

‘Humanizing’ the Law of Self-Determination – the Chagos Island Case

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Abstract

Human rights are perceived more and more as a set of norms of all-encompassing effects determining all international action, in particular also those by the United Nations. The recent ICJ Opinion in the *Chagos* case seems to suggest, however, that the field of self-determination is not yet really affected by this development. The ICJ has dealt with this case in a very traditional manner declaring, as it was foreseeable, that the de-colonisation process of the Chagos Islands has not been lawfully completed. At the same time, the ICJ widely ignored the direful lot of the Chagossians. This article investigates whether it is still tenable to deal with a decolonisation case exclusively from the perspective of ‘classic colonial self-determination’ while barely considering the lot of the people directly affected by these events. The main proposition of this article is that the process of humanization of international law must not stop short from affecting also the law of self-determination. It is suggested, on the contrary, that in the 21st century the law of self-determination has to set the individuals composing the people in the forefront.

Keywords

self-determination – humanization of international law – *Chagos* case – decolonization – ICJ Advisory Opinion

1 Setting the Stage

The recent International Court of Justice (ICJ) Advisory Opinion (AO) on the *Legal Consequences of the Separation of the Chagos Archipelago from*

*Mauritius*¹ can be seen as the last step in a long row of pronouncements by the ICJ on the concept of self-determination that has, as few others, dominated international law discussions in the 20th century.² The fight for self-determination has many facets and this is reflected in the relevant ICJ jurisprudence. Most pronouncements the ICJ has issued on this subject over the years refer to the so-called ‘colonial right to self-determination’ and therefore to that ramification of the right to self-determination that proved to be the strongest after

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- 1 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 22 June 2019, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf>>, visited on 11 June 2021.
 - 2 See, in particular, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>>, visited on 11 June 2021. *Western Sahara*, 16 October 1975, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/61/6197.pdf>>, visited on 11 June 2021. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>>, visited on 11 June 2021. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>>, visited on 11 June 2021. During the inter-war period it was the *Åland* case that became prominent as a dispute relating to self-determination issues. Within the League of Nations this dispute was, however, not resolved by the Permanent Court of International Justice but addressed, first, by a Commission of Jurists, while the solutions founds thereby were afterwards specified further by a Commission of Rapporteurs. See the “Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question”, League of Nations Commission of International Jurists on the Aaland Islands Question, *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question* (Harrison & Sons, Limited, 1920) as well as ‘The Aaland Islands Question’, Report Presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21/68/106 (1921). Thus in 1920, the Committee of Jurists affirmed the legal relevance of self-determination as a criterion of territorial settlement in situations where legal normality had been disturbed by ‘revolutions or wars’. In the following year, the Council established a Commission of Rapporteurs (1921) to give effect to the legal principles laid out by the Committee of Jurists. According to the Commission, self-determination may be realized though secession when the prospects of its credible internal realization are no longer present: “The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.” As to the position the ICJ has taken with regard to this concept, see A. Cassese, ‘The International Court of Justice and the right of peoples to self-determination’ in V. Lowe/M. Fitzmaurice (eds.), *Fifty years of the International Court of Justice* (CUP: Cambridge 1996) pp. 351–363.

1945, the one that contributed most to the success of this concept. At first look, also the *Chagos Islands* Opinion pertains to this current and there can be no doubt that this Opinion contains, as will be seen below, a series of clarifications that, as contestable as they may be, will influence if not steer the further discussion on colonial self-determination in a decisive manner. In this sense, this Opinion could be seen as somewhat as a final statement by the World Court on a phenomenon, colonialism, that has been an aberration in the history of mankind and that has been eventually, although much belatedly, mostly overcome, also and fundamentally through recourse to the concept of self-determination. The remnants of colonialism can now be addressed with legal and political resolve taking recourse to a rich panoply of legal instruments and jurisprudential statements also by the ICJ.

This account of the relevant developments might provide a comforting sensation as to the civilizational progress in international law. Nonetheless, a closer look at this line of jurisprudence in general and at the *Chagos* AO in particular might give a somewhat different impression. To celebrate the *Chagos* AO for bringing at least colonial self-determination full circle is deceptive. It is the very end of self-determination that is here at issue, the question of what is the finality of this concept. How does self-determination, in particular in its colonial fashion, fit into the overall international legal order? If this concept is really to be attributed such a prominent, pivotal position, how can it be reconciled with other principles of international law of equally fundamental nature, in particular in the area of human rights? If the dictum of the 'humanization of international law'³ is to be attributed more relevance than that of a mere political slogan the concept of self-determination should be one of the primary candidates where the significance of this proposition could be tested.

In literature for quite some time there has been a tendency to interpret self-determination as a concept essentially based on a human rights perspective. Restrictions in regard to these human rights elements have exceptionally to be tolerated in order to protect other needs of the society such as international peace and security.⁴ A closer look at the actual practice – and now at the *Chagos* case – seems to suggest, however, that we are still very far from such a situation. The relationship between self-determination and human rights is

3 See, fundamentally, Th. Meron, *The Humanization of International Law* (2006). See also B. Simma, *International Human Rights and General International Law: A Comparative Analysis, The Protection of Human Rights in Europe* (1993) 1V/2, pp. 153–236 and, for a forward-looking perspective, A.A. Cançado Trindade, *International Law for Humankind* (3rd ed. 2020).

4 R. McCorquodale, 'Self-determination: A Human Rights Approach', 43 *ICLQ* (4/1994) p.885.

widely unclear and for the rest it seems that in case of conflict the former prevails over the latter.

As will be shown, the *Chagos Islands* case had offered a unique opportunity for investigating the relationship between self-determination and the protection of human rights more closely. Despite some openings in this direction, on a whole, this opportunity was missed. It is true that the ICJ paid lip service to the notion that self-determination is a fundamental human right, but the formal commitment to this idea had no real consequences on the substantive level. Otherwise the Court would have taken up the opportunity to deal, at least to some extent, with the immediate interests of the people of the Chagos Islands, the Chagossians. Several judges addressed this issue separately – thereby only emphasizing the respective shortcomings of the Opinion.

Nonetheless, looking ahead, if we take notice of what this proceeding has omitted, this AO could constitute a watershed prompting a comprehensive stock-taking on the relevance and the actual meaning of self-determination in the 21st century. In particular, it has not only to be examined how self-determination should be implemented so as to guarantee the respect human rights involved. In parallel, but more fundamentally, it has to be sorted out whether self-determination these days is defensible at all if human rights as a cross-cutting element are ignored. The main proposition of this contribution is that self-determination and the defense of human rights can no longer be seen as two independent subjects, as ships passing in the night. Self-determination cannot be implemented detached from full realization of human rights if the risk shall be avoided to make the former concept not only irrelevant but even dangerous and detrimental.

2 The Chagos Islands Case

2.1 *The Origins of the Chagos Islands case*

The *Chagos Islands* case is in one sense a ‘typical’, ‘traditional’ case of colonial self-determination which, however, presents very specific traits that were in the end also decisive for this case resisting the wave of self-determination of the second half of the 20th century.

As is well-explained in the ICJ Opinion of 25 February 2019,⁵ for a long time, between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius.⁶ As soon

⁵ ICJ *Chagos* Advisory Opinion, *supra* note 1.

⁶ *Ibid.*, para. 28.

as it became clear that the traditional colonial empires could no longer be upheld and that colonies would have to be granted independence, fears came up among Western nations that the resulting power vacuum would be filled by the Communist states with the Soviet Union in particular entering into these new free spaces.⁷ The Chagos Islands posed a particularly delicate challenge as this archipelago lies rather detached from Mauritius in the midst of the Indian Ocean being thereby extremely attractive as a military base. The United Kingdom took recourse to a sophisticated stratagem in order to come up to its imperative international law duties in the field of decolonization while at the same time preserving its strategic interests in cooperation with the United States: Mauritius should be granted independence, but at the same time the British government required the Mauritian government to accept the detachment of the Chagos Islands that were to be integrated into a new 'British Indian Ocean Territory (BIOT)' and which should remain with the UK. In the so-called 'Lancaster House Agreement' Mauritius had to agree to this UK plan as a factual pre-condition for being granted independence in 1968, a right which would have pertained to Mauritius anyway. In 1966 the UK concluded with the US an "Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory" which should last 50 years and which included, in particular, also the largest island of the Chagos archipelago, Diego Garcia.⁸ This had as a consequence that the Chagossians – mostly descendants of Afro-Madagascar slaves who were brought to these formerly uninhabited islands in the 18th and 19th century by French and British settlers⁹ – were forcibly removed in the years between 1968 and 1973.¹⁰

Starting with the 1980s, also as a result of mounting protests by Mauritius, it became, however, more and more clear that the Mauritius/Chagos process of self-determination had not been completed lawfully.¹¹ In ever more international law instruments touching in some way the BIOT, the question of self-determination reappeared giving also proof to the growing status and pervasiveness of this concept. One example was the UK reporting obligations under various human rights instruments: the refusal by the UK to report about

7 S. Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians', 69 *ICLQ* (2020), pp. 203–220.

8 This treaty expired on 30 December 2016 and was extended then for a further twenty years period. See ICJ, 2019, para. 51.

9 D. Taylor, 'Slavery in the Chagos Archipelago', *Chagos News*, n. 14, 2000, pp. 1–4.

10 S. Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians', 69 *ICLQ* (2020) pp. 203–220, p. 205.

11 It has to be remembered that the ICJ had left no doubt as to this circumstance from the very beginnings. *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 34 et seq.

human rights issues referring to the BIOT came under growing strain and was finally no longer accepted.¹² The most notorious case bringing the *Chagos* case into the international headlines regarded the establishment by the UK of a “BIOT Environmental Protection and Conservation Zone (EPCZ)” encompassing a 200-mile geographical area surrounding the Chagos Archipelago.¹³ This measure had not only implications as to sovereign rights by Mauritius according to the UN Convention on the Law of the Sea (UNCLOS) ratified by this country in 1982 but had as a side effect also the creation of a massive barrier as regards Chagossians wanting to return to the Chagos Islands. In a proceeding started before an Arbitral Tribunal constituted under Annex VII of UNCLOS, Mauritius managed to succeed at least partially as this Tribunal found the establishment of the EPCZ to be in violation with UNCLOS, stating furthermore that the UK’s undertaking to return the Chagos Archipelago to Mauritius, when no longer needed for defence purposes, was to be considered legally binding.¹⁴

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

2.2 *Jurisdiction and the Integrity of the Courts Judicial Function in the Chagos Islands Opinion*

In view of the paramount importance here to be attributed to the right to self-determination, it was clear from the beginning that the decisive hurdle to be overcome for the Court to be able to provide substantive support to the cause of the Chagos Islands was that of jurisdiction. This problem appeared both in the sense whether jurisdiction was legally given at all and, if this question was to be answered in the affirmative, whether this jurisdiction should be exercised (propriety). In fact, there can be no doubt that the attempts to get a pronouncement on this case by the ICJ unfolded at the backdrop of fierce bilateral struggles between Great Britain and Mauritius, supported by other states, in diverse fora. The attempt to win over the UN General Assembly for a

12 See on this issue and on several other international legal regimes running over time into conflict with the UK’s self-determination obligation as to the BIOT P. H. Sand, ‘The British Indian Ocean Territory: International Legal Black Hole?’, 55 *QIL* (2018) pp. 35–59.

13 *Ibid.*, p. 55.

14 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 50.

request of an Advisory Opinion was the immediate result of the limited success these initiatives had had. These backgrounds where, of course, generally known and they entered into conflict with the fact that the advisory function of the ICJ had not been conceived as an alternative to the contentious function in case no consensus was given for the exercise of the latter. The exercise of the contentious function by the ICJ is essentially based on the free submission by the parties to this function; any attempt to circumvent this rule might be perceived as potentially undermining the very basis of the international judicial activity.¹⁵ However, what appears to be neat and clear in theory seems to be ambiguous in reality, with broad political leeway. Neither the distinction between the actual presence of jurisdiction and propriety of its exercise is by no means so evident in practice as it might seem in the abstract.

The ICJ decided unanimously that it had jurisdiction¹⁶ while two judges, Peter Tomka (Slovakia) and Joan E. Donoghue (USA) voiced the conviction that the ICJ should not have exercised it. Of these two, only Judge Donoghue wrote, as a consequence, a Dissenting Opinion, while Judge Tomka, notwithstanding his rejection of the majority's procedural position, agreed with the majority on the merits.

The UK submitted a large number of arguments both against the very existence of jurisdiction as against the propriety of its acceptance by the Court should it be considered as given in the abstract. Most of them were openly unconvincing from the outset, thereby only weakening the UK's hand. Thus it could hardly be argued that this was not a 'legal question'¹⁷ or that an advice given by the Court in this case would 'not be useful for the General Assembly'¹⁸. Neither could it be argued seriously that an Advisory Opinion in this case would mean a reopening of the arbitral proceeding in the UNCLOS case mentioned above regarding the EPCZ as this proceeding had different parties, different addressees and was of a different nature.¹⁹

Nonetheless, there was doubt about the propriety of the use of this jurisdiction. Thus it was feared that the *Chagos Island* AO proceeding might end up in the same way as the contentious proceeding in the *East Timor* case²⁰ a quarter

15 This was exactly the argument by Judge Donoghue in her Dissenting Opinion.

16 *ICJ Chagos Advisory Opinion*, *supra* note 1, paras. 55–62, 183.

17 *Ibid.*, para. 57.

18 *Ibid.*, para. 75. As the Court correctly stated in this regard: "it is not for the Court itself to determine the usefulness of the response to the requesting organ".

19 *Ibid.*, para. 79 et seq.

20 Case Concerning *East Timor (Portugal v. Australia)*, 30 June 1995, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf>>, visited on 11 June 2021.

of a century before²¹ where the ICJ refused to enter into a substantive discussion of the contentious issue laid before the Court by the parties.²²

In hindsight, it can be said that these fears were unjustified for a series of reasons. First of all, it is well-known that the rule expressed by the Permanent Court of International Justice (PCIJ) in the *Eastern Carelia* case,²³ according to which the Court can refrain from expressing an opinion if ‘compelling reasons’ would “render it very inexpedient that the Court should attempt to deal with [a] question”,²⁴ has been widely eroded though it did not totally disappear.²⁵ And in fact, the ICJ has never taken recourse to this option.

No doubt, the wording of Article 65 of the ICJ Statute still upholds this possibility, when it states 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”.

The advisory function is a discretionary function allowing the Court also not to respond to a request for an opinion if this should be necessary to protect the integrity of the Court’s judicial function.²⁶ This discretion has, however, to be used with prudence, and the propriety to exercise this advisory function has to be evaluated taking into consideration all the circumstances of the case.²⁷ According to the ICJ, ‘in principle’ it should not refuse to answer.²⁸ In light of the Court’s previous jurisprudence, and in particular the *Western Sahara* case of 1975,²⁹ the *Nuclear Weapons* case of 1996,³⁰ the *Wall* case of

21 See in this sense S. Allen, ‘The Chagos Advisory Opinion and the Decolonization of Mauritius’, 23 *ASIL* (2/2019).

22 At the same time, it has to be remarked, however, that in the *East Timor* case the ICJ, notwithstanding the eventual denial of jurisdiction, made in para. 29 a bold statement about the essence of the dispute at issue: “In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”

23 *Eastern Carelia*, 23 July 1923, P.C.I.J., Advisory Opinion, <http://www.worldcourts.com/pcij/eng/decisions/1923.07.23_eastern_carelia.htm>, visited on 11 June 2021.

24 *Ibid.*, para. 34.

25 M. Shaw, *International Law* (7th ed. 2014) p. 805.

26 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 64.

27 P. Hilpold, ‘The International Court of Justice’s Advisory Opinion on Kosovo: Perspectives of a Delicate Question’, 14 *ARIEL* 2009 (2013), p. 281.

28 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 65.

29 *Ibid.*

30 *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>, visited on 11 June 2021.

2004³¹ and the Kosovo case of 2010,³² such a refusal would have been all but revolutionary.

In particular, after the *Kosovo* Opinion of 2010, where good reasons were given for the ICJ to exercise this discretion for the first time in history,³³ it has become clear that the bar for exercising such a refusal was set extremely high by the Court. After the *Chagos* case it is hardly imaginable what the 'compelling reasons' prompting the ICJ to decline to give an answer should look like.³⁴ A presumption applies that the organ requesting advice is acting in the correct exercise of its functions, and for the ICJ to contest such a presumption could be tantamount to provoking a constitutional crisis within the UN system.³⁵ It would therefore be somewhat strange purporting to defend the integrity of the ICJ judicial function while at the same time putting at peril the integrity of the UN system in its basic structures.³⁶

31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>>, visited on 11 June 2021.

32 *ICJ Kosovo* Advisory Opinion, *supra* note 2.

33 See Hilpold (note 27) at 28 as well as *idem*, *The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Re-Requisites*, in: P. Hilpold (ed.), *Kosovo and International Law* (Leiden/Boston: Martinus Nijhoff: Leiden/Boston 2012), pp. 1–29.

34 Judge Gaja has evidenced such a situation with regard to the case that the issue of reparation had been raised as this would introduce a bilateral dispute. And in fact, this was carefully avoided by all parties interested in a decision against the UK. See *ICJ Chagos* Advisory Opinion, *supra* note 1, Separate Opinion Judge Gaja, <<https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-07-EN.pdf>>, visited on 11 June 2021. As to future similar situations, much depends upon the further development of the concept of *erga omnes*-obligations. It could be argued that the state community by invoking the UK's state responsibility with subsequent request of reparations are acting on the basis of Article 48 of the ILC Draft Articles on State Responsibility.

35 It should furthermore be considered that the 'Eastern Carelia exception' as it was conceived by the PCIJ in 1933 (lack of sufficient information to arrive at a judicial conclusion due to the non-participation of one party of the underlying dispute) could still materialize in a modern context.

36 It is interesting to see how the Court continues to uphold this possibility to decline jurisdiction – a category which has elements of a right and an obligation – while denying its applicability in concrete cases, thereby, as it seems, defending an extensive use of its advisory function. On the other hand, sticking – at least theoretically – to the possibility to decline an answer for the purpose of defending the integrity of the Court has an important constitutional role: It provides basic legitimacy to a function whose exercise may affect the legal position of states in a similar way as a judgment in a contentious procedure without having these states accepted such a jurisdiction. Pierre d'Argent writes in this context of a 'frustrating concept' which, however "is probably not devoid of a certain regulatory hidden effect". See P. d'Argent, 'Article 65', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3th ed. 2019), para. 52.

On a whole, in the *Chagos* Case, the Court followed a very traditional approach that was ‘politically correct’ but at the same time missed some important opportunities.

The questions presented were answered in a de-colonization perspective as developed in the 1970s focusing on the colonial territory delimited by borders drawn according to the *uti-possidetis* principle.³⁷ Accordingly, the outcome of this proceeding could be anticipated from the very beginning.

Essentially, the violation of de-colonization obligations by an old colonial power, perhaps the foremost among all colonial states, was at issue. It was beyond doubt that the violations committed by the United Kingdom in this area were outrageous, and UK representatives had to admit these circumstances, though grudgingly and only partly, even during the proceeding.³⁸ Some compensation was paid³⁹ and further payments seem at least to be possible.⁴⁰

The outcome of this proceeding was predictable in the sense that it was quite unthinkable that the ICJ could have justified these events in whatever form. This proceeding was about colonialism in its purest form, showing fully the ugly face of this ‘scourge of mankind’. Denying the propriety of an answer in such a case would have put into peril the UN’s self-perception as one of the leading institutions fighting colonialism. Colonialism is now unanimously condemned, and it is often said to constitute a violation of *jus cogens* and

37 The ICJ did not, however, explicitly refer to this concept. This much contested concept would otherwise have seen a further development and strengthening and this was clearly not intended by the ICJ. See also J.-L. Iten, ‘L’avis consultatif de la Cour internationale de Justice du 25 février 2019 sur les Effets juridiques de la séparation de l’archipel de Chagos de Maurice en 1965’, 12 *RGDIP* (2/2019) pp. 383–400 (396). On the concept of *uti possidetis*, see the still fundamental contribution by G. Nesi, *L’uti possidetis iuris nel diritto internazionale* (1996).

38 See *Chagos* case, para. 116: “In the oral proceedings, the United Kingdom reiterated that it fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact”.

39 The UK agreed twice to pay compensation: on 4 September 1972 (GBP 650,000 to Mauritius for the resettlement of the Chagossians) and on 7 July 1982 (GBP 4 million – officially ‘*ex gratia*’ – for the final settlement of all claims by the Chagossians or by Mauritius in favour of the Chagossians. See J.-L. Iten, *supra*, note 37, at 385. On the pitiful process by which some modest sums have been paid – much belatedly – to Chagossians, see *The Decision by the England and Wales High Court of 11 May 2006*, 11 May 2006, EWHC, <<http://www.bailii.org/ew/cases/EWHC/Admin/2006/1038.html>>, visited on 11 June 2021.

40 P. Wintour, ‘Chagos Islanders denied right to return home’, *The Guardian*, 16 November 2016, <<https://www.theguardian.com/world/2016/nov/16/chagos-islanders-denied-right-to-return-home>>, visited on 11 June 2021.

even to qualify as a crime against humanity.⁴¹ This holds in particular true if colonialism in its most traditional form is at issue with one of the once dominant Western European states exercising colonial powers.⁴² In this sense, the *Chagos* AO was not really revolutionary even though it brought, as will be seen, some clarification as to the 'defining moment' from which self-determination was to be retained as a rule of customary international law and with regard to the concrete implementation of this right. It will be shown that these findings may be contestable but nonetheless they set landmarks in international law as a consequence of the ICJ's authority.⁴³

At the same time, this AO stands out more for what it does not say than for what it actually says. An AO of this kind could have been handed down very well also in the 1970s or 1980s without causing much of a stir. As already anticipated, the main proposition of this contribution is that this opinion is missing out on a central aspect, the human right perspective, which is hardly touched upon and with the ICJ openly turning down responsibility for this issue. It is suggested here that this has been a deplorable omission. It seems as if nearly half a century of human rights developments and affirmations have passed without really affecting the ICJ.

2.3 *A Square look at Self-Determination as Defined by the Court*

2.3.1 Substantive Issues

The most innovative elements of this Opinion regard the considerations on the right to self-determination. As is well known, the ICJ has already elaborated extensively on the right to self-determination in past cases but at the same time still many questions in this field remain unanswered. The ICJ took

41 M. Stothard, 'Macron calls France's colonial past a 'crime against humanity'', *Financial Times*, 17 February 2017 <<https://www.ft.com/content/87d6f430-f521-11e6-95ee-f4e555136086>> visited on 11 June 2021.

42 Politically more difficult are post-colonial situations, such as it was the case with East Timor where a colonial territory on the point of being granted independence is occupied by another country which happens to be itself a former colony. The non-liquet judgment by the ICJ in the *East Timor* case in 1995 was disappointing even though, if considered from a realistic vantage point, taking into consideration the political forces at play at that time, hardly something different could be expected. The Court would have had to rule about a situation of neo-colonialism thereby expanding enormously the UN's field of activity and leading it to uncharted waters. On the other hand, after the *Chagos* opinion, a similar situation to the *East Timor* case would probably have been decided in a different way.

43 "[A]dvisory opinions carry with them the prestige and the authority of the Court". See P. d'Argent, 'Article 65', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed. 2019), para. 49.

here the opportunity to create greater clarity, while continuing, however, to leave open many questions in this area.

In the *Chagos* case, a crucial question regarded the exact date when the right to self-determination emerged as a customary international law norm. Should this have happened after Mauritius had become independent, as sustained in particular by the UK, it would have been much harder to argue in favour of a right to self-determination for the Chagos Islands.

The ICJ, however, opined for self-determination becoming an international customary law norm at a much earlier time, qualifying “[t]he adoption of resolution 1514(XV) of 14 December 1960 [as] a defining moment in the consolidation of State practice on decolonization”.⁴⁴

The fact, that resolution 1514(XV) was adopted by 89 votes in favor and 9 abstentions, mostly by colonial powers, was not seen as a hindrance by the Court in this context as “[n]one of the States participating in the vote contested the existence of the right of peoples to self-determination” and “[c]ertain States justified their abstention on the basis of the time required for the implementation of the right”,⁴⁵ a stance surely favouring an extensive interpretation of the right to self-determination, much helpful to Mauritius.

The next question the ICJ had to answer in this context was whether the right as it existed in 1960 implied also the obligation by the colonial power to desist from any changes in the colony’s territorial delimitation, already well before the colony could exercise its right to self-determination. For the Court, such an obligation was actually given, thereby introducing sort of a principle of ‘*uti possidetis*’ with retroactive effect at least to the year 1960.

The basis for such a rule, purportedly in vigor in the year 1960, was found in paragraph 6 of resolution 1514(XV) which goes as follows:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.⁴⁶

44 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 150. Victor Kattan made the good point that “the ICJ did not mention how the Decolonization Declaration came to reflect customary international law, other than to describe it as a ‘defining moment’ in the consolidation of state practice on decolonization”. See V. Kattan, ‘The Chagos Advisory Opinion and the Law of Self-Determination’, 10 *Asian Journal of International Law* (2020) pp. 12–22 (21).

45 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 152.

46 *Ibid.*, para. 153.

This finding is remarkable as in the past this provision, which again can be found in the Friendly-Relations-Declaration of 1970, was prevailingly read in a different light. In fact, as this provision refers to a 'country', it could be interpreted in the sense that it protects national sovereignty of existing states, thereby avoiding the spread of secession processes.

For the Court, instead, the territorial borders of colonies, which should be considered to this end as 'countries' starting with the year 1960 at the latest, should no longer be subject to changes against the will of their population. The importance of this will was set out in resolution 1541 (XV) according to which the right to self-determination has to be exercised in a way that "must be the expression of the free and genuine will of the people concerned".

In a certain sense, this dispute brings again the old controversies about the relationship between human rights, self-determination and de-colonization to the fore. This widely forgotten conflict may have brought about some compromises and certainties, but it is by far not resolved in each of its details and ramifications, still allowing for somewhat diverging human rights narratives. For decades, the human rights rhetoric has been instrumental in the anti-colonial struggles of the third world.⁴⁷ Human rights were primarily related to the nation as a whole; the 'individualistic' perspective began to prevail only in the mid-1970s,⁴⁸ in particular with the CSCE Helsinki Final Act of 1975⁴⁹ and after the coming into force of the two UN Human Rights Covenants of 1966 in 1976.⁵⁰ With many of the newly independent countries (emerging as independent states as a result of the fight for self-determination) turning autocratic, the fully-fledged adoption and implementation of the International Covenant on Civil and Political Rights (ICCPR) continued to remain, in many cases and for many years, not a real option. De-colonization and the defense of the resulting sovereignty, continued, however, to be a human rights project,

47 See extensively R. Burke, *Decolonization and the evolution of international human rights* (University of Pennsylvania Press 2010: Philadelphia, PA).

48 S. Moyn, *The last utopia: human rights in history* (Harvard University Press: Cambridge, MA 2010).

49 Steven L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (CUP: Cambridge 2016) pp. 209 et seq.

50 The change of perspective in the human rights discussion, from the nation-state to the individual, was strongly promoted by the NGO movement's ever-growing strength and coverage. See *inter alia* A. Dirk Moses, M. Duranti & R. Burke (eds.), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics (Human Rights in History)* (Cambridge: Cambridge University Press 2020) and S. Moyn and U. Öszu, 'The Historical origins and Setting of the Friendly Relations Declaration', in Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50* (Cambridge University Press: Cambridge 2020) pp. 23–47 (43).

in a discussion imbued by cultural relativism.⁵¹ This was not only a conflict between North and South but also between East and West, with the UN Friendly Relations Declaration of 1970⁵² trying to find a way out of these conflicts, but in substance showing an overall bias in favour of protection of state sovereignty. As has been remarked, “[i]n the Friendly Relations Declaration, self-determination was focused on decolonization situations and as a right of peoples to achieve their independence”⁵³ and “the reference to human rights remains limited to the principle of self-determination”.⁵⁴

The ensuing UN self-determination practice was met up to the 1980 with considerable criticism by human rights experts.⁵⁵ As it seems, the double standard in the discussion about self-determination introduced in the 1960s and 1970s was conducive to different narratives about the relationship between self-determination, decolonization and human rights that persist up to this day. The *Chagos* case demonstrates that in a period of an ever-increasing individualization of human rights protection, it is more urgent than ever to overcome this quandary.

Undoubtedly, no ‘free and genuine will of the people concerned’ was expressed at the time of the detachment of the Chagos Islands, no matter whether the ‘people concerned’ are seen as the Mauritians or the Chagossians.

This special, qualified *uti possidetis* principle ‘post 1959’ is intended to further strengthen the right to colonial self-determination as thereby any changes of (internal) borders, undertaken by the same colonial power starting with the year 1960, are presumed to be intended to circumvent the self-determination obligation and therefore to be considered as invalid.

At the time when representatives of the Mauritian local government, the ‘Committee of the Twenty-Four’, gave their consent to this excise of the Chagos

51 Burke, *supra* note 47.

52 The General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation*, (UNGA Res 2625 (XXV)).

53 E. Riedel, ‘Human Rights Protection as a Principle’, in Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50* (Cambridge University Press: Cambridge 2020) pp. 231–257 (250).

54 *Ibid.*

55 See in particular M. Pomerance, ‘Self-Determination in Law and Practice: The New Doctrine in the United Nations’, in M. Nijhoff, *The Hague/Boston/London* (1982) who wrote a detailed, devastating criticism about this one-sided, biased approach to self-determination by UN institutions. As Thomas M. Franck wrote in a book review on Michla Pomerance’s book “a ghastly perversion of the Wilsonian dream”. See T. M. Franck, ‘Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War’, 77 *AJIL* (1983), p. 669.

Islands in 1965, Mauritius was still a British colony waiting to become independent. For the Court, such a situation made it impossible to speak of an 'international agreement',⁵⁶ and in literature the way in which these negotiations were conducted was seen as symptomatic for the presence of duress.⁵⁷ In any case no direct consultation of the 'people concerned' (Mauritians or Chagossians) was undertaken.

The Court admits that international law does not impose a specific mechanism for the implementation of the right to self-determination in all instances,⁵⁸ but at the same time it emphasized also that "heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony".⁵⁹

The Court states that "[n]o example has been brought to the attention of the Court in which, following the adoption of resolution 1514(XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule".⁶⁰

This finding is somewhat puzzling as thereby the Court seems to be unaware of a series of such detachments occurring during different decolonization processes that met with some, little or next to no protest.⁶¹

56 *ICJ Chagos Advisory Opinion, supra* note 1, para. 172.

57 See U. Demšar *et al.*, 'The concept of duress in the world of decolonization', 55 *QIL* (2018) pp. 119–130.

58 See *ICJ Chagos Advisory Opinion, supra* note 1, para. 158.

59 *Ibid.*, para. 172.

60 *Ibid.*, para. 160.

61 As James Summers reveals, the GA, after 1960, repeatedly criticized, with reference *inter alia* to GA Res 1514(XV), the separation of a number of colonial territories. This was not only the case with regard to the Chagos archipelago from Mauritius in 1968 but also with regard to Mayotte from the Comoros Islands in 1976, Walvis Bay from the mandate territory of Namibia in 1977 and the Esparses Islands from Madagascar in 1979. See J. Summer, 'Decolonization revisited and the obligation not to divide a Non-Self-Governing Territory', 55 *QIL* (2018) pp. 147–176 (164). See on these cases also J. Trinidad, 'Self-Determination and territorial integrity in the Chagos Advisory Proceedings: Potential broader ramifications', 55 *QIL* (2018) pp. 61–69 who refers also to the particularly problematic case of Mayotte. According to Anthony Whelan a presumption against the permissibility of pre-independence colonial partitions applies that is to be interpreted strictly if the partition is designed to facilitate the continuation of colonial domination, a circumstance that was clearly given in the *Chagos* case. See A. Whelan, 'Wilsonian Self-Determination and the Versailles Settlement', 43 *ICLQ* (1/1994) pp. 99–115. On the state practice evidencing a divergence between colonial boundaries and the frontiers of the newly created states, see also the Separate Opinion by Judge Luchaire in *Frontier Dispute*, 22 December 1986, ICJ, Separate Opinion, <<https://www.icj-cij.org/public/files/case-related/69/069-19861222-JUD-01-01-EN.pdf>>, visited on 11 June 2021, who at p. 653 writes

As a result, it can be said that this Opinion contains a strong restatement of the law of self-determination in the colonial context. We now definitely know when the right to self-determination has become binding customary law – it was on 14 December 1960, with the adoption of resolution 1514(XV) at the latest. The territory of each single non-self-governing territory existing at that date, whose population had not yet freely exercised the right to self-determination, is to be considered a ‘country’ in the sense of para. 6 of resolution 1514(XV) whose territorial integrity has to be respected. Any detachment by the administering power of parts of such a non-self-governing territory is only possible if based on the freely expressed and genuine will of the people of the territory concerned.

As shown, these findings are based on a reasoning that is in many senses unconvincing. Nonetheless, the ICJ has thereby delivered new constructions of basic international law issues that are most probably here to stay.

Therefore, notwithstanding their partially weak foundations, these findings can be accepted as a further consolidation of right of the colonial right to self-determination, a right that is practically undisputed on a global level and that since long has been recognized with the status of *jus cogens*.⁶² This latter qualification is not used by the Court in the present case. The Court rather continues to qualify the right to self-determination as an obligation *erga omnes*,⁶³ a qualification that might be of some value for the implementation of this right but adds little to its substantive notion.⁶⁴

As will be shown below, the real problem with this Opinion lies with what it omits. With this Opinion, by far not the last word about self-determination has been said, not even as to colonial self-determination. In fact, it is doubtful whether a differentiation such as that between ‘colonial self-determination’ and ‘self-determination outside the colonial context’ still makes sense. Concentrating too strictly on colonial self-determination may go at the expense

as follows: “the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony it replaced, and this may actually result from the exercise of the right to self-determination”.

62 See H. Gross Espiell, *The Right to Self-Determination – Implementation of United Nations Resolutions*, (E/CN.4/Sub.2/405/Rev.1, 1980).

63 *ICJ Chagos Advisory Opinion*, *supra* note 1, para. 180. As Bruno Simma writes, the ICJ is rather hesitant in espousing the concept of *jus cogens* while being far more open towards the concept of *erga omnes* obligations. See B. Simma, ‘The International Court of Justice: a critical appraisal’, in F. Mégret/Ph. Alston (eds.), *The United Nations and Human Rights* (2020) pp. 151–180.

64 For some more elucidations as to this comment, see the Commentary to Article 48 of the ILC Draft Articles on State Responsibility (DASR).

of other aspects of self-determination that might have become of paramount importance in the meantime.

2.3.2 Implementation

It was long wondered how the Court would deal with the second question posed by the General Assembly, as to the consequences under international law in case it would find a violation of international law, as it was expectable. In fact, a multitude of possible answers was imaginable, running from a deferment of this question to the General Assembly to a detailed statement about the UK's responsibility for having not yet completed the Chagos Islands' self-determination process. As Articles 30 and 31 of the International Law Commission's (ILC) Draft Articles on States Responsibility (DASR) set out, a state responsible for an international wrongful act is under an obligation of cessation (Article 30) and an obligation to make full reparation for the injury caused (Article 31).

The Court demonstrated a considerable amount of resolve when it stated that the continued administration of the Chagos Archipelago by the UK constituted an unlawful act of a continuing character⁶⁵ and that, "[a]ccordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible".⁶⁶

The Court did, however, not go beyond this statement, in particular as to possible obligations to make reparations. It rather limited itself to say some words about a further possible involvement by the General Assembly and other members of the state community. It reiterated the responsibility by the General Assembly to determine the further steps to be taken⁶⁷ and it emphasized, like in the *East Timor* judgment, the *erga omnes* nature of the right to self-determination.⁶⁸

As mentioned above, also in the *Chagos Islands* case the Court stopped short from qualifying the right to self-determination as a peremptory law norm the violation of which would have consisted in a serious breach of international law according to Article 40 of the Draft Articles on State Responsibility. Interestingly enough, the Court, when it turned to the consequences of the UK's violation of the right to self-determination, it mentioned some but not all the consequences resulting from such a breach according to Article 41 of

65 *Ibid.*, para. 177.

66 *Ibid.*, para. 178.

67 As it did in the Kosovo Opinion of 2010. See *ICJ Kosovo Advisory Opinions*, *supra* note 2, para. 44.

68 Commentary to Article 48 of the ILC DASR, *supra* note 64, paras. 179–180.

the DAsR. The Court highlighted the obligation of all UN member states to co-operate to complete the decolonization of Mauritius⁶⁹, but made no mention of the obligation not to recognize the situation resulting from the continued violation of the right to self-determination by the UK^{70 71}

The omission of any reference to an obligation to make reparation might seem inconsequential but at a closer look doing otherwise would have caused considerable problems.

First of all, the criticism that the ICJ is tackling a contentious case in the clothes of an advisory proceeding would then have received additional weight. Reference to the *erga omnes* nature of the violated right might imply such a request, but this was not the place to fathom out these still much contested elements of *erga omnes* obligations.⁷²

Second, such a finding could have been an enormous burden to bear for the UK as the amount of reparation due for more than half a century of illegal occupation of a non-self-governing territory – in association with the illegal removal of its population – is hard to imagine.

And finally, and perhaps most importantly, in this case the ICJ could no longer have avoided to address the human rights aspects of this case. Apparently the ICJ has done so and some reference to human rights can be found in the Separate Opinion. In reality, however, a closer consideration of this case's human rights implications has been studiously avoided. The resulting analysis appears therefore to be incomplete and not really convincing.

3 The (Widely Missing) Human Rights Aspect

3.1 *What the Court States in this Respect*

At para. 144 of The Chagos AO the Court states as follows: “The Court is conscious that the right to self-determination, as a fundamental human right, has

69 See ILC DAsR, Article 41, para. 1.

70 *Ibid.*, para. 2.

71 See also F. Salerno, ‘L’obbligo di non riconoscimento di situazioni territoriali illegittime dopo il parere della Corte Internazionale di Giustizia sulle Isole Chagos’, C11 *Riv.Dir.Int.* (3/2019) pp. 729–752, who argues that this might also be indicative of a general weakening of the obligation of non-recognition in respect to illegal situations (*ibid.*, para. 751).

72 See ILC DAsR, Article 48, para. 2 lit b):

“Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

...

b. Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.”

a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analyzing the right to self-determination in the context of decolonization.”⁷³

Thereby, the Court has limited the purview of its analysis in a way that was both unconvincing and unnecessary. In fact, if the right to self-determination is a ‘fundamental human right, how is it possible to come to a meaningful analysis if exactly this aspect – which then should be the most pivotal one – is ignored? First of all, it is already open to debate whether the right to self-determination can really be qualified as a human right. Although enshrined in Article 1 of the ICCPR, it surely does not constitute an individual human right.⁷⁴ It should rather be seen as a pre-condition for the full enjoyment of all other human rights.⁷⁵ As such this aspect is surely of a fundamental nature and therefore the question arises how could this be ignored in an analysis that takes its political motivation to a considerable extent from the motivation to soften the plight of the people concerned.

Also the Court makes reference to the dire situation of the Chagossians, but only *en passant*, as it seems purely as a matter of duty, only to discard afterwards any necessity to deal with this issue further.

At para. 181 of the Chagos AO the Court states the following:

As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

3.2 *The Origins of the Contradictions Between Self-Determination and Human Rights*

It seems to be difficult to reconcile the statement above with the lofty finding in para. 144 of the Chagos AO according to which the right to self-determination is a fundamental human right.⁷⁶ If taken seriously this finding would have implied a full examination of the human rights implications of Great Britain's

73 ICJ Chagos Advisory Opinion, *supra* note 1, para. 144.

74 See M. Nowak, *U.N. Covenant on Civil and Political Rights* (2nd ed. 2005) Article 1, p. 15 para. 17.

75 UNESCO, *International Meeting of Experts on further study of the concept of the rights of peoples*, (SHS-89/Conf. 602/7), 22 February 1990, p. 5.

76 It is interesting to note that in the *East Timor* judgment of 1995 the right to self-determination was rather qualified as “one of the *essential principles* of contemporary international law” (para. 29).

continuing disrespect of her obligations as a colonial power. Of course, this would have meant to attribute, at least partially, a new understanding to the concept of self-determination, namely to put the individual at the centre of interest and not the territory, to apply the rules on self-determination according to the needs of the people concerned and not on the basis of *uti possidetis* considerations, in clinical isolation from the needs of the persons immediately affected by the related measures. It would rather have been necessary to try to achieve the best possible compromise between all individual interests involved, perhaps in a somewhat utilitarian perspective.⁷⁷ To apply the rules on self-determination in a strictly traditional manner that aims at the dismantlement of the old colonial power structures, entails surely the advantage of facilitating enormously the search for applicable procedures and rules, but it leaves open the question about the undergirding normative values. The fight against colonialism is without doubt a pivotal aim of modern international law, but then we have to ask whether in addition, and perhaps with the same emphasis, also the fate of the individuals mostly affected by the implementation of these rules should be taken into consideration.

Fully appropriately Judge Gaja in his separate opinion pointed to the need to attribute greater relevance to the will of the people most affected by these developments, the Chagossians, while, at the same time, he also admitted the many difficulties on the practical and the legal levels that would be associated with such an approach.

This brings us back to the question what self-determination should mean in the 21st century. In this context, both old and new questions have to be addressed.

First of all, we have to return to the question of who is the 'self' who tries to enact its will. This question dates back to the very beginnings of the modern discussion on self-determination. To what extent can self-determination find place in a system of human rights protection based mainly on the protection of individual rights? The answer to this question will affect the notion of self-determination itself.

The discrepancies between a concept of collectivized individual rights in a human rights protection system that is profoundly skeptical towards any form of collectivization of individual position can be explained both by the different temporal genesis of these concepts as well as with the 'constructive

⁷⁷ On the potential and the limits of the utilitarian approach in human rights protection see M.-B. Dembour, 'Critiques', in D. Moeckli et al. (eds.), *International Human Rights Law* (2018) pp. 46.

ambiguity' that laid at the basis of the attempt to pack them together in the UN Covenants of 1966.

When the modern concept of self-determination was launched by US President Woodrow Wilson towards the end of World War I,⁷⁸ Wilson had conceived this right as a decision criterion for the re-ordering of Europe, having, first of all, the creation of a peaceful setting of European states on his mind.⁷⁹ Of course, at the backdrop of this initiative, also the human rights perspective can be discerned when Wilson requires the 'consent of the governed' as a basic element for the legitimate exercise of the right to self-determination.⁸⁰ Nonetheless, in the interwar-period, human rights had yet not acquired the status of an established binding body of international norms,⁸¹ and the principle of self-determination, when re-activated after 1945 and inserted as 'rights' in Article 1 of the two UN Human Rights Covenants of 1966,⁸² preserved much of their original connotation thereby preparing the ground for conflict with the strict human rights perspective.

3.3 *Categorical Impediments to Overcome the 'Blind Eye' of Colonial Self-Determination Towards Human Rights*

In the practice of the International Covenant on Civil and Political Rights, which was – contrary to the International Covenant on Economic, Social and

78 As is well-known, Woodrow Wilson referred to the right to self-determination in a famous speech before the Congress on 11 February 1918. See 56 Cong. Rec. 8671 (11 February 1918).

79 It was not his intention to introduce a new criterion empowering ethnically defined peoples as such. On the contradictions of the Wilsonian self-determination model, see A. Whelan, 'Wilsonian Self-Determination and the Versailles Settlement', 43 *JCLQ* (1/1994) pp. 99–115.

80 See P. Hilpold, 'Self-Determination in the 21st Century – Modern Perspectives for an Old Concept', 36 *Israel Yearbook of Human Rights* (2006), pp. 247–288. On the many contradictions the Wilsonian concept of self-determination was based – even if read alone from the national perspective – see A. Lynch, 'Woodrow Wilson and the Principle of 'National Self-Determination: A Reconsideration' 28 *Review of International Studies* (2/2002) pp. 419–436. See also the *Western Sahara* AO (*supra* note 2) where the ICJ stated that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned." ICJ Reports 1975, p. 12, para. 55.

81 True, a detailed system of minority protection obligations had been established that anticipated many elements of the future human rights system. Yet, these norms met with extensive resistance and the failure to insert them into a broader system of general human rights norms contributed much to the failure of this system as a whole. See P. Hilpold, 'The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment', 17 *Max Planck Yearbook of United Nations Law* (2013), pp. 87–124.

82 As is well known, Article 1 on self-determination was inserted in identical wording on the initiative of socialist and Third World Countries. W. Schabas, *Nowak's CCPR Commentary* (2019) Article 1, para. 7ss and M. Bossuyt, *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (1987) pp. 19 seq.

Cultural Rights – early on equipped with an individual complaints procedure,⁸³ the right to self-determination played only a minor role, proving difficult to reconnect to human rights provisions in the stricter sense. Article 1 was less understood as a right on which the individual could immediately rely on than as a pre-condition for the implementation of the other human rights provisions set out in the Covenants.⁸⁴ Attempts by individuals to advance self-determination claims via the individual claims procedure introduced by the Optional Protocol no. 1 were dismissed by the Human Rights Committee from the very beginning.⁸⁵

The above mentioned requirement, identified already by US President Woodrow Wilson, that self-determination should be based on the ‘consent of the governed’ introduces a human rights element but this has merely an instrumental nature and touches upon the individual only as a reflex. It is not directed at the creation of individual entitlements.

If the purview of the right to self-determination shall be extended to encompass squarely also human rights, the basic aims of the right to self-determination have to be properly understood. According to Wilson’s perspective, granting self-determination was basically directed at granting (just) peace and security. It was the post-war order he had in mind when he devised this concept and not the worldwide realization of a human rights based principle. It is interesting to notice that a very similar function is attributed up to these days to the protection of minorities, a concept located in many senses somewhere between human rights protection and the right to self-determination.⁸⁶ Modern minority rights law, has, however, developed much further and is now, without doubt, aimed primarily at the protection of individual human rights.⁸⁷ Self-determination has not undergone a similar development.

83 See the First Optional Protocol to the CCPR of 16 December 1966, para. 1: “... The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.” General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, (General Assembly resolution 2200A XXI), 16 December 1966.

84 See in this sense also CCPR General Comment No. 12: Article 1, adopted on 13 March 1984, which entered into force together with the ICCPR, on 23 March 1976.

85 See the famous case: The Human Rights Committee, *Ominayak and the Lubicon Lake Band v. Canada*, (HRC Report Doc. A/45/40, voll II, Annex IX), p. 1 para. 32.1.

86 See A. Spiliopoulou Akermark, *Justifications of Minority Protection in International Law* (1979) p. 69.

87 *Ibid.*, p. 75, referring to ‘human dignity’. It might also be worth noting that Wilsonian self-determination and the modern concept of minority protection were given birth practically at the same time.

Colonial self-determination has been the most important ramification of self-determination. To add openly the human rights perspective would have implied the following main challenges:

- A new justification for secession could have been created, thereby definitely establishing a concept of 'remedial secession' or 'remedial self-determination'.⁸⁸
- Requiring that self-determination had to be justified by human rights considerations could have rendered colonial self-determination more complicated and would have in some cases halted the self-determination process.
- It would have created a title for continuing interference in what was retained to be internal affairs in particular against former colonies having acquired independence recently.⁸⁹

4 Conclusions

In the *Western Sahara* case Judge Dillard has famously stated that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".⁹⁰ This statement has remained, by and large, a *petitio principii*. The *Chagos* case has demonstrated that still in 2019 questions of self-determination are treated by the ICJ in a way that is largely dissected from the human rights perspective. Although on the factual level they were omnipresent in this proceeding, the ICJ gave them only scant attention, disposing of them hastily at the end. While the ICJ in general has opened up towards human rights aspects broadly and consistently, raising hope for even more

88 As is well known, the concept of 'remedial secession' was elaborated by L.C. Buchheit, *Secession*, 1978. See also Stefan Oeter, 'Secession, Territorial Integrity and the Role of the Security Council', Peter Hilpold (ed.), *Kosovo and International Law* (Brill 2012) pp. 109–138.

89 There has been some debate on whether self-determination has a 'permanent character', i.e. whether it will be 'onsumed' by one-time exercise or whether it constituted a 'continuing right'. In view of the fact that former colonies, after gaining independence, have regularly rejected further self-determination (secession) claims by sub-units, the 'consumption theory' is to be preferred. Cf. W. Schabas, *supra* note 82, pp. 18 et seq. Different elements of self-determination, such as 'internal self-determination' remain alive, even after colonial self-determination has been accomplished. For a more individualistic – and permanent – nature of self-determination, see already Ch. Tomuschat, 'Secession and Self-Determination', Marcelo G. Kohen (ed.), *Secession. International Law Perspectives* (Cambridge 2006) pp. 23–45.

90 *Western Sahara*, 16 October 1975, Advisory Opinion, ICJ, Separate opinion by Judge Dillard, p. 122 <<https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-07-EN.pdf>>.

such openings in the future,⁹¹ it seems that in questions touching upon self-determination the situation is different. Maybe the basic philosophy that made (colonial) self-determination such a strong concept in the after-war period, the attempt to attribute independence to former colonies, as soon as possible and against all counter-vailing forces and considerations, still determines the basic attitude towards this issue. Re-attributing sovereignty on the Chagos Islands to Mauritius⁹² will surely give redress to past injustice, but it is not so certain that thereby the destiny of the Chagossians will be improved by any degree.⁹³ Had the ICJ put the immediate interests of the Chagossians at the forefront, most probably a quite different AO would have been the result.⁹⁴ Territorial sovereignty over the Chagos islands would not have been the prime interest but rather of instrumental value. A change of (factual) sovereignty⁹⁵ could have been an issue in the immediate if it was conducive to the improvement of the lot of the Chagossians. The question of sovereignty could then have been addressed the way the ICJ decided to tackle the human rights question. Given the dimension of historic injustice associated with colonialism, it

91 See, in this context, the seminal piece by B. Simma, 'The International Court of Justice: a critical appraisal', in F. Mégret/Ph. Alston (eds.), *The United Nations and Human Rights* (2020) pp. 151–180.

92 For the International Tribunal for the Law of the Sea no specific act of re-attribution is necessary. In its recent judgment of 28 January 2021 (*Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives on the Indian Ocean*, Case No. 28) on preliminary objections this Court stated the following: "The United Kingdom's continued claim to sovereignty over the Chagos Archipelago is contrary to those determinations. While the process of decolonization has yet to be completed, Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations ..." *Ibid.*, para. 246.

93 This problem relates to the discussion who is the 'self' entitled to exercise the right to self-determination, (and maybe also compensation) a question still open in theory and practice. See on this aspect P. Weismann, 'Peoples' Right to Self-Determination', 21 *International Community Law Review* (2019) pp. 463–479 (476). By way of the 'humanization' of self-determination, this discussion can be avoided.

94 For a critical judgment on the present-day role played by the ICJ AO see P. d'Argent, Article 96 UN Charter, in: A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019) para. 19: "In the course of time, with requests relating more and more often to politically loaded legal questions or thorny ongoing conflicts, the 'advisory' aspect of the advisory jurisdiction appears to have somehow been eroded or transformed, making way for a more declaratory function: legal certainty is requested from the Court not so much in order to act in a better fashion or decide later on but in order to solidify claims and gain political advantage by disqualifying opposing views."

95 As mentioned, for the International Tribunal for the Law of the Sea, legally, a change of sovereignty has already taken place with the United Kingdom, after the ICJ's *Chagos* AO, no longer allowed to claim sovereignty over these islands. Sovereignty has passed to Mauritius.

is understandable that in the past the focus was set uncompromisingly on the aim to overcome this profound aberration in the development of human civilization. In the meantime, however, human rights protection has become a subject conditioning and determining all activities by the UN.⁹⁶ Decolonization can no longer be considered an alone-standing goal, independently from the human rights perspective. Even if top priority is still to be attributed to colonial self-determination, the human rights aspects have to be taken into consideration in all international acts and in particular in those exercised by the United Nations.⁹⁷

It remains to be seen whether the principles identified in the *Chagos* AO, in particular as to the defining moment in which a right to self-determination had come into being, will be applied also to neo-colonial situation such as that of the Western Sahara⁹⁸ or West Papua.⁹⁹ This is far from certain as it is extremely doubtful whether the state community is willing to award these claims similar support.¹⁰⁰ But even if this 'strong' form of self-determination should apply only for the traditional colonial context, it does not even come up to some basic requirements that should apply in the meantime in this area.¹⁰¹

96 As to the extent the UN Security Council is bound to respect human rights see Ch. Tomuschat, 'The Security Council and Jus Cogens', in E. Canizzaro (ed.), *The Present and Future of Jus Cogens* (Roma: Sapienza Università Editrice, 2015) S. 7–97, at 82–85.

97 On this paradigm shift see *inter alia* R. Teitel, *Humanity's Law* (2011). According to this author, the humanity's law framework should be seen as positing a limit to the prevailing self-determination ethos. *Ibid.*, p. 110. See also Ch. Tomuschat, *Human Rights: Between Idealism and Realism* (3th ed. 2014).

98 In favour See G.J. Naldi, 'Self-determination in Light of the International Court of Justice's Opinion in the Chagos Case', *7 Groningen Journal of International Law* (2/2020) pp. 216–235 (235).

99 In favour R. McCorquodale *et al.*, 'Territorial Integrity and Consent in the Chagos Advisory Opinion', 69 *ICLQ* (2020) pp. 221–238. The way this process of self-determination had been carried out was simply outrageous. See, for example, M.Ya'kub Aiyub Kadir, 'Revisiting Self-determination in Indonesia: An International Law Perspective', *Indonesia Law Review* (2/2015) pp. 123–139 (133); A. Cassese, *Self-Determination of Peoples* (1995) pp. 82 et seq. and W. Mandowen, 'West-Papua and the Right to Self-determination. A Challenge to Human Rights', in Th. Rathgeber (ed.), *Economic, Social and Cultural Rights in West-Papua* (2005) pp. 7–16.

100 As it was acutely observed, this proceeding was more on decolonization than on self-determination. See J. Klabbbers, 'Shrinking Self-determination: The Chagos Opinion of the International Court of Justice', 8 *ESIL Reflections* (2/2019).

101 And this brings us back to some basic questions that haunted the UN discussion about self-determination from its very beginnings. As Carol Anderson puts it her review about Roland Burke's monograph cited above (see *supra* note 47), the question was, from the drafting process of the Universal Declaration of Human Rights until the debate about the creation of the post of a "High Commissioner for Human Rights" whether individual rights and national freedom were really inseparable or whether it was more than

In fact, paying lip-service to self-determination as a ‘fundamental human right’¹⁰² is not enough. As shown, a presumption applies that the organ requesting advice from the ICJ is acting in the correct exercise of its functions.¹⁰³ In order to make this presumption correspond to reality, the ICJ should have taken into consideration the far-reaching function the General Assembly, as a UN organ, has assumed in the field of human rights protection.

The *Chagos* AO should therefore be seen as a wakening call.¹⁰⁴ If real relevance is to be attributed to the often heard slogan of the all-encompassing, cross-cutting effects of human rights, self-determination with its far-reaching structuring and sometimes also disruptive effects cannot be sidelined from this process. Thereby also the divide between Article 1 and the subsequent articles of the ICCPR could be overcome.¹⁰⁵

As to the immediate situation of the Chagossians, this AO means, at least ideally, a strong backing of their cause in the sense that their right to self-determination has been recognized, although in an oblique, much too ‘traditional’ way. Now it is up to politicians and the human rights community to ‘connect the dots’.¹⁰⁶ The Chagossians living in Mauritius, the Seychelles and the United Kingdom still constitute a people with strong cultural ties and a common identity that makes them identifiable as a unitary community. And we should not forget that they continue to perceive themselves as such. This fact, and the extreme poverty most of them are living in, obliges the state community, and in particular those states that were most involved in this history of exploitation and disenfranchising, to provide redress. As has been pointed out in literature,

enough that a colony had achieved statehood. See Carol Anderson, *American Historical Review* (2010) pp. 113–114 (114).

102 *ICJ Chagos* Advisory Opinion, *supra* note 1, para. 144.

103 For a critical stance towards the present day exercise of the advisory jurisdiction by the ICJ see P. d’Argent, ‘Article 96 UN Charter’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice* (2019) para. 19.

104 As Diane Marie Amann remarks in her commentary upon the *Chagos* AO: “assertions of human rights prototypically stand at odds with assertions of state sovereignty”. See D.M. Amann, ‘Chagos AO’, 113 *AJIL* (2019) pp. 784–791 (790).

105 In this sense, decolonization is in fact a ‘black box of human rights’, namely in the sense that it hides a largely unexplored relationship. For this formulation see S. L.B. Jensen, ‘Decolonization: The Black Box of Human Rights?’, 41 *Human Rights Quarterly* (2019) pp. 200–203. Samuel Moyn and Umut Örsu (*supra*, note 50) speak of “muddy legal and conceptual link between self-determination and human rights in 1960s” (*ibid.*, p. 43). It is argued here that this ‘muddiness’ persists, to a certain extent, up to this day.

106 It has to be noticed, that in this regard, much has been done by the London-based Minority Rights Group. See MRG, ‘Chagos Islands: The Right of Return for the Chagossians’, *minority rights group international*, 17 November 2016, <<https://minorityrights.org/law-and-legal-cases/right-return-chagos-islanders/>> visited on 11 June 2021.

the effective damage suffered by the Chagossians to date far exceeds the earlier *ex gratia* payments by the UK.¹⁰⁷ The sovereignty question is a highly loaded one, and, in view of the geo-political interests concerned, an extremely difficult solution. This fact, however, should not stand in the way of short term measures directed at the improvement of the Chagossians' living conditions, in particular by the UK, the United States and also by Mauritius. Joined agreements with Mauritius could be sought that might leave the sovereignty issues in abeyance, for the moment, but which could deal (with immediate effect) with environmental issues, economic aspects and the human rights situation of the Chagossians.¹⁰⁸ Thereby the basis should be created for sensibilizing the Mauritians for their duties towards the Chagossians once the Chagos Islands should be returned (factually) to Mauritius. The omissions in the *Chagos AO*, complying, as shown, much more with the 'traditional' state-centred view on human rights in the decolonizing process than with the more individualistic one taking shape in the 1970s, should not provide any excuse for further inaction. Even if the ICJ, in the 'operative part' of the *Chagos AO*, has remained widely silent as to the human rights aspects of self-determination, purposefully or not, it has prompted the international law community to have a closer look at exactly these aspects and to return to a discussion that had been widely left to historians and political scientists. It is now up to the legal academia on the one side and to politicians on the other to build up this still widely missing yet indispensable limb of the modern right to self-determination.¹⁰⁹

107 See P. Sands, *The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics*, in *The Global Community Yearbook of International Law & Jurisprudence* (2013) pp. 125–150 (146ss.) with further references. The author, in this context, rightly refers to the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", laid down by General Assembly Resolution 60/147 of 16 December 2005 (*Ibid.*, p. 147).

108 *Ibid.* See also N. Wenban-Smith and M. Carter, 'Chagos, A History: Exploration, Exploitation, Expulsion, 2016 and L. Jeffrey, 'For Mauritians, Joy, For Chagossians, Sadness, Mauritian Independence, the Sacrifice of the Chagos Archipelago, and the Suffering of the Chagos Islanders', in R. Ramtohul and Th. Hylland Eriksen (eds.), *The Mauritian Paradox* (University of Mauritius Press, Réduit, 2018) pp. 245 et seq.

109 This is not to underestimate the challenge associated with such a task. In a certain way, the dimension of such a task has been very well evidenced by the many book reviews published on the monographs published by Roland Burke and Samuel Moyn (*supra* note 50). See, for example, R. Irwin, *6 Journal of Global History* (2011) p. 353: "Is it possible to discuss a singular human rights narrative if the phrase's meaning alters in context? Do rights possess meaning outside the specific political contests in which they are deployed? Where does 'legitimacy' come from, and how has it affected the human rights story? And, perhaps most importantly, *why* did the human rights conversation change over time?"