court did not even consider the free and genuine will of the Chagossians to determine them as separate "people" and the holder of the right to self-determination. The Court took a territorial approach to determine peoplehood. According to this approach, the term "people" embraces the entire population of a colonial territory or a State.

In *Chagos AO,* the ICJ considered that the "peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole" and recalled that "the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing

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[40] *Chagos AO* (n 1) *(Written Statement of Mauritius)* para 6.50.3. <https://www.icj-cij.org/public/files/case-related/169/169-20180301-WRI-05-00-EN.pdf> accessed 25 May 2022.

[41] Ibid, paras 6.56 and 6.57.

[42] Chagos AO (n 1) (Written Comments of the United Kingdom of Great Britain and Northern Ireland) 69, para 4.31 < https://www.icj-cij.org/public/files/case-related/169/169-20180514-WRI-01-00-EN.pdf> accessed 25 May 2022.

[43] *Chagos AO* (n 1) para 160.

territory."[44] Here, the Court did not distinguish Chagossians from the Mauritian people as the holders of the right; instead took a territorial approach to define people. The Court used "Mauritian nationals, including those of Chagossian origin" to describe "people."[45] Such clarification of "peoplehood" by the World Court will remove some confusion that a minority group, inhabitants of an overseas territory under an independent State, or a particular group who are facing gross human rights violations by the independent state will not be entitled to the right to self-determination as a separate entity than people of one single territorial unit.

Ian Klabber is worth quoting here as he observed that "It is impossible to think of any excuse for genocide, apartheid or slavery. But self-determination is different: perhaps precisely because it embodies its own antithesis, it is easy to think of compromising self-determination, putting it on hold, or denying it altogether in the name of some higher or different interest, and in the realization that my self-determination may end up undermining your self-determination, as when there is a minority within a minority".[46]

In conclusion, the Chagos AO underscored the significance of the right to self-determination's territorial aspect. Mauritius advocated for self-determination through territorial integrity, emphasizing inclusiveness across colonial territories. The ICJ supported this stance, stressing that respecting territorial integrity is crucial to the right to self-determination. The Court's territorial-based "peoplehood" determination aligned the rights of inhabitants with the whole population, facilitating clarity amidst potential complexities in self-determination claims. This reaffirms the intricate interplay of self-determination, territorial integrity, and minority rights in international law.

4. Human Rights of the Chagossians

The Chagos Archipelago case presents a glaring omission in the ICJ's consideration of human rights. While acknowledging Chagossians' suffering due to forced displacement, the Court neglected a comprehensive exploration of their human rights violations. The Court's focus on territorial aspects of self-determination downplayed Chagossians' individual rights. The absence of addressing Chagossians who aren't Mauritian nationals and not assessing the legality of their mistreatment, despite UK's admission, underscores the overlooked relevance of human rights. This omission was criticized by judges who highlighted the need to address reparations and compensation. In essence, the ICJ failed to fully address the human rights dimensions of the Chagos AO, leaving a critical gap in its analysis.

[44] Ibid.

[45] Ibid, para 181.

[46] Jan Klabbers, 'Shrinking Self-Determination: The Chagos Opinion of the International Court of Justice' (2019) 8 ESIL Reflections 1.

The worst victims whose human rights were totally ignored after the detachment of Chagos Archipelago by forcefully removing them from their homeland were its former inhabitants, the Chagossians. Ever since they had been prevented from returning home. Even the United Kingdom in its written statement fully admitted and regretted the fact that "it treated the Chagossians very badly at and around the time of their removal and it deeply regrets that fact".[47] In the oral proceeding, it mentioned that such a removal was "shameful and wrong".[48]

ICJ, as an independent body and advisor of the UN, had a mandate to discuss openly the human rights implications in the *Chagos AO*. The Court had the capacity to address human rights because the duty to protect human rights and the consequences arising out of breach of these rights fall within the broad category of legal question. In *Chagos AO,* the ICJ applied "international law" in replying to the questions posed to it, and "international law" essentially includes "international human rights law". The questions posed by the UNGA confirmed this position as the question (a) asked the Court to assess "was the process of decolonization of Mauritius lawfully completed […….]having regard to international law [….]" and question (b) asked, "what are the consequences under international law […..]".[49] The wording of the questions confirmed that the Court was at liberty to deal with any human rights implication and their consequences in the *AO* since international law includes international human rights law.

The ICJ observed in the *Chagos AO* that "[t]he Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analyzing the right to self-determination in the context of decolonization".[50] When the Court acknowledged that the right to self-determination is a fundamental human right and it has a broad scope of application, how it is possible to come to a meaningful conclusion without addressing all the aspects?

The Court referred human rights of Chagossians at para 181 of the *Chagos AO* as it says that "As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization

[47] *Chagos AO* (n 1) *(Written Statement of the United Kingdom of Great Britain and Northern Ireland)* para 1.5 < https://www.icj-cij.org/public/files/case-related/169/169-20180215-WRI-01-00-EN.pdf > accessed 25 May 2022.

[48] *Chagos AO* (n 1) para 116.

[49] Request for Advisory Opinion (n 10) 1.

[50] *Chagos AO* (n 1) para 144.

of Mauritius".[51] Furthermore, judges in their individual and joint opinion regretted the human rights violation of the Chagossians. Vice President Xue mentioned that the "deplorable situation of the displaced Chagossians".[52] Judge Tomka noted that "I have deep sympathy for the unfortunate Chagossians who were removed from the Archipelago between 1967 and 1973 against their will and who have been prevented from returning. […] they were not represented in — and defended vigorously enough by — the Government of Mauritius; they were in fact abandoned by the United Nations".[53]

Judge Robinson kept a separate section for the "plight of the Chagossians".[54] Judge Sebutinde in her separate opinion mentioned that "I wish to say a word about the resettlement of the Chagossians. Now that Mauritius is an independent State, it is not inconceivable that some Chagossians may wish to return home to the archipelago, while others may wish to remain part of a third State such as Seychelles or even the United Kingdom. Consistent with the right to self-determination, that choice is entirely in the hands of the Chagossians, which they must be permitted to exercise freely and genuinely".[55]

Despite mentioning the plight of Chagossians, this *AO* did not deal with the human rights violations of Chagossians and the effective remedy for that. In the opinion, ICJ recalled that "the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory".[56] By such a statement, the Court emphasized the territorial aspect of the right to self-determination as mentioned in the previous section and thus the Court minimizes the human rights dimension of the right. The court emphasized the generic human rights of Mauritius nationals including Chagossians, but it missed dealing with the particular concerns of the Chagossians. Most importantly, the AO is silent about the protection of Chagogossians who are not Mauritian nationals.

As mentioned above, the ICJ recalled the UK's admission that its treatment of Chagossians was "shameful or wrong". The Court may use such admission and examine whether such treatment was "illegal" and "unlawful" and assess the consequences in line with international human rights law. Such an omission was

[51] Ibid, para 181.

[52] Ibid *(Declaration of Vice-President Xue)* para 15 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-01-EN.pdf> accessed 25 May 2022.

[53] Ibid *(Declaration of Judge Tomka)* para 1 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-02-EN.pdf> accessed 25 May 2022.

[54] Ibid *(Separate Opinion of Judge Robinson)* part IV < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-09-EN.pdf> accessed 25 May 2022.

[55] Ibid *(Separate Opinion of Judge Sebutinde)* para 51 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-08-EN.pdf> accessed 25 May 2022.

[56] Ibid, para 160.

criticized by some Judges in their separate opinion. Judge Salam expressed his concerns as he mentioned that "it is regrettable that the Court did not expressly mention, in this context, the possibility of compensation for the Chagossians".[57] Judge Trindade also criticized the Court for not dealing with this issue as he mentioned that "there is no justification for the International Court of Justice not having addressed in the present Advisory Opinion the right to reparations, in its distinct forms, to those forcibly expelled from Chagos and their descendants".[58] In the line of the observation, it may be summed up that *Chagos AO* had a strong human rights dimension which the Court failed to effectively address.

5. Self-Determination as Customary International Law:

The ICJ in *Chagos AO* considered that the right to self-determination was crystalized as a customary norm when resolution 1514 (XV) was adopted on 14 December 1960.[59] The Court unanimously recognized that Resolution 1514, which was adopted with overwhelming support and no objections, established self-determination as a customary norm, indicating a consensus among participating States on this matter[60] The Court considered this resolution 1514 as the "consolidation of state practice on decolonization," as expressed in several resolutions adopted before it, and the independence of several non-self-governing territories.[61] The court further emphasized the acceleration of the process of decolonization after the adoption of this resolution.[62]

The Court heavily relied on the role of the UNGA resolutions in recognizing the existence of a rule, or the emergence of *opinio juris* and thus its normative value despite its non-binding nature.[63]

This is not the first time to do so, but prior to the *Chagos AO*, the Court has previously found in *Military and Paramilitary Activities in and against Nicaragua Case* that a UNGA resolution adopted in consensus may provide sufficient evidence of *opinio juris* in relation to the ostensible rule of a CIL.[64] In the *Nuclear Weapon AO*, ICJ observed "substantial numbers of negative votes and abstentions;

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[57] Ibid *(Declaration of Judge Salam)* para 6 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-11-EN.pdf> accessed 25 May 2022.

[58] Ibid *(Separate Opinion of Judge Cancado Trindade)* para 256 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-04-EN.pdf> accessed 25 May 2022.

[59] *Chagos AO* (n 1) para 152.

[60] Ibid, 152.

[61] Ibid, para 150.

[62] Ibid, para 150.

[63] Ibid, para 151.

[64] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (merit) [1986] ICJ Rep 14, para 193.

thus, […..], they still fall short of establishing the existence of an *opinio juris*".[65] The ICJ in the Chagos AO emphasized the importance of consensus and noted the significant number of abstentions. It clarified that a UNGA resolution, like Resolution 1514, can be regarded as opinio juris for customary international law even if not all states adopt it. It shows that if a UNGA resolution is adopted without any negative votes and only a few abstentions, even from states with special interests, it can serve as ample evidence of opinio juris.

Some international law scholars expressed concerns over the Court's approach to turning a non-binding UNGA resolution into a binding customary international law or creating international law in the guise of identification of CIL, etc.[66] Some commentators claimed that the Court failed to articulate the relationship between the resolution as an *opinio juris* and the state practice upon which the court relied, whether the practice was conducted in accordance with the *opinio juris* or not.[67] Courts' failure to inquire into the confluence between the *opinio juris* and state practice rigorously may lead the readers of the AO to easily find that the "Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit"[68].

To address these concerns, the Court could clarify terms like "consolidation of state practice on decolonization." It could also explain why the abstention of nine members, even some colonial powers, doesn't constitute "substantial numbers of negative votes and abstentions" regarding UNGA resolution 1514 as opinio juris evidence. Additionally, the Court should elucidate why it attributed significance to a recommendatory, non-binding resolution, and how it connects to claimed state practice and resolution 1514.

Rather than a quick "assertion", in my opinion, if the Court analyzed Judge Trindade's question and the responses by the participants, it might remove those concerns. During the proceedings, Judge Trindade threw a question to the participants "[….] what are the legal consequences ensuing from the formation of customary international law, with the significant presence of *opinio juris* communis, for ensuring compliance with the obligations stated in those General

[65] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinions)* [1996] ICJ Rep 226, para 71.

[66] Jake Christophersen, 'General Assembly Resolutions in the Determination of Customary International Law: The ICJ's Advisory Opinion in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965" [2019] Bristol Law Review 5-6.

[67] Angus Fraser and Benjamin Teng, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion of 25 February 2019), International Court of Justice: Historical Customary International Law and Self-Determination in the Colonial Context' [2019] 26 Australian International Law Journal 181, at 186.

[68] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417.

Assembly resolutions?".[69] In the written statements, the UK and the USA claimed that there was no *opinio juris* at the time Resolution 1514 was adopted or "exclusive or virtually uniform state practice" to support the conclusion of a CIL.[70] They claimed that the non-binding and recommendatory nature of the resolution would prevent it from forming a CIL.[71]

Mauritius and other participants rebutted this view in a comprehensive manner. In its written statement, Mauritius emphasized the nature of resolution 1514. It highlighted the scope of the resolution as it sets forth the obligations for all States including UN members, all administering powers, and in certain cases the UK.[72] Then it highlighted the mandatory nature of the text of the resolution as it said:

> "All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."[73] [emphasis added]

By quoting this paragraph, Mauritius took the view that resolution 1514 itself did not create the *opinio juris*, but it was the reaffirmation of that. Argentia in its written statement noted that "[t]hese resolutions are the expression of the *opinion juris communis* and also interpret obligations stemming from both conventional law (the Charter of the United Nations in particular) and customary law".[74] To support its position that the right to self-determination existed on 1960, Mauritius relied on the declaration of UK made before ICJ in 2009 in which the UK stated that " [t]he principle of self-determination was articulated as a right of all colonial

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[69] *Chagos AO* (n 1) *(Written Reply of the Republic of Nicaragua to the Question of Judge Cancado Trindade)* <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-01-00-EN.pdf> accessed 25 May 2022.

[70] Ibid, *(Written Reply of the United States of America to the Question of Judge Candado Trindade)* <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-05-00-EN.pdf> accessed 25 May 2022; *(Response of the United Kingdom of Great Britain and Northern Ireland* <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-02-00-EN.pdf> accessed 25 May 2022.

[71] Ibid

[72] Ibid, *(Written reply of the Republic of Mauritius to Judge Cancado Trindade's Question)* page 2 <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-03-00-EN.pdf> accessed 25 May 2022.

[73] UNGA resolution 1514 UNDoc A/Res/1514(XV), paragraph 7.

[74] *Chagos AO* (n 1) *(Answer of the Argentine Republic to the question put by Judge Cançado Trindade)* <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-06-00-EN.pdf> accessed 25 May 2022.

countries and people by *General Assembly resolution 1514 (XV)*"[75]. By analyzing the question and the responses of the parties the Court would easily support its position and that reasoning might remove the concerns of the international legal scholars.

6. Right to Self-Determination as a *Jus Cogens* norm

Participant States like Belize[76], Cyprus[77], the Netherlands[78], Mauritius[79], South Africa,[80] etc., in their written statements submitted in the *Chagos AO,* recognized the peremptory nature of the right to self-determination. The written statement of the African Union which reflects the opinion of its member states mentioned that "the right of peoples to self-determination –first expressed in the nineteenth century– is a cardinal principle in modern international law, regarded as *jus cogens*"[81].

The other participant States remained silent to express their position regarding the normative status of the right to self-determination. Such a silence regarding the right to self-determination as a peremptory norm does not signify that they were against it. However, despite terming the right to self-determination as obligation *erga omnes,* the Court omitted to consider whether or not the right to self-determination was the peremptory norm from which no derogation is permitted. In Chagos AO, the Court acknowledged the obligatory nature of the right to self-determination, but didn't assess its peremptory status. The ICJ reconfirmed its previous position in *East Timor Case* and *Wall AO* that "respect for the right to self-determination is an obligation *erga omnes*" and that "all States have a legal interest in protecting that right".[82]

The ICJ found in the *Chagos AO* that "the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-

[75] Ibid, *(Written Comments of the Republic of Mauritius on the response of the United Kingdom and United States to Judge Cancado Trindade's Question)* <https://www.icj-cij.org/public/files/case-related/169/169-20180913-OTH-01-00-EN.pdf> accessed 25 May 2022.

[76] Ibid, *(Statement of Belize)* pages 5, 11-12 < https://www.icj-cij.org/public/files/case-related/169/169-20180130-WRI-01-00-EN.pdf> accessed 25 May 2022.

[77] Ibid *(Written Statement of Cyprus)* page 4 <https://www.icj-cij.org/public/files/case-related/169/169-20180212-WRI-01-00-EN.pdf> accessed 25 May 2022.

[78] Ibid *(Written Statement of the Kingdom of the Netherlands)* <https://www.icj-cij.org/public/files/case-related/169/169-20180227-WRI-01-00-EN.pdf> accessed 25 May 2022.

79 *Written Statement of the Republic of Mauritius* (n 40).

[80] *Chagos AO* (n 1) *(Written Statement by the Republic of South Africa)* <https://www.icj-cij.org/public/files/case-related/169/169-20180301-WRI-12-00-EN.pdf> accessed 25 May 2022.

[81] Ibid *(Written Statement of the African Union)* para 69 < https://www.icj-cij.org/public/files/case-related/169/169-20180301-WRI-07-00-EN.pdf> accessed 25 May 2022.

[82] *Chagos AO*, (n 1) para 180.

determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State"[83]. Then it concluded that "the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that *all Member States must co-operate with the United Nations to complete the decolonization of Mauritius*" [italic mine].[84] Although the Chagos AO did not indicate the term "peremptory norm", some judges in their separate opinion mentioned that the right to self-determination is a peremptory norm or norm of *jus cogens*. Judges Cançado Trindade, Robinson, and Sebutinde were critical of the omission of the ICJ to refer to the right to self-determination as the peremptory norm.[85]

Judge Trindade and Robinson in their joint declaration expressed their concerns that "the Court should have devoted more of its reasoning to highlight the importance of General Assembly resolutions in the consolidation of the right of peoples to self-determination, and, given the relevance of *jus cogens* to the issues raised in the proceedings, the Court should have pronounced on the *jus cogens* character of the right of peoples to self-determination".[86] Judge Robinson in his separate opinion offered an in-depth examination of the *jus cogens* character of the right to self-determination.[87] Then he opined that "the Court's case-law, State practice and *opinio juris*, and scholarly writing are sufficient to warrant characterizing the right to self-determination as a norm of jus cogens, and to justify the conclusion that it possessed that status in the relevant period 1965-1968".[88] Judge Sebutinde in her separate opinion regretted about the Court's omission to admit right to self-determination as peremptory norm as she observed that "the Court fails in the Opinion to recognize that the right to self-determination has evolved into a peremptory norm of international law *(jus cogens*), from which no derogation is permitted and the breach of which has consequences not just for the administering Power concerned, but also for all States".[89]

Despite reflecting the fundamental values of the international community by both, the obligations *erga omnes* and the *jus cogens* norm are distinct. Judge

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[83] Ibid para 177.

[84] Ibid para 182.

[85] See, Ibid, *(Joint Declaration of Judges Cancado Trindade and Robinson)* para 260 < https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-05-EN.pdf> accessed 25 May 2022; *Separate Opinion of Judge Robinson* (n 54) 308-326'; *Separate Opinion of Judge Sebutinde* (n 55)

[86] Ibid;

[87] See, *Separate Opinion of Judge Robinson* (n 85) 308-326.

[88] See, Ibid, 217, para 50.

[89] *Separate Opinion of Judge Sebutinde* (n 55) 285, para 25.

Robinson noted "while a *jus cogens* norm will always result in an obligation *erga omnes*, an *erga omnes* obligation will not always reflect a norm of *jus cogens*".[90] Such a distinction between the two norms and the recognition of the participant States demanded that the Court should analyze the nature of the right to self-determination as the peremptory norm. In light of the ongoing discussion, in my view examination of the peremptory nature of the right to self-determination in the context of decolonization of Mauritius had some merit. I think the Court should examine whether the right to self-determination was a *jus cogens* norm in the context of the decolonization of Mauritius.

7. Conclusion

The *Chagos Archipelago advisory opinion* stands as a pivotal marker in the decolonization narrative, enriching the realm of self-determination jurisprudence. Notably, the Court's territorial lens reframed the "people" concept, influencing the scope of self-determination—especially radical secessionist claims. The Court's stance echoes in the evolving landscape of customary international law identification. Yet, it missed an opportunity to delve into Chagossians' human rights and the peremptory nature of self-determination. This uncharted territory leaves lingering questions. Ultimately, *Chagos AO* champions territorial integrity, unequivocally rejecting all forms of colonialism.

[90] See, *Separate Opinion of Judge Robinson* (n 85) 322, para 77.

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> Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.
>
> R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.
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> Page v Smith [1996] AC 155 (HL).

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> Callery v Gray [2001] EWCA Civ 1117, [2001] 1WLR 2112 [42], [45].
>
> Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]-[37].
>
> R v Leeds County Court, ex p Morris [1990] QB523 (QB) 530-31.

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Act of Supremacy 1558.

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Osman v UK ECHR 1998-VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

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Thomas Hobbes, Leviathan (first published 1651, Penguin 1985) 268.

Gareth Jones, Goff and Jones: The Law of Restitution (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, An Introduction to Comparative Law (Tony Weir tr. 3rd edn, OUP 1998).

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Halsbury's Laws (5th edn, 2010) vol 57, para 53.

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Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' (2005) 12(5) Public Law 440. (adopted preferred form)

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JAG Griffith, 'The Common Law and the Political Constitution'(2001) 117 LQR 42, 64.

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Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT <http://ejlt.org//article/view/17> accessed 27 July 2010.

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