

## A policy of 'quiet disregard'

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# A POLICY OF 'QUIET DISREGARD': THE CHAGOS ISLANDS, ISLANDERS AND INTERNATIONAL LAW

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## ABSTRACT

This article critically analyses the legal history of the Chagos Archipelago and its inhabitants. This is a story of multiple domestic and international courts, from the domestic jurisdiction of the United Kingdom to the Advisory Opinion recently adopted by the International Court of Justice. This article discusses the main judicial decisions adopted since the detachment of the archipelago from Mauritius in 1965 to the ruling of the International Court of Justice in 2019.

## Keywords

Self-determination; Chagos Archipelago; Chagossians; International Court of Justice; European Court of Human Rights; UNCLOS.

## 1. INTRODUCTION

In its recent Advisory Opinion of 25 February 2019, the International Court of Justice clarified the situation of the Chagos Archipelago under international law. It affirmed that the right to self-determination of peoples was already part of customary international law by the end of 1960 and that the exercise of such a right requires respect for the territorial integrity of non-self-governing territories.<sup>1</sup> Applied to the situation of Mauritius and the Chagos Islands, this meant that the detachment of the Chagos Archipelago in 1965 did not allow for the lawful completion of the process of decolonisation of Mauritius when reaching its independence in 1968, given that part of its territory remained under colonial administration.<sup>2</sup> In turn, this means that the United Kingdom's continued administration of the Chagos Archipelago

amounts to an internationally wrongful act of a continuing character.<sup>3</sup> The Court also decided that it was for the United Nations General Assembly to establish the modalities needed for ensuring the completion of the decolonisation of Mauritius.<sup>4</sup> This article critically analyses the legal history of the Chagos Archipelago, from the time in which it was detached from Mauritius to the recent Advisory Opinion adopted by the International Court of Justice.

## 2. THE ISLANDERS

The Chagos Islands are coral atolls lying about 2,200 miles east of the African coast and 1,000 miles south-west of India. The archipelagic islands, consisting of 65 in total, were ceded by France to Great Britain in 1814 with the coming into force of the Treaty of Paris from which time they continued to be governed as Dependencies of Mauritius (which is about 1,200 miles South-South-West). By 1959, the government of Mauritius was openly seeking complete independence. Although Mauritius gained its independence from colonial rule in March 1968, the Chagos Islands were retained by the United Kingdom, for which a sum of £3 million was paid and a promise made to cede the islands to Mauritius when they were no longer needed for defence purposes.<sup>5</sup> The islands were retained as part of a strategic defence plan that had been discussed between the United States and United Kingdom at least since the early 1960s when the independence of Mauritius seemed an inevitable outcome. The imperative to retain these islands came from the global political affairs of that period; the Cuban missile crisis and looming Vietnam war left the United States vulnerable, and the Suez crisis accorded the

United Kingdom a significantly weakened global position. Consequently, in September 1965, at the Lancaster House Meeting, the United Kingdom and Mauritius agreed the terms of the detachment of the Chagos Islands. The islands were constituted as the British Indian Ocean Territory (BIOT) on 8 November 1965 by Order in Council (SI 1965/1920), which also provided for the appointment of a Commissioner for the Territory.<sup>6</sup> Under the terms of that Order, the Commissioner was empowered to make laws for the 'peace, order and good government' of the Territory.

On 30 December 1966, the United States and United Kingdom signed a 50-year agreement to lease the Chagos Islands for military purposes.<sup>7</sup> Diego Garcia, the main island of the archipelago, continues to be the site of the United States' military base Camp Justice. The agreement between the United Kingdom and the United States stated that the islands would be without a resident civilian population. How to manage the Islands' population consequently became a delicate, yet central, question. According to the United Kingdom, the Chagos Islands were inhabited only by migrant workers with no property rights. This has been exposed through subsequent litigation as a 'legal façade'.<sup>8</sup> The House of Lords described the population in remarkably different terms from those used by the United Kingdom: '...they had a rich community life, the Roman Catholic religion and their own distinctive dialect derived (like those of Mauritius and the Seychelles) from the French'.<sup>9</sup> Removal was effected through deception and, ultimately, making life on the islands for the Chagossians unsustainable. The main industry was copra, and in April 1967, by virtue of BIOT Ordinance Number Two, the BIOT administration acquired the land and the commercial interest of the company operating the copra plantations on the island, Chagos-Agalega Ltd, which had bought the plantations in 1962. The plantations were leased back to the company until such time as they were required by the US, with the plantation on Diego Garcia closed in 1971. Plantations formed the main industry and source of employment on the islands; their closure spelled the end of the Chagossian's way of life on the Islands. That same year, the Commissioner enacted an Immigration Ordinance making it unlawful for a person to enter or remain in the BIOT without a permit and allowed for the removal

of those islanders remaining.<sup>10</sup> The islands were depopulated by April 1973.

The transfer of the population was effected without sufficient planning and support for the Chagossians; life in Mauritius for the islanders was one of 'high unemployment and considerable poverty. Their conditions were miserable'.<sup>11</sup> Laura Jeffery offers the following description of their desperate situation:

By the time the Chagos islanders started to arrive at the docks in the capital Port Louis, Mauritius in general and Port Louis in particular were suffering from a severe shortage of housing stick. This was the result of high population growth and density plus the devastating effects, especially on poor-quality housing, of recent cyclones...Upon arrival in Mauritius, most Chagos islanders were homeless, had to seek new accommodation, and had to pay for accommodation (unlike in Chagos).<sup>12</sup>

Yet those islanders moved to Mauritius nonetheless retained their British Dependent Territories citizenship. Although the numbers of Chagossians removed during this period is not clear, it seems likely to have been a figure of well over a thousand people.<sup>13</sup>

The scale of the disregard of the rights of the islanders is breath-taking. The United Kingdom was, of course, not oblivious to its obligations, and a secret memorandum shows that it was particularly sensitive to its obligations under the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 XV of 14 December 1960 and subject to the scrutiny of the Committee of 24 (Special Committee on Decolonization)).<sup>14</sup> The formal position thus became that the islands had no permanent population. Consequently, BIOT, in contrast to other British overseas territories, is not on the United Nations' list of non-self-governing territories. Adam Tomkins refers to this as a 'deliberate fabrication on the part of British officials'.<sup>15</sup> Somewhat infamously, documents submitted during the English court hearings revealed that a senior official at the Foreign Office wrote to a diplomat in 1966: '... there will be no indigenous population except seagulls who have not yet got a Committee (the Status of Women Committee does not cover the rights of Birds)'. The response from the head of the Colonial Office, DA Greenhill, was the following: 'Unfortunately, along with the Birds go some few Tarzans or Men Fridays whose

origins are obscure, and who are being hopefully wished on to Mauritius.<sup>16</sup> In the words of Lord Justice Laws, 'It is as if some of the officials felt that if they willed it hard enough, they might bring about the desired result, and there would be no such permanent population'.<sup>17</sup>

The matter of the BIOT was raised almost immediately in the General Assembly, which in December 1965 noted the detachment of the Chagos Islands with concern and approved the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to Mauritius.<sup>18</sup> In 1972, the United Kingdom paid Mauritius £650,000 towards resettling the Chagossian population. Pursuant to a private law case brought by Michel Vincatassin, and also violent clashes in Mauritius by Chagossian activists,<sup>19</sup> an agreement was signed in July 1982 in which the United Kingdom Government agreed to pay £4 million compensation to the Chagossians in return for the islanders renouncing all claims arising out of their removal from their island homes. This was to be the start of decades of litigation, both national and international, aimed to remedy and resolve two inter-related but separate issues: firstly, the violation of the rights of the Chagossians expelled from their island homes; and, secondly, the question, increasingly pressed by Mauritius, of sovereignty over the Chagos Archipelago.

#### a. Bancoult I: 'the wintry asperity of authority'

In 2000, Olivier Bancoult, a Chagossian born in Peros Banhos in 1964, sought judicial review (specifically, a writ of certiorari) against the Secretary of State for Foreign Affairs.<sup>20</sup> In 1967, when he was the age of three, the applicant's family had travelled from their home to Mauritius to seek medical treatment for his sister; they never returned. The challenge was partly that the Immigration Ordinance of 1971, purportedly made under section 11 of the 1965 Order, was *ultra vires*. While the applicant's arguments based on constitutional rights were rejected, Laws LJ held, with respect to the 'peace, order and good government' provision outlining the Commissioner's powers to legislate for the island, that it 'may be a very large tapestry, but every tapestry has a border'.<sup>21</sup> His stark conclusion on the question of *ultra vires* was that

he could not 'see how the wholesale removal of a people from the land where they belong can be said to conduce to the territory's peace, order and good government...'<sup>22</sup>

Consequently, the 1971 Immigration Ordinance was quashed. The Foreign Secretary, Robin Cook, responded immediately to the judgment: 'I have decided to accept the Court's ruling and the Government will not be appealing'.<sup>23</sup> The 1971 Ordinance was revoked and replaced with BIOT Immigration Ordinance No 4 of 2000, which allowed Chagossians to return to all islands except Diego Garcia without permits. Robin Cook, however, also made reference to 'feasibility work', and it was clear that the practical hurdles would be considerable: awaiting the Report's conclusions, no islanders returned to live in the outer Chagos islands. Meanwhile, in 2002, the validity of the 1982 settlement was confirmed by the Queen's Bench.<sup>24</sup> On appeal, Sedley LJ remarked: 'It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not of adjudication'.<sup>25</sup> Nonetheless, and despite the obvious practical obstacles to resettlement, legal strategies continue to be a central part of the Chagossians' struggle.

Although *Bancoult I* was clearly welcomed by the applicant and was a significant administrative law decision, a less-promising aspect of the judgment that is less discussed is the approach taken to constitutional rights. Looking at this element of the *Bancoult I* decision demonstrates the precariousness of the islanders' human rights position. The applicant had argued that his rights under the Magna Carta should be respected. The Queen's Bench, relying on *Liyanage v The Queen*,<sup>26</sup> held otherwise:

Belongers here take the benefit of the constraints which the common law imposes on the construction of legislation which interferes with such rights; belongers there do not. However, I think it plain that in practice, in the post-imperial world as it is, this is a misfit which nearly always will be nothing but theoretical; territories such as Gibraltar possess written constitutions which enshrine fundamental rights based on or akin to the model of the European Convention on Human Rights. But BIOT does not, and there is therefore a dissonance, one which may strike real loves, between the richness of the rights

which our municipal law today affords and the wintry asperity of authority...<sup>27</sup>

Because Mauritius and the Chagos Islands were ceded, the applicable (arcane) rule was that the law of the land as was continued until changed. Thus, the common law was not deemed to be the same as that applicable in the United Kingdom, and more particularly, the rights of the Magna Carta were held to be inapplicable.

This constitutional aspect of the decision – that is, the rejection of the argument that the islanders enjoy the same rights as other British citizens – opened the door to a dramatic volte-face on the part of the Government. The decision to allow the islanders to return failed to withstand the terrorist attacks of 11 September 2001, which, in the United States' eyes, heightened the strategic importance of the islands from a defence perspective. In turn, the June 2002 Feasibility Report concluded that return, certainly to the islanders' former way of life, was not possible: global warming was among the many factors indicated as pointing to this conclusion. Thus, the Government decided not to support resettlement.<sup>28</sup>

## **b. Bancoult II: 'The law gives it and the law may take it away'**

In 2004, the United Kingdom government drafted two Orders in Council, the BIOT (Constitution) Order 2004<sup>29</sup> and the BIOT (Immigration) Order 2004, which again restored immigration control and removed the islanders' right to enter, or be present on, the Chagos Islands without permission. The Orders were not debated in Parliament and were assented to exercising prerogative powers. Before the Administrative Court, the Orders were quashed on the basis that they were not made in the interests of the islanders, a decision affirmed by the Court of Appeal. That decision was appealed to the House of Lords.<sup>30</sup> In a landmark ruling well-known to students of English law, the House of Lords, affirming the decision of the lower courts on this particular point, held that there was no reason why prerogative legislation should not be subject to the same scrutiny (judicial review) as other prerogative acts. While the door to review had been opened, both constitutional and administrative law presented further blocks to quashing the Orders.

For the domestic courts, the primary question was whether an Order in Council, classified as primary legislation for the purposes of the Human Rights Act 1998, could be overridden by the judiciary. To that question, Lord Hoffmann, delivering the majority judgment, answered that he saw 'no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action'.<sup>31</sup> That decision was accepted unanimously. He further held, along with Lords Bingham and Mance, that the Order in Council was not a colonial law for the purposes of reviewing the exercise of prerogative powers by Her Majesty in Council (hence non-application of the Colonial Laws Validity Act 1865, which would have had the effect of ousting the Court's jurisdiction).<sup>32</sup>

Despite opening the door to review, that review was to prove extremely light touch: Lord Hoffmann held that the Crown could remove a right of abode by Order in Council and that in this case that power had been exercised lawfully. Following the logic of *Bancoult I*, Hoffmann held that 'In a ceded colony...the Crown has plenary legislative authority. It can make or unmake the law of the land'.<sup>33</sup> Consequently, while the Chagossians have a constitutional right to abode, 'there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it'.<sup>34</sup> He further rejected the argument that in legislating for the islands, the crown is restricted to ruling for the peace, order and good governance, or otherwise for the benefit of the inhabitants of that colony: 'Her Majesty in Council is ... entitled to legislate for a colony in the interests of the United Kingdom...' and, furthermore, is 'entitled...to prefer the interests of the United Kingdom'.<sup>35</sup>

Reviewing the decision using ordinary principles of administrative law, Lord Hoffmann was not persuaded that the fundamental right of abode was in issue. That issue, he reasoned, had been argued long ago and compensated for. Given the impracticality of return without considerable financial support from the United Kingdom Government, the current legal action, he reasoned, was effectively part of a protest. Consequently, the House of Lords' review as to the irrationality of the Order was from the



outset contorted into a very light touch. Security interests clearly weighed heavily in its decision. Alarming, Lord Hoffmann included in his reasoning an assertion that it was within the powers (that is, it would not be irrational) of the Foreign Secretary to take into account the fact that permitting resettlement without adequate support would engage the scrutiny of the United Nations under article 73 of the Charter.<sup>36</sup> Further, the majority held that the argument that the applicant had a legitimate expectation of being permitted to return home based on the Foreign Secretary's response to *Bancoult II* was unfounded. The promise made at that time was subject to the outcome of the Feasibility Report. Each Lord Law expressed considerable sympathy for the islanders; but the majority could not find a way for their rights to be protected. In the words of Lord Carswell:

No one could fail to feel distressed about their plight at that time. It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to a party who has been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially – in the words of the Book of Common Prayer, truly and indifferently minister justice.<sup>37</sup>

Lord Bingham was in the minority in holding that the orders were irrational because they had been made without good reason.<sup>38</sup> Stephen Allen argues, 'Had the House of Lords chosen to follow the more appropriate standard outlined by Lord Woolf in *Coughlan*, it would have been difficult for it to conclude that a change of policy was warranted on the evidence provided'.<sup>39</sup>

The idea that international law might have relevance to the resolution of the claim was given short shrift by Lord Hoffmann: 'As for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity of a purely domestic law'.<sup>40</sup> Allen is surely using under-statement when he describes this as an 'abrupt conclusion'.<sup>41</sup>

### **c. To the European Court of Human Rights: 'no more relevance in BIOT than a local government statute'**

The United Kingdom, when ratifying the European Convention on Human Rights, had

extended that ratification under Article 56 (the 'colonial clause', formerly Article 63) to Mauritius. On creating the BIOT, however, no such declaration was made. The House of Lords had held that the Convention consequently did not extend to the BIOT; in the words of Lord Hoffmann, 'BIOT is not part of the United Kingdom and the Human Rights Act, though it may be part of the law of England, has no more relevance in BIOT than a local government statute for Birmingham'.<sup>42</sup> That argument was to be tested before the European Court of Human Rights.<sup>43</sup>

An application to the European Court of Human Rights was lodged by a group of Chagossians<sup>44</sup> resident in Mauritius, the Seychelles and the United Kingdom in September 2004. The applicants complained of a violation of Article 3 (freedom from torture and inhumane and degrading treatment); Article 8 (right to respect for private life and home); Article 1 Protocol 1 (right to property); and Article 6 (right to a fair trial). Finally, they claimed a violation of their Article 13 right to an effective remedy. Once again, the islanders met with considerable sympathy - the Court referred to their treatment from 1967-1973 as 'callous and shameful'<sup>45</sup> – yet were left with no legal redress for the wrongs done to them.

The applicants argued that, in spite of the non-applicability of the colonial clause, the Convention's reach extended extraterritorially because the United Kingdom exercised effective control over the islands. The Human Rights Committee had already taken the view that the International Covenant on Civil and Political Rights extends to the BIOT, in spite of the United Kingdom's insistence that it does not.<sup>46</sup> The Government argued that Article 56 provided an insurmountable hurdle to the applicants' claims: the right of individual petition, although a declaration had been made for Mauritius, had not been extended to BIOT since it was established.<sup>47</sup> As to the relationship between the principles of extraterritorial jurisdiction under Article 1 and the colonial clause in Article 56, the Court referred to 'constant case-law to the effect that no jurisdiction arose where a Contracting State had not, through a declaration under Article 56 ... , extended the Convention or any of its Protocols to an overseas territory for who international relations it was responsible'.<sup>48</sup> Once again, it seems that law was to stand in

the way of justice: 'Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice.'<sup>49</sup> Further, neither the fact that many of the applicants were now resident in the United Kingdom, nor the fact that the Order had been made in the United Kingdom, was sufficient to bring the violations within the jurisdiction of the Court. In any event, the Court reassured itself, the applicants could not claim to be victims of a violation because their claims had already been settled through civil claims. In settling, the Court held, the applicants renounced further use of remedies (as for those applicants who had not personally agreed to a settlement, their claims failed for non-exhaustion of domestic remedies). Again, the islanders' claims were, at least implicitly, viewed as being extra-legal insofar as they formed part of an 'overall campaign to bring pressure to bear on government policy rather than disclosing any new situation giving rise to fresh claims under the Convention'.<sup>50</sup> The applicants' claims were dismissed for being manifestly ill-founded.

#### **d. Bancoult III and the Marine Protected Area**

Meanwhile, in 2009 it was revealed that the idea of a Marine Protected Area (MPA) in the Chagos Islands with a total ban on commercial fishing was being considered. The Government, highlighting the environment benefits of an MPA, ultimately implemented the idea by Proclamation No. 1 of 2010.<sup>51</sup> Covering more than half a million square kilometres, it was the largest MPA in the world. Mauritius, however, determined that its revived – and increasingly forcefully asserted – claim to sovereignty over the Chagos Islands<sup>52</sup> was considerably affected by this decision. The matter was consequently referred to arbitration, as per the United Nations Convention on the Law of the Sea (UNCLOS). Mauritius claims included that the United Kingdom was in violation of UNCLOS because it was not the coastal State, and that the United Kingdom's declaration of the MPA was incompatible with its obligations under UNCLOS. Mauritius argued that it had consistently asserted its sovereignty over the Chagos Islands since the 1980s, both before the United Nations General Assembly and in

bilateral communications.<sup>53</sup> The tribunal issued its award on 18 March 2015 *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v UK)*.<sup>54</sup> It found that the manner of the creation of the MPA disregarded Mauritius' rights and was consequently unlawful. The tribunal, however, disclaimed jurisdiction over the sovereignty issues raised by Mauritius in their submissions (Judges Kateka and Wolfrum dissenting on this point<sup>55</sup>); its award was concerned with the procedural aspect of the MPA's creation in light of the Lancaster House Undertakings made when the islands were detached from Mauritius. The tribunal viewed these undertakings as both a *sine qua none* of the agreement and binding on the United Kingdom as a matter of international law. Specifically, it held that the United Kingdom had failed in its obligations to meaningfully consult with Mauritius in the creation of the MPA, which amounted to a breach of UNCLOS Articles 2(3), 56(2) and 194(4). Despite side-stepping the sovereignty question, Michael Waibel argued that the 'arbitration itself put the United Kingdom in the awkward position of having to defend a colonial legacy in the Indian Ocean whose establishment is at least in tension with the legal principles applicable to decolonization'.<sup>56</sup>

Although the question of Mauritius' rights had thus begun to be asserted in legal fora, what the UNCLOS arbitration had not dwelt on was the connection between the creation of the MPA and the continued exclusion of the Chagossians from their homes. A further claim resulting from the decision to create an MPA, that once again went all the way to the highest domestic court, was brought by Olivier Bancoult. He argued his case before the English courts on two grounds: firstly, that the consultation process had failed to disclose that the creation of a 'no take' zone would interfere with Mauritian inshore fishing rights; secondly, the decision had been taken for an improper purpose (that is, to prevent the possibility of islanders returning to their homes).<sup>57</sup> The second argument was supported by documents sent from the United States' Embassy in London to the United States Federal Government reporting on a meeting with officials from the Foreign and Commonwealth Office that had been revealed by WikiLeaks. The brief report attributed the following comments to Mr Roberts, Secretary of State:

7. Roberts stated that according to the HGM's [sic] current thinking on a reserve, there would be no 'human footprints' or 'Man Fridays' on the BIOT's uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents ...

Establishing a marine reserve might indeed, as FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands' former inhabitants or their descendants from resettling in the BIOT.<sup>58</sup>

While ruling against the Divisional Court's decision that the cable was inadmissible, the Majority of the Supreme Court nonetheless found that there was no evidence that excluding this evidence had any material bearing on the outcome of the proceedings. Still less did it have bearing on the decision of Mr Milliband, the Foreign Secretary whose ultimate decision it was to establish the MPA. As Paul Daly has observed:

This must be a difficult defeat for the Chagossians to stomach. It is very difficult in judicial review cases to uncover evidence of improper purposes but here the claimants had, by chance, what they must have thought looked like an obvious smoking gun. To learn that even this was insufficient to make out a successful judicial review claim must have come as an unfortunate surprise.<sup>59</sup>

The Supreme Court further held that Mauritian fishing interests could have been asserted during the consultation process. Once again, the English courts proved unreceptive to the islanders' plight. The sovereignty question, and that of self-determination, however, were not over.

### 3. THE INTERNATIONAL COURT OF JUSTICE ON THE SEPARATION OF THE CHAGOS ARCHIPELAGO

On 22 June 2017 the UN General Assembly requested the International Court of Justice to render an Advisory Opinion on the 'legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965'. With the affirmative vote of 94 Member States,<sup>60</sup> the General Assembly asked the Court to answer the following 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, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?';

(b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland 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 international community displayed widespread interest in the questions posed to the Court, with thirty-seven States, in addition to the African Union, taking part in either the written or the oral proceedings concerning the requested Advisory Opinion.<sup>61</sup>

This was the twenty-seventh occasion on which the International Court of Justice received a request for an Advisory Opinion. The Court's jurisdiction to render an Advisory Opinion is explicitly established in Article 65(1) of its Statute, which provides that '[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.'<sup>62</sup> In the past, only once has the Court found itself lacking the jurisdiction to give an Opinion,<sup>63</sup> and in the present case there were no doubts as to the admissibility of the request. The Court swiftly agreed that the request was admissible, as it was made by the General Assembly and both questions submitted could be considered of legal character.<sup>64</sup> However, as the Court emphasised: 'The fact that [it] has jurisdiction does not mean [...] that it is obliged to exercise it'.<sup>65</sup> In fact, a strong argument raised by some of the intervening delegations, and which found limited reception from the bench, was that the Court should, for the first time in its history, exercise its discretion not to render an Advisory Opinion, nonetheless, falling within its jurisdiction.



There were four main reasons presented to the Court to support the exercise of its discretion not to provide the requested Advisory Opinion. These were:

...that, first, advisory proceedings are not suitable for determination of complex and disputed factual issues; secondly, the Court's response would not assist the General Assembly in the performance of its functions; thirdly, it would be inappropriate for the Court to re-examine a question already settled by the Arbitral Tribunal constituted under Annex VII of UNCLOS in the Arbitration regarding the Chagos Marine Protected Area; and fourthly, the questions asked in the present proceedings relate to a pending bilateral dispute between two States which have not consented to the settlement of that dispute by the Court.

The Court emphasised that only 'compelling reasons' could lead to exercising its discretion not to render an Opinion, and proceeded to evaluate each of the four reasons presented.<sup>66</sup> First, it rejected the argument that advisory proceedings were not suited to dealing with the questions asked, taking the position that within the proceedings there was enough information on the facts to answer the questions.<sup>67</sup> Secondly, it affirmed that it was not up to the Court, but to the General Assembly, to determine whether an answer to the questions posed would be of assistance to the latter in performing its functions; hence, it also rejected that reason to exercise its discretion. Thirdly, the Court rejected the third argument raised – that of the case having been already decided by an Arbitral Tribunal under UNCLOS – for two reasons; on the one hand, stating that the principle of *res judicata* does not apply to the advisory jurisdiction of the Court; and, on the other hand, affirming that the issues under analysis were not analogous to those decided by the aforementioned tribunal.

Arguably, the strongest reason to support the Court's exercise of discretion was the fourth one raised: that the questions asked in the advisory proceedings related to an existent bilateral dispute between two States – Mauritius and the United Kingdom – and that they had not consented to the settlement of that dispute by the Court. In fact, this reason was accepted by two of the Judges: Peter Tomka and Joan Donoghue. Both Judges understood that by

rendering the requested Opinion, the Court would be circumventing the lack of consent from the United Kingdom to adjudicate a bilateral dispute concerning sovereignty over the Chagos Archipelago.<sup>68</sup> Conversely, the majority of the Court rejected this argument. They affirmed that the request of the General Assembly was not aimed at solving a territorial dispute between two States, but that its purpose was rather to help the Assembly discharge its functions concerning the decolonisation of Mauritius.<sup>69</sup>

Having decided to exercise its jurisdiction to render the Advisory Opinion, the Court reflected upon the first question posed by the General Assembly: Was the process of decolonisation of Mauritius lawfully completed when gaining independence in 1968, taking into consideration the separation of the Chagos Islands in 1965? In order to answer that question, the Court had to determine whether the right to self-determination of peoples had already crystallised as a customary norm binding on all States at the time of the facts – the detachment of the Archipelago in 1965 and the independence of Mauritius in 1968.<sup>70</sup> Certainly one of the most significant findings of the Court was the confirmation that the right to self-determination was part of customary international law by the end of the year 1960, when the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)).<sup>71</sup> The Court affirmed that: 'although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm'.<sup>72</sup>

Moreover, the Court stated that an essential element of the right to self-determination is the territorial integrity of non-self-governing territories. Peoples of these territories are entitled to exercise the right to self-determination in relation of the entirety of their territory. Therefore, the detachment of a part of the territory by the administering Power would be in clear contravention of the right to self-determination, unless based on the freely expressed and genuine will of the people entitled to exercise such a right.<sup>73</sup>

When applied to the situation of Mauritius, these rules mean that the detachment of the Chagos Islands in 1965, prior to independence, could only be considered to have been lawfully done, if it followed the free and genuine will of the people. However, the Court considered

that the 'Lancaster House agreement', through which the detachment was determined, was not a reflection of such free and genuine will.<sup>74</sup> In fact, the General Assembly itself, in its Resolution 2066 (XX) of 16 December 1965, noted 'with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples]'.<sup>75</sup> Therefore, the conclusion reached by the Court was that the process of Mauritian decolonisation was not lawfully completed when it acceded to independence in 1968, given that the detachment of the Chagos Archipelago in 1965, and its incorporation into a new colony (the BIOT), was unlawful.<sup>76</sup>

After answering the first question in the negative, affirming that the process of decolonisation of Mauritius had not been lawfully completed, the Court provided an answer to the second question posed by the General Assembly: What are the legal consequences arising from the continued administration of the Chagos Islands by the United Kingdom? In rather clear terms, the Court affirmed that the administration of the Chagos Archipelago constituted an unlawful act, under international law, of a continuing character, which entails the international responsibility of the United Kingdom.<sup>77</sup> Consequently, the United Kingdom is under the international obligation to bring to an end, as rapidly as possible, the administration of the Chagos Archipelago, so to enable the completion of the decolonisation process of Mauritius 'in a manner consistent with the right of peoples to self-determination'.<sup>78</sup> Moreover, the Court indicated that it is for the General Assembly to determine the modalities required for the completion of the de-colonisation process of Mauritius, including the issue of the resettlement of Mauritian nationals on the Chagos Islands, which – the Court emphasised – is a topic relating to the protection of human rights.<sup>79</sup> Nevertheless, the Court clarified that 'respect for the right to self-determination is an obligation *erga omnes*, [therefore] all States have a legal interest in protecting that right',<sup>80</sup> which means that all States need to co-operate with the United Nations to complete the process of decolonisation of Mauritius.<sup>81</sup>

While voting together with the majority, it is worth highlighting that Judges Tomka and Gevorgian expressed their disagreement with the Court's finding that the United Kingdom's continued administration of the Chagos Archipelago amounted to an internationally wrongful act that engages its international responsibility. Both Judges considered that such a finding was not appropriate for the context on an Advisory Opinion, blurring the lines between the advisory and contentious jurisdictions of the Court.<sup>82</sup> Although Judge Gevorgian acknowledged that similar statements have been made by the Court in other Advisory Opinions – such as in the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*<sup>83</sup> or in the Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>84</sup> –, he affirmed that those cases should be distinguished from the present one, since on those occasions the United Nations Security Council had already established the illegality of the situation.<sup>85</sup>

While Judges Donoghue, Tomka and Gevorgian believed for different reasons that the Court had exceeded its authority, other judges considered that the Court might have actually failed to go far enough. Judges Sebutinde, Robinson, Salam and, of course, Cançado Trindade appended their respective declarations and separate opinions indicating certain shortcomings of the Court's decision. In particular, their respective votes highlighted the value of other resolutions adopted by the General Assembly;<sup>86</sup> the lack of any consideration of the issue of reparations, following the finding of an internationally wrongful act;<sup>87</sup> and the understanding that the right to self-determination should not only be viewed as a customary norm that imposes *erga omnes* obligations, but as a norm belonging to the domain of *jus cogens*.<sup>88</sup> From these separate opinions, we will pay closer attention to the detailed, comprehensive, and solidly-grounded individual vote of Judge Cançado Trindade, which almost doubled in length the decision adopted by the Court, as it is particularly insightful in bringing to the forefront the legal history of the principle of self-determination and its close connection with the suffering of the Chagossians.

## a. The separate opinion of Judge Cançado Trindade

For those of us who have engaged over the decades with the jurisprudence of the Inter-American Court of Human Rights, there was always an expectation that Judge Cançado Trindade would offer deep and carefully crafted reflections from the bench. The separate opinions issued by Judge Cançado Trindade have come to satisfy the legal curiosity of academic readers, providing a new opportunity to learn about, and reflect on, international law. On this occasion, his separate opinion started with a comprehensive legal history of the engagement with the right to self-determination within the ambit of the United Nations. It covered the numerous resolutions the General Assembly approved through the 1950s, which led to the adoption of Resolution 1514 (XV) of 14 December 1960,<sup>89</sup> the one that, according to the Court, reflected the normative character of the right to self-determination. However, the historical legal development of the right to self-determination within the United Nations did not end in 1960. Judge Cançado Trindade's opinion highlighted the many resolutions the General Assembly continued to adopt during the 1960s and 1970s, which included – among many – the creation of the Special Committee on Decolonization, with the mission to monitor the implementation of Resolution 1514 (XV),<sup>90</sup> as well as a resolution on the 'Question of Mauritius', in which it warned that the detachment of certain islands from the territory of Mauritius would be in contravention of the Resolution 1514 (XV).<sup>91</sup>

Moreover, the right to self-determination would be inserted within the two United Nations Conventions on Human Rights adopted in 1966 – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights –, both of which treaties begin with an identical Article 1, which states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the

realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>92</sup>

The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, affirmed that the right recognised in Article 1 of both Covenants enshrines an inalienable right of all peoples and that States Parties to these treaties are under the obligation to respect such a right not only in relation to their own peoples, but towards all peoples deprived of the possibility of exercising this right.<sup>93</sup> Judge Cançado Trindade further highlighted how the Committee had raised the issue of compliance with the right to self-determination in the specific case of the Chagos Archipelago in concluding observations to reports submitted by the United Kingdom under the International Covenant on Civil and Political Rights.<sup>94</sup> The Committee has stated that the United Kingdom should ensure that the Chagos islander can exercise their right to return to their territory and should also consider the payment of compensation for the denial of this right over such an extended period of time.<sup>95</sup>

On the other hand, the separate opinion of Judge Cançado Trindade fairly addressed the engagement of the European Court of Human Rights with the situation of the Chagossians – which was discussed above.<sup>96</sup> In its reasoned assessment, the separate opinion expressed regret about the fact that the European Court of Human Rights failed to deal with the merits of the case brought by the Chagos islanders, finding their claims to be inadmissible on procedural grounds. Judge Cançado Trindade exposed the excessive formalism underlying the approach adopted by the European Court of Human Rights, which led it to reject the Chagossians' claims due to its restrictive interpretation of the concept of 'victim' and of the requirement to exhaust domestic remedies.<sup>97</sup>

Judge Cançado Trindade also discussed the case law of the International Court of Justice concerning the right to self-determination.<sup>98</sup> This case law has as its starting point the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* from 1971, in which the Court recognised that the development of international law had led the principle of self-determination to be applicable to all non-self-

governing territories.<sup>99</sup> It continued in the Advisory Opinion on *Western Sahara* from 1975, as the Court emphasised that the exercise of the right to self-determination requires a free and genuine expression of the will of the people concerned.<sup>100</sup> A further step in the recognition of the right to self-determination by the International Court of Justice, as explained by Judge Cançado Trindade, took place in 1995, in the judgment on the *East Timor* case (Portugal v Australia), in which the Court affirmed the right to self-determination as one of the 'essential principles of contemporary international law' that is endowed with an *erga omnes* character.<sup>101</sup> The *erga omnes* character of the right to self-determination was further confirmed by the Court in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>102</sup> Lastly, in the 2010 Advisory Opinion on the *Declaration of Independence of Kosovo*, the Court stated that the development of the international law of self-determination has created 'a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'.<sup>103</sup>

A further issue discussed in the separate opinion concerned the question posed by Judge Cançado Trindade to the intervening delegations, at the end of the oral advisory proceedings, which received a significant number of written answers. The question was as follows: 'In your understanding, 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 [the] General Assembly resolutions [mentioned in the request for this Opinion]?'<sup>104</sup> The response from the delegations overwhelmingly stressed the '*opinio juris communis* as to the considerable importance of the fundamental right to self-determination (as from General Assembly resolution 1514(XV) of 1960) to the progressive development of (conventional and customary) international law, as well as to its universalization and humanization'.<sup>105</sup> Only the delegations from the United Kingdom and the United States sought to cast doubts as to the obligations emanating from the pertinent resolutions of the General Assembly.<sup>106</sup>

Judge Cançado Trindade's separate opinion went on to reflect upon the *jus cogens* character of

the fundamental right to self-determination, and did so by taking the reader on a journey through the International Court of Justice's case law on the topic of *jus cogens*. He emphasised that only brief references to *jus cogens*/peremptory norms can be found within the Court's rulings, enumerating the following ones:

*North Sea Continental Shelf* (of 20.02.1969, para. 72), *Nicaragua versus United States* (of 27.06.1986, para. 190), *Arrest Warrant* (of 14.02.2002, paras. 56 and 58), *Jurisdictional Immunities of the State* (of 03.02.2012, paras. 92-93 and 95-97), as well as in its Advisory Opinions of *Threat or Use of Nuclear Weapons* (of 08.07.1996, para. 83), and of *Kosovo* (of 22.07.2010, para. 81). The ICJ went further than that, in the case of the *Obligation to Prosecute or Extradite*, in stating, in its Judgment (of 20.07.2012), that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)" (para. 99).<sup>107</sup>

To these, he added the affirmation of the prohibition of genocide as a norm of *jus cogens* character, made by the Court in its judgment in *Armed Activities on the Territory of the Congo*, later confirmed in the two cases of the *Application of the Convention against Genocide*.<sup>108</sup> These rather limited interventions from the Court, to which is possible to add the absence of any references to peremptory norms in the present case, led Judge Cançado Trindade to express his criticism to the slow and reluctant approach adopted by the Court on the topic of *jus cogens*.<sup>109</sup>

In contrast, the development of the material content of *jus cogens* has been a task undertaken by individual judges, such as Cançado Trindade himself. His separate and dissenting opinions from the bench of the International Court of Justice – and before then from his seat at the Inter-American Court of Human Rights –<sup>110</sup> have provided careful reflections that have helped to shape the scope of international *jus cogens*. His current opinion provided a brief recollection of some of these memorable interventions in different cases, which included his dissenting opinion in the *Application of the Convention against Genocide* case (Croatia v Serbia); his (three) dissenting opinions in the case on the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands



v United Kingdom, India and Pakistan); his separate vote in the Advisory Opinion on the *Declaration of Independence of Kosovo*; his memorable dissenting opinions in the case of *Jurisdictional Immunities of the State* (Germany v Italy); his dissent in the case of the *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v Russian Federation); his opinion in the case of the *Obligation to Prosecute or Extradite* (Belgium v Senegal); and his separate opinion in the case of *A.S. Diallo* (Republic of Guinea v Democratic Republic of the Congo).<sup>111</sup>

The seriousness that his current opinion attached to the breach of international law under analysis – an understanding shared by Judges Sebutinde and Robinson –<sup>112</sup> led to further reflections on two interconnected topics: that of suffering and reparations. Concerning suffering, Judge Cançado Trindade managed to offer a vivid picture of the suffering of the victims who have been uprooted through the forced expulsion from the Chagos Archipelago to allow for the installation of a military base of the United States. The unforgettable story of Ms. M. Liseby Elysé, from which excerpts are shared in the separate opinion, was linked by the Judge to different extracts from ancient Greek tragedies, showing the timeless character of profound human suffering when violence is imposed to the detriment of the vulnerable victims.<sup>113</sup> Nonetheless, this suffering was not presented by Judge Cançado Trindade for us to resign ourselves to the subsistence of injustice, but to bear in mind that the consistency of human cruelty along the centuries has led to the awakening of human conscience to the need to bring justice to the victims. As he wisely claimed: ‘The sufferings imposed by colonialism throughout the last centuries continue nowadays to be studied, with growing attention, for the sake of the preservation of memory in the search of justice.’<sup>114</sup>

As to reparations, the separate opinion of Judge Cançado Trindade clearly affirmed the indissoluble link between a breach of international law and the duty of reparations – a position also shared by Judge Salam.<sup>115</sup> In other words, when a court of law establishes the

existence of an internationally wrongful act – as in the present case – it also should determine the measures that need to be adopted to bring to an end all the effects of the breach and to ensure respect for the legal order. Moreover, such reparations should encompass a variety of measures, namely: ‘*restitutio in integrum*, appropriate compensation, satisfaction (including public apology), rehabilitation of the victims, guarantee of non-repetition of the harmful acts or omissions.’<sup>116</sup> It is worth remembering that if reparations were to have been established by the Court in this case, it would not have been the first time in which the Court determined reparations within the context of an Advisory Opinion.<sup>117</sup>

#### 4. CONCLUSION

As a final reflection, it is encouraging to see that the International Court of Justice confirmed its practice of not hiding away from rendering Advisory Opinions on rather sensitive topics. With the sole (real) dissent of Judge Donoghue (from the United States) and some clear reticence expressed by Judge Tomka (from Slovakia), the Court confirmed that already by the end of 1960 the right to self-determination was part of customary law. This stance was also supported by the vast majority of the delegations that intervened in the proceedings before the Court, which actually highlights another positive element to extract from this case; the fact that so many States (and an international organisation) displayed their belief in the value of the International Court of Justice as an appropriate forum for international dispute settlement. Furthermore, different voices from the bench emphasised their conviction that the right to self-determination of peoples belongs to the realm of *jus cogens*, revealing a clear commitment with the idea that the developing law of decolonisation became an undeniable manifestation of the humanisation of contemporary international law, an unstoppable trend of the prevalence of the *raison d’humanité* over the old *raison d’État* in the framework of the *jus gentium* of our times.<sup>118</sup>

## NOTES

1. International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, 25 February 2019 [152].
2. *ibid* [174].
3. *ibid* [177].
4. *ibid* [180].
5. A memo from the Colonial Office dated 20 October 1964, and referred to by the Queen's Bench clearly stated that from a defence perspective, the agreement under discussion with regards to the Chagos Islands would only be tenable if the islands were not "subject to the political control of Ministers of a newly emergent independent state". *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and another* [2001] QB 1067, 1080.
6. The BIOT initially included the islands of Aldabra, Desroches and Farquhar, which were ceded to the Seychelles in June 1976.
7. Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the British Indian Ocean Territory (1967) \*Cmnd 3231, 30 December 1966.
8. *R (On the application of Bancoult) (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) (Bancoult II)* [2008] UKHL 61, per Lord Hoffman [10].
9. *ibid* [5].
10. Section 4(1) of the Immigration Ordinance 1971 provides: No person shall enter the Territory or, being in the Territory, shall be present or remain in the Territory, unless he is in possession of a permit or his name is endorsed on a permit in accordance with the provisions of section 5 and section 7 of this Ordinance respectively.  
  
Section 9 provides: It shall be unlawful for any person to enter the Territory or to be present or to remain in the Territory in contravention of the provisions of section 4...  
  
Section 10(1): The Commissioner may make an order directing that any person whose presence within the Territory is, under the provisions of this Ordinance, unlawful, shall be removed from and remain out of the Territory, either indefinitely or for a period to be specified in the order.
11. *Bancoult II*, above n 8, per Lord Hoffmann [11].
12. Laura Jeffery, *Chagos islanders in Mauritius and the UK: Forced displacement and onward migration* (Manchester University Press, Manchester, 2011) 26.
13. For a discussion of the population data, see Richard Gifford and Richard P. Dunne, 'A Dispossessed People: The Depopulation of the Chagos Archipelago 1965-19973' (2014) 20 *Population, Space and Place* 37. These authors calculate the population removed from the Chagos Islands to have been 1,328.
14. Article 73 of the UN Charter provides that Members of the United Nations which have or assume responsibility for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost... the well-being of the inhabitants of these territories...
15. Adam Tomkins, 'Magna Carta, Crown and Colonies' (2001) *Public Law* 571, 581.
16. Documents cited in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and another (Bancoult I)* [2001] QB 1067, 1083.
17. *ibid* 1081.
18. General Assembly Resolution 2066(XX) of 16 December 1965.
19. Jeffery, above n 12, 38-39.
20. *Bancoult I*, above n 16.
21. *ibid* 1103.
22. *ibid* 1104.
23. Public Statement made on 3 November 2000, quoted in Stephen Allen, *The Chagos Islanders and International Law* (Hart 2014), 14.
24. *Chagos Islanders v Attorney General* [2003] EWHC 2222.
25. *Chagos Islanders v Attorney General* [2004] EWCA Civ 997, per Sedley LJ [54].
26. *Liyanage v The Queen* [1967] 1 AC 259.
27. *Bancoult I*, above n 16, 1099-1100.

28. Foreign Office Under Secretary of State, Mr Bill Rammell, written statement to House of Commons, 15 June 2004 (Hansard (HC Debates), col 32 WS).
29. Section 9 of the BIOT (Constitution) Order 2004 reads: 1. Whereas the territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the territory. 2. Accordingly, no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory.
30. *Bancoult II*, above n 8.
31. *ibid* [35].
32. Section 2 of the Act reads: Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
33. *Bancoult II*, above n 8 [44].
34. *ibid* [45].
35. *ibid* [49].
36. *ibid* [55]. Article 73 reads: Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories...
37. *Bancoult II*, above n 8 [136].
38. In light of evidence revealed through Wikileaks in 2012, Mr Bancoult appealed to the Supreme Court to set aside the House of Lord's judgment: *R (on the application of Bancoult (No 2)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 35. The appeal was dismissed by a majority of 3 to 2. Lord Kerr suggested that it was a least possible that a different outcome might have occurred had the evidence been available.
39. Allen, above n 23, 28.
40. *Bancoult II*, above n 8 [66].
41. Allen, above n 23, 30.
42. *Bancoult II*, above n 8 [65].
43. *Chagos Islanders v the United Kingdom* (2013) 56 EHRR SE15.
44. Letters of authority were received from 1786 applicants.
45. *Chagos Islanders*, above n 43 [83].
46. The Human Rights Committee has adopted the following conclusions on the BIOT: 'Although this territory was not included in the State party's report (and the State party apparently considers that, owing to an absence of population, the Covenant does not apply to this territory), the Committee takes note of the State party's acceptance that its prohibition of the return of Ilois who had left or been removed from the territory was unlawful. The State party should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable. It should consider compensation for the denial of this right over an extended period. It should include the territory in its next periodic report.' *Concluding Observations of the Human Rights Committee on the United Kingdom (Overseas Territory)*, 6 December 2001, CCPR/CO/73/UKCCPR/CO/73/UKOT [38].
47. Article 56 reads: (1). Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the... Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible. (4). Any state which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.
48. *Chagos Islanders*, above n 43 [68].
49. *ibid* [74].
50. *ibid* [83].

51. A 200 nautical mile Fishing Conservation and Management Zone had already been created by BIOT Proclamation No. 1 of 1991 and subsequently an Environmental Protection and Preservation Zone created by BIOT Proclamation No. 1 of 2003. Neither were full exclusive economic zones.
52. The Parliament of Mauritius adopted on 7 July 1982 the Interpretation and General Clauses (Amendment) Act which incorporated the Chagos Islands into the definition of Mauritius.
53. *Award in the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v UK)*, 18 March 2015 [103].
54. *ibid*.
55. *ibid* [91]. These partly dissenting judgments noted: 'disturbing similarities between the establishment of BIOT in 1965 and the establishment of the MPA in 2010. Although these events are 45 years apart, they show a certain pattern. This is the disregard of the rights and interests of Mauritius. The 1965 excision of the Chagos Archipelago from Mauritius shows a complete disregard for the territorial integrity of Mauritius by the United Kingdom which was the colonial power. British and American defence interests were put above Mauritius' rights.'
56. Michael Waibel, 'Mauritius v UK: Chagos Marine Protected Area Unlawful' (EJIL: Talk!, 17 April 2015), available at: <https://www.ejiltalk.org/mauritius-v-uk-chagos-marine-protected-area-unlawful/> [accessed on 3 April 2019].
57. *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs (Bancoult III)* [2018] UKSC 3.
58. Cable from United States Embassy, London, on UK Government's Proposals for a Marine Reserve Covering the Chagos Archipelago, May 2009, cited at para 30 of the judgment.
59. Paul Daly, 'The Reverse Carltona: R (Bancoult) v Foreign and Commonwealth Secretary (No 3) [2018] UKSC 3' (*Administrative Law Matters*, 6 May 2018), available at: <https://www.administrativelawmatters.com/blog/2018/05/06/the-reverse-carltona-r-bancoult-v-foreign-and-commonwealth-secretary-no-3-2018-uksc-3/> [accessed on 3 April 2019].
60. The complete vote in the UNGA was as follows: 94 States in favour, 15 against, 65 abstentions and 19 non-voting. These results are available at: <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares71292> [accessed on 27 March 2019].
61. In alphabetical order, the intervening States were: Argentina, Australia, Belize, Botswana, Brazil, Chile, China, Cuba, Cyprus, Djibouti, France, Germany, Guatemala, India, Israel, Kenya, Korea, Lesotho, Liechtenstein, Madagascar, Marshall Islands, Mauritius, Namibia, Netherlands, Nicaragua, Niger, Nigeria, Russian Federation, Serbia, Seychelles, South Africa, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Vanuatu, Viet Nam, and Zambia.
62. Statute of the International Court of Justice, 18th April 1946 (33 UNTS 993), Article 65.1.
63. International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996 [32].
64. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1 [55]-[59].
65. *ibid* [63].
66. *ibid* [65].
67. *ibid* [74].
68. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, dissenting opinion of Judge Donoghue [3] and [5]; declaration of Judge Tomka [4].
69. *ibid* [86]-[91].
70. *ibid* [148].
71. United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV), 14 December 1960, A/RES/1514(XV).
72. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1 [152].
73. *ibid* [160].
74. *ibid* [172].
75. United Nations General Assembly, Question of the Mauritius, Resolution 2066 (XX), 16 December 1965, A/RES/2066 (XX).
76. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1 [174].



77. *ibid* [178] and [177].
78. *ibid* [178] and [182].
79. *ibid* [180] and [181].
80. *ibid* [180].
81. *ibid* [180] and [182].
82. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, declaration of Judge Tomka [8], declaration of Judge Gevorgian [5].
83. In that occasion the Court affirmed that: ‘the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory’. See International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, 21 June 1971 [133(1)].
84. In that Opinion the Court stated: ‘Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto...’. See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 9 July 2004 [163(3)].
85. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, declaration of Judge Gevorgian [6].
86. *ibid*, joint declaration of Judges Cançado Trindade and Robinson.
87. *ibid*, separate opinion of Judge Cançado Trindade; *ibid*, declaration of Judge Salam [6] and [7].
88. *ibid*, separate opinion of Judge Sebutinde [25], [26] and [47]; *ibid*, separate opinion of Judge Robinson [48] and [77]; *ibid*, separate opinion of Judge Cançado Trindade; *ibid*, joint declaration of Judges Cançado Trindade and Robinson [8].
89. *ibid*, separate opinion of Judge Cançado Trindade [9]-[17].
90. *ibid*, separate opinion of Judge Cançado Trindade [19]-[20].
91. *ibid*, separate opinion of Judge Cançado Trindade [21]-[22].
92. International Covenant on Civil and Political Rights (adopted on 16 December 1966) 999 UNTS 171 (entered into force on 23 March 1976), Article 1; International Covenant on Economic, Social and Cultural Rights, (adopted on 16 December 1966) 993 UNTS 3 (entered into force on 3 January 1976), Article 1.
93. UN Human Rights Committee, *General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984 [2] and [5].
94. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, separate opinion of Judge Cançado Trindade [63]-[65].
95. UN Human Rights Committee, Concluding Observations, 6 December 2001 (CCPR/CO/73/UK), 9 [38]; UN Human Rights Committee, Concluding Observations, 30 July 2008 (CCPR/C/GBR/CO/6), 6 [22].
96. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, separate opinion of Judge Cançado Trindade [272]-[277].
97. *ibid*.
98. *ibid*, separate opinion of Judge Cançado Trindade [69]-[75].
99. *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, above n 83 [52].
100. International Court of Justice, *Western Sahara (Advisory Opinion)*, 16 October 1975 [55], [56] and [59].
101. International Court of Justice, *Case concerning East Timor (Portugal v Australia)*, 30 June 1995 [29].
102. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above n 84 [156].
103. International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)*, 22 July 2010 [79].
104. International Court of Justice, doc. CR 2018/25, of 05.09.2018, 58 [26].
105. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, separate opinion of Judge Cançado Trindade [88].

106. However, a recent article by Chasapis Tassinis and Nouwen discussed how the United Kingdom had defended the understanding of peoples' self-determination as a right within the United Nations Security Council already in the 1940s. See Orfeas Chasapis Tassinis and Sarah Maria Heiltjen Nouwen, "The Consciousness of Duty Done"? British Attitudes Towards Self-Determination and the Case of Sudan' (February 1, 2019), University of Cambridge Faculty of Law Research Paper No. 8/2019, 42 and 43.  
Available at: <https://ssrn.com/abstract=3333047> [Accessed on 28 March 2019].
107. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, separate opinion of Judge Cançado Trindade [153].
108. *ibid*, separate opinion of Judge Cançado Trindade [154] and [155].
109. *ibid*, separate opinion of Judge Cançado Trindade [163].
110. IACHR, *Blake v. Guatemala*, Series C 36 (1998), separate opinion of Judge Cançado Trindade [15]; IACHR, "Street Children" v. *Guatemala*, Series C 63 (1999), joint concurring opinion of Judges Cançado Trindade and Abreu-Burelli [2]; IACHR, *Juridical Condition and Rights of Undocumented Migrants*, AO-18 (2003), concurring opinion of Judge Cançado Trindade [41] and [72]; IACHR, *Plan de Sánchez Massacre v. Guatemala*, separate opinion of Judge Cançado Trindade [29] and [30]; IACHR, *Pueblo Bello Massacre v. Colombia*, Series C 140 (2006), separate opinion of Judge Cançado Trindade [64]; *López Álvarez v. Honduras*, Series C 141 (2006) concurring vote of Judge Cançado Trindade [54]; IACHR, *Goiburú v. Peru*, Series C 153 (2006), separate opinion of Judge Cançado Trindade para 67; IACHR, *La Cantuta v. Peru*, Series C 162 (2006), separate opinion of Judge Cançado Trindade [61].
111. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, above n 1, separate opinion of Judge Cançado Trindade [161].
112. *ibid*, separate opinion of Judge Sebutinde [25], [26] and [47]; *ibid*, separate opinion of Judge Robinson [48] and [77].
113. *ibid*, separate opinion of Judge Cançado Trindade [219]-[228].
114. *ibid*, separate opinion of Judge Cançado Trindade [227].
115. *ibid*, separate opinion of Judge Cançado Trindade [257]-[263]; *ibid*, declaration of Judge Salam [6]-[7].
116. *ibid*, separate opinion of Judge Cançado Trindade [263].
117. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above n 84 [163(3)].
118. *ibid*, separate opinion of Judge Cançado Trindade [313] and [318].

