

Chagos: A Chance for the ICJ to do more for advancing human rights through the rule of law?

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An objective of the St. Gallen workshop on the advisory opinion concerning the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* was to discuss hidden and so far, untold perspectives and dynamics that have framed the Chagossians' long legal struggle to return. In the following I focus on some untold perspectives on power and its ability to subvert human rights that have emerged within the oral proceedings. The hearings have provided a transformative moment for the ICJ, as a court of international law concerned with human rights and self-determination,¹ to continue its work on these issues. The interrelated questions from the General Assembly ask the Court to provide a legal opinion on whether or not the decolonisation of Mauritius was lawfully completed in light of the separation of the Chagos Archipelago from Mauritius. The Court was then asked to opine on the consequences under international law arising from the continued administration by the UK 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.

The African Union (AU) has, in a stunning moment of never seen before collective action, positioned the case as one that is fundamentally aligned to the AU's mandate and purpose, 'to safeguard and consolidate

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¹ For an analysis of the ICJ's record on human rights and self-determination through advisory opinions and interstate cases see R Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden J Intl L* 745–751.

the hard won independence as well as the sovereignty and territorial integrity of our states and to fight against neo-colonialism in all its forms'.² By placing questions of decolonisation before the Court, the AU invites the Court to mobilise the right to self-determination. This right is perhaps the Court's greatest legal weapon against colonial era injustices which continue to prevent people from freely choosing their own path to social, economic, cultural and political development. And those questions on decolonisation do not appear out of thin air but arise, as argued by Mauritius and its supporters, from rules and principles that were well established in United Nations (UN) law by 1965.³ So, Mauritius has asked the ICJ to follow a clear line of precedent laid out in the Namibia and Wall cases⁴ that any severance of a territory by an administering power when such severance is not reflective of the free and genuine will of the people holding the right to self-determination is a breach of that right. That decolonisation remains incomplete due to the detachment of the Chagos Archipelago from Mauritius in 1965 is, for Mauritius, evidenced by ongoing colonial power (the islands remain under the administration of the British until such time as they are no longer required for defence purposes) and crucially, the human tragedy of the case evidenced in the desire and ongoing inability of Chagossians to return. This was supported through compelling video testimony brought before the judges.⁵

Taking this decolonisation lens, Mauritian counsel and the AU have invited the Court to view the case as one that transcends the plane of a purely bilateral dispute between Mauritius and the United Kingdom and

² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)* see <www.icj-cij.org/en/case/169>; Written statement of the African Union <www.icj-cij.org/files/case-related/169/169-20180301-WRI-07-00-EN.pdf> 16.

³ Written statement of the Republic of Mauritius, <www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-00-EN.pdf> 189-211; written comments of the Republic of Serbia <www.icj-cij.org/files/case-related/169/169-20180515-WRI-06-00-EN.pdf> 30.

⁴ Statement of Belize, <www.icj-cij.org/files/case-related/169/169-20180130-WRI-01-00-EN.pdf> 2.20, 2021.

⁵ Public sitting held on Monday 3 September 2018 at 10am on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (*Request for advisory opinion submitted by the General Assembly of the United Nations*), Verbatim Record 72. Legal counsel for Mauritius played a video statement of Madame Elysé, which was offered as 'a statement of impact', showing 'what the continuation of colonialism really means for real people'.



in so doing have transplanted the subject matter of the legal opinion into one which belongs to a 'broader frame of reference'.⁶ That frame is one that touches and concerns the 'whole world'.⁷ This is because separating the territory of Mauritius prior to independence without the freely expressed consent of the people, has prevented Mauritius from including those Chagossians living in Mauritius at the time of separation from enjoying a cardinal principle under international law that cannot be set aside, the right to self-determination.

By framing the question in this way the ICJ is invited to discuss the case as one that concerns a violation of a fundamental human right to self-determination. A right that carries a special corresponding duty on the part of all states to enforce this right *erga omnes*. Crucially, in the oral proceedings, that right was contextualized within the factual reality of unequal power relations and the continuation of colonialism. The continued existence of colonialism and its frustrating effects on human rights, particularly the ability of ongoing structures of colonialism to impede the social, economic and cultural development of dependent peoples, was a discernible theme that was woven into the oral and written submission from Mauritius and its supporters. This is an overdue conversation that I have previously had⁸ in the hope that issues of power, ongoing colonialism and the so far peripheral nature of the Chagossians human rights will finally take their rightful place within the legal record as a means to obtain some legal remedy for the Chagossian community. On the point of remedy, the Court could indirectly attribute remedy to the community through the following requirements on the UK and Mauritius. First, that the UK completely and speedily withdraw from the Chagos Archipelago. Second that the UK transfer administrative responsibilities to Mauritius. Third, a requirement that the UK and Mauritius cooperate to facilitate the urgent resettlement of Mauritian nationals of Chagossian origin in the archipelago in a manner that promotes the economic, social and cultural well-being of the community.⁹ The Court could safeguard the implementation of these remedies for the community through the creation of a special intergovernmental trust mechanism with

⁶ Written statement of the African Union (n 2) 31.

⁷ Oral Statement of Kenya 11.

⁸ K Bhatt, 'A Post-Colonial Legal Approach to the Chagos case and the (Dis) application of Land Rights Norms' (2018) *Intl J Law in Context* 1-19.

⁹ Drawing from the written statement of Mauritius (n 3) 19-20.

the UN acting as trustee on behalf of the Chagossian community as beneficiaries.¹⁰

Frequently lost in the midst of a case that has been adjudicated for over twenty years within a state focused legal structure interested in interstate discourses about the rightful owner of the islands, is the human rights situation of the Chagossian people and the power structures against which they have struggled to find legal remedy. So, whilst the ICJ proceedings saw differing views¹¹ on whether the right to self-determination had crystallised at the key date of dismemberment (8th of November 1965) into a universally recognised norm of customary international law, such dry legal arguments tend to crowd out a bigger conversation around power and an international legal system that has, in this case, permitted power to determine legal outcomes for so long.

At the ICJ core legal issues were thoughtfully contextualised through the lens of colonisation and power. I wonder whether in 2018, the weight of that contextualisation might well be strong enough to provide Chagossians with legal remedy through a legal process that fills in some gaps in legal protection. Those gaps emanate from a state focused system that is tied to principles of inter-temporal law, is less focused on giving clear support to indigenous or nomadic peoples' rights to land except to the extent that any such rights extend authenticity to a state's claim to sovereignty,¹² and has so far largely side-lined the plight of non-state actors like

¹⁰ I Bantekas, 'The Emergence of the Intergovernmental Trust in International Law' (2010) 81(1) *British YB Intl L* 224-228.

¹¹ The UK government argued that the right had not crystallised into a norm of customary international law by the key date of 1965, written statement of the United Kingdom, <www.icj-cij.org/files/case-related/169/169-20180215-WRI-01-00-EN.pdf>, 137-138. For a counterview see Belize's submission extending a thorough history of the norm from the 1950s supporting its argument that by the 1960s and certainly by 1965, the right of colonised peoples to self-determination was an established part of customary international law, Statement of Belize (n 4) 5

¹² So, in *Western Sahara* nomadic ties to land were considered to the extent they provided degrees of authenticity to support the territorial claims of Morocco for example: ICJ, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 and similarly, in *Pedra Branca* the ties of the Orang Laut people of the sea were used to authenticate the territorial ties of Malaysia to the disputed islands, ICJ, *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* (*Pedra Branca case*) (Judgment) [2008] ICJ Rep 12.



the Chagossians within judicial mechanisms at the European and domestic levels. The European Court¹³ has already disregarded the human rights of the Chagossian people when it declared the case inadmissible on the grounds that each of the islanders had accepted the paltry sum of £ 2976 paid by the British government. The case ultimately saw the Chagossians plunged into a human rights black hole¹⁴ in which national laws and international treaties for the protection of human rights do not apply to the islands. Claims have also been vacated at the domestic level even when legal arguments for return have engaged fundamental sources of law like the Magna Carta right to abode.¹⁵ When those rights have been used as a prospective sword by a group of Chagossians to make a legal claim to return, remarkably they have been relegated from fundamental to important¹⁶ rights capable of extinguishment for economic and military reasons without legal precedent of use for exiling a settled population.¹⁷ Judges in the UK House of Lords found that a changed macro-political field and sufficient public interest justified the 2004 order in council to set aside the territory for defence purposes resulting in no person having the right of abode in the territory. Those macro political considerations specifically related to powerful state focused geopolitical concerns like the changed security situation after 9/11, the prohibitive financial and ecological costs of resettlement in the atolls and the UK's continued co-operation with an important ally in maintaining key defence installation on Diego Garcia.¹⁸

That these considerations were accepted by judges giving the majority opinion on the policy grounds of sufficient public interest and that the rights withdrawn were considered not of practical value to the Chagossians,¹⁹ demonstrates the serious and so far largely unquestioned power

¹³ *Chagos Islanders v United Kingdom* App no 35622/04 (ECtHR, 11 December 2012).

¹⁴ PH Sand, 'Diego Garcia: British–American Legal Black Hole in the Indian Ocean?' (2009) 21(1) *J Environmental L* 13–137.

¹⁵ *R. (On the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 77.

¹⁶ *R. (On the Application of Bancoult)* (n 15) 45, 61, 70.

¹⁷ *R. (On the Application of Bancoult)* (n 15) 157.

¹⁸ *R. (On the Application of Bancoult)* (n 15) 27, 63, 113, 132.

¹⁹ *R. (On the Application of Bancoult)* (n 15) 63.

dynamics and incentives operating within the case.²⁰ Those incentives have muted the visibility of Chagossians' rights to return to their ancestral lands when those legal claims compete with powerful state-focused geopolitical uses for territory, a steady stream of financial lease inducements and questionable neoliberal behaviours surrounding the financial costs of resettlement. For example, facilitating the original clearance of the islands was a state expropriation of land by the BIOT Commissioner under the Acquisition of Land for Public Purposes (Private Treaty) Ordinance No. 2 1967. The eviction of the Chagossians has been legally facilitated through the repeated and overzealous use of a legitimate but extreme form of power, the royal prerogative. The defining characteristic of the prerogative is that its exercise does not require the approval of Parliament or any form of consultation or debate.²¹ Whilst the UK government has, on numerous occasions including during the oral proceedings, expressed its deep regret for the way the Chagossians have been treated, admitting a callous disregard for their interests,²² the Chagossians' ability to obtain fair legal outcomes embedded within the rule of law has been visibly dimmed from the legal record.

Despite the numerous legal attempts made by Chagossians to mobilise and implement their human rights those rights have been side-lined when they interfaced with powerful state geopolitical and neoliberal interests. That these dynamics and neoliberal behaviours have not been questioned enough for how they distance Chagossians claims to return to the islands and debilitate the Chagossians attempts to find legal remedies through a fair, clear and predictable rule of law, is a characteristic of the case. Against this context, the questions posed to the Court within the oral proceedings have permitted the human rights effects of the eviction and the inability of the Chagossians to be resettled, to be fully interrogated in a Court of law and crucially for those questions to be viewed through a lens of power asymmetry, ongoing colonisation and dubious neoliberal tropes surrounding development.

²⁰ Although some highly charged minority legal opinions were delivered within the House of Lords bemoaning the cynical governmental policy towards the islands that treated them as 'bare land' to be cleared for macro political considerations.

²¹ T Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 *Intl J Constitutional L* 146.

²² Written statement of the United Kingdom <www.icj-cij.org/files/case-related/169/169-20180514-WRI-01-00-EN.pdf> para 4.3.



Interventions by Mauritius and its supporters have prompted the Court to look at the ways through which power has and continues to dictate legal outcomes. The possibility brought up on numerous occasions during the arbitration award²³ of the underlying presence of oil, gas and mineral resources within the Indian Ocean sea bed was subtly raised by the AU in its submissions on the self-determination point. Specifically, the AU made mention to UNGA Resolution 1803²⁴ and its specific reference to the permanent sovereignty over natural wealth and resources as being a basic constituent of the right to self-determination.²⁵ This reference to natural resources might prompt the Court to think about the real prospects of a large scale extractive initiative and sitting behind this, a government that has expropriated land through a 1967 ordinance and evicted a settled population without their free, prior and genuine consent in violation of their right to development and self-determination. The motivating factors behind which are perhaps to enjoy regular income streams, and to retain control over territory through a dubious military base project which would facilitate a larger financial prize in the form of future mineral rights lurking beneath the Indian ocean. The Court might even consider that aspects of this fact pattern are representative of an ongoing colonial mission that is incompatible with the purpose and principles of the UN Charter.

This line of analysis was also raised within Cyprus's oral submission. Itself a former British colony with two parts of its territory retained by the British for sole use as a military base, Cyprus discussed the importance of examining self-determination in light of modern day realities²⁶ that continue to subvert and obscure ongoing manifestations of colonialism through attaching a different label of security and defence purposes. Cyprus's understanding of the self-determination norm is one that transcends a superficial fact pattern of colonisation and is in keeping with the expansive and evolutionary nature of the norm, far reaching enough to apply not only to situations of decolonisation but to ongoing situations of alien subjugation, domination or exploitation, whatever label might

²³ PCA, In the matter of the Chagos Marine Protected Area Arbitration before an arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland, *Decision by the Arbitrators* (18 March 2015).

²⁴ UNGA Res 1803 (XVII) (14 December 1962).

²⁵ Written statement of the African Union (n 2) 102.

²⁶ Oral Statement of Cyprus, paras 4 and 5.

attach to them.²⁷ The entire Chagos debacle is one such fact pattern. Likewise, Kenya's submission supported arguments around foreign military bases²⁸ being fundamentally incompatible with the purposes and principles of the Charter of the UN and of UNGA Resolution 1514²⁹ on decolonisation given their ability to partially or totally disrupt the national unity and territorial integrity of colonial territories and their lasting implication for international peace and security.³⁰ Kenya also impressed on the Court the realities of unequal power, what it means to emerge from a period of lengthy colonial domination and how unreasonable it would be to expect a dominated country to immediately confront its colonial power after 150 years of rule. Against this background it would be wrong of a former colonial power to treat Mauritius's actions as reflecting consent for the dismemberment of territory.³¹ Kenya makes a persuasive case asking the Court to understand the human and legal tragedy of the Chagossians as one formed from ongoing colonial power games. Through these arguments Kenya and its supporters request that the Court rectify the injustices of the Chagos case through the rule of law.

It remains to be seen whether the ICJ will provide a legal opinion that answers the specific questions put forward by the General Assembly regarding the legal consequences of an incomplete decolonisation process in this case. By discharging its legal functions, the Court can play a role in correcting prior injustices by reaffirming the right to self-determination as a non-negotiable rule of customary international law that in 2018 is strong enough to redress ongoing colonial power asymmetries through a rule of law that cannot be held hostage to the changing fortunes of politics and economics. Unlike commercial transactions where legal opinions are provided only for the benefit of the contracting parties and are made subject to a range of assumptions and qualifications, there can be no qualifications to a legal opinion dealing with a right of this multilateral nature. Whether the ICJ takes up this baton remains to be seen but there is no doubt that it has been placed on a compelling trajectory to do so.

²⁷ Oral Statement of Cyprus (n 26) para 8.

²⁸ Kenya specifically referred to UNGA Res 2165 (XXI) (8 December 1966) on the elimination of foreign military basis in the Countries of Africa, Asia and Latin America.

²⁹ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions).

³⁰ Oral Statement of Kenya (n 7) 29.

³¹ Oral Statement of Kenya (n 7) 44.

