

“Humanizing” the Law of Self-Determination: The “Western Sahara” Case (1975) and the Chagos Island Case (2019) Compared

Peter Hilpold

1 Introduction

Nearly half a century has passed since the ICJ has rendered its famous Advisory Opinion in the “Western Sahara” case.¹ Notwithstanding all its shortcomings, this document set the course for further steps by UN institutions in the endeavour to identify the meaning of self-determination in the modern international law order.

With the Advisory Opinion in the *Chagos* case of 2019,² also concerning a case of colonial self-determination, time has come for a stocktaking. However, at first glance, no real progress seems to have been achieved as to the development of this concept. As will be shown, the *Chagos* AO is replete with contradictions, omissions, and missed opportunities. Nonetheless, further progress in the slow but steady integration of this unwieldy concept of self-determination into an international law order more and more dominated by the human rights perspective cannot be denied. In the following it shall be tried to re-read the *Western Sahara* case from the viewpoint of some pivotal statements in the *Chagos* AO. It shall be demonstrated that also the omissions and ambiguities of this document may offer useful elements in this sense when interpreted in the light of the development of international law within half of a century.

1 Western Sahara (Advisory Opinion) [1975] ICJ Rep 12.

2 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95. This contribution builds on P. Hilpold, “‘Humanizing’ the Law of Self-Determination – the Chagos Island Case” (2022) 91 NJIL 2022, 189.

2 The Way to the *Chagos*’ AO 2019

Beside all their historical and factual differences, the *Western Sahara* Case and the *Chagos Islands* Case present some striking similarities. Both cases present, at their core, processes of aborted self-determination, both were subject of an Advisory procedure by the ICJ and in both cases the Opinion eventually released was not able to bring about an immediate solution of the underlying challenges. In some respects, however, the *Chagos* case is far more “traditional” than the earlier *Western Sahara* case: While the former regards a “classic” relationship between a Europe colonial power (Great Britain, historically the colonial power par excellence) and a depending territory in the Southern hemisphere separated by “salt water”, the latter is compounded by the presence of a former colony, Morocco, whose territorial claims stand in the way of the realization of the Western Sahara’s right to self-determination. There can be no doubt that the formation of the colonial right to self-determination had taken place nearly exclusively in the “classical” setting as described above, deriving moral and eventually legal authority from the attempt to overcome situations of domination, subjugation and exploitation absolutely irreconcilable with modern international law. As a general principle it has, however, also to apply to cases where self-determination is denied by subjects not pertaining to the Western European countries having historically created the problem of colonialism as such.

Between 1814 and 1965 the Chagos Archipelago, a group of seven atolls with some 60 islands in the Indian Ocean, has been administered by Great Britain as a dependency of the colony of Mauritius.³ When Great Britain had progressively to abandon its colonial empire, especially from 1960 onwards, it became evident that it would only be a matter of time until also Mauritius had to be granted full sovereignty. The Chagos Islands, however, were of enormous strategic importance, especially in the context of the East–West conflict, at that time reaching a further escalation. Great Britain ideated, together with the US, a stratagem that should permit respect of the unavoidable decolonization obligations while preserving the military outpost in the Indian Ocean, considered vital for the defence of the West.

In the “Lancaster House Agreement” of 23 September 1965 the representatives of the Mauritian government had to accept the detachment of the Chagos Islands from Mauritius as a pre-condition for Mauritius being granted independence in 1968. The Chagos Islands were integrated into a newly created “British Indian Ocean Territory” (BIOT) which should remain with the UK.

³ *Chagos Islands*, para. 28.

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.⁴ The Chagossians – mostly descendants of Afro-Madagascar slaves who were brought to these formerly uninhabited islands in the 18th and 19th centuries by French and British settlers⁵ – were forcibly removed in the years between 1968 and 1973.⁶

These developments were grudgingly accepted by Mauritius in an environment that was close to duress and in any case blatantly in disregard of the spirit of the decolonization idea. In the following years, Mauritius tried hard to have this act of injustice reverted.

While it was not possible for Mauritius to act against the UK in a contentious case before the ICJ as the UK had denied consent for jurisdiction, in 2017 the UN General Assembly 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 resolution was strongly supported by the African Union, while the UK, in concomitance with the Brexit process, had lost critical support by Western European countries previously shielding the UK in this respect. The Opinion was eventually rendered on 25 February 2019, causing a debacle for the UK. The ICJ left no doubt that:

[...] the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.⁷

3 The Main Results of the Chagos Island AO: With Particular Relevance for the Western Sahara Case

This outcome was to be expected but beyond this general statement, the *Chagos* AO contains some further clarifications that might be of even greater importance for cases such as the Western Sahara situation.

4 This treaty expired on 30 December 2016 and was extended then for a further twenty years period. See *ibid.*, para. 51.

5 D. Taylor, ‘Slavery in the Chagos Archipelago, Chagos News’ n. 14 (2000), 1–4.

6 S. Allen, ‘Self-determination, the Chagos Advisory Opinion and the Chagossians’ (2020) 69 ICLQ. 203–205.

7 Chagos Islands, para. 178.

First of all, the ICJ undertook to define the exact date when the right to self-determination emerged as a customary law norm. According to this Court, and this is a primer in the rich ICJ jurisprudence on self-determination, “[t]he adoption of resolution 1514(XV) of 14 December 1960 [was] a defining moment in the consolidation of State practice on decolonization”.⁸

This finding is important for the Chagos case as it is for the Western Sahara question. In fact, this means that self-determination issues with regard to the Western Sahara have crystallized into a legal question associated with legal entitlements already at the beginning of the 1960s, when this territory was controlled by the Spanish colonial power. If the subject of this entitlement is looked for, reference has to be made to this date and not to somewhere in the 1970s or later. This aspect is of particular importance in view of the population transfer carried out by Morocco starting in the mid-1970s.

A second issue, the Court had to deal with in the Chagos case, was the question whether the right of self-determination 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 vigour in the year 1960, was found in paragraph 6 of resolution 1514 (XV) which goes as follows:

Any attempt 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.⁹

Thereby, for the Court, a colonial territory, starting with the 1960s at the latest, is to be considered a “country” whose borders should no longer be subject to changes against the will of their population.

At first sight, this statement might be of specific importance for the *Chagos* case, as in this case it had to be dealt with islands being detached from a larger colonial entity, Mauritius, without free consultation of the respective population. In the case of the Western Sahara, no such changes of the territorial delimitations had occurred. Nonetheless, the underlying principle, according to which a consultation of the colonial entity is needed if territorial changes are to be undertaken, must apply also in the *Western Sahara* case. What is

⁸ Ibid., para. 150.

⁹ Ibid., para. 153.

true for partial territorial changes must apply also to the territory as a whole. Changes in the structure of a colonial territory's population carried out by population transfer are incompatible with the requirement to consult this territory's population.

The "free and genuine will of the people concerned" which should be decisive for exercising the right to self-determination according to resolution 1541 (XV), adopted the day after resolution 1514 (XV), has to be the will of the people endowed with this entitlement. In case of a prolonged colonial domination beyond the "critical date" of the year 1960, no advantage can accrue to the colonial countries or a third country from the continued violation of international law. Therefore, natural changes of the population will have to be accepted but artificial measures by population transfers are suited to alter the subject entitled to express its "free will" and are therefore prohibited.

As it is generally known, the anti-colonization resolutions of 1960 do not impose a specific mechanism for the implementation of the right to self-determination in all instances and this fact is reiterated by the ICJ in the *Chagos* case.¹⁰ Nonetheless, the Court took the opportunity to specify in this case 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."¹¹

Again, this statement can be related to the general principle requiring the utmost respect for the will of the people living on the colonial unit at the time when the right to self-determination had come to life as a legal entitlement.

Finally, the ICJ repeated the statement that the right to self-determination constitutes an obligation *erga omnes*. First stated in the *East Timor* case¹² in 1995, this qualification forms now a consistent jurisprudence. In the *Western Sahara* case we were not yet as far: This concept formally endorsed by the ICJ twenty-five years before in the *Barcelona Traction* case of 1970¹³ in the meantime has been the object of a wealth of studies which clarified this principle to a considerable extent,¹⁴ even if much further elucidation in this field is still needed. As is well known, the concept of *erga omnes* obligations has also been integrated into the ILC draft articles on state responsibility of 2001. According to Article 48 of this ILC draft, a violation of *erga omnes* obligations attributes a

10 Ibid., para. 158.

11 Ibid., para. 172.

12 See ICJ, *East Timor (Portugal v. Australia) (Judgement)* [1995] ICJ Rep 90, [29]. As to this case see P. Hilpold, *Der Osttimor-Fall* (P. Lang 1995).

13 See ICJ, *Barcelona Traction, Light and Power Company, Limited (Judgement)* [1970] ICJ Rep 3, [33].

14 See P. Picone, *Comunità internazionale e obblighi "erga omnes"* (Jovene 2013).

series of rights to other states than the injured one (in this case the non-self-governing territory of Western Sahara), first of all the claim of cessation of the violation. In this light also the position by the European Union, requesting Morocco to respect the right to self-determination of Western Sahara, has a solid international law foundation.¹⁵

4 What the Chagos AO Does Not Say or State Only Indirectly

The relevance of the *Chagos* AO for the further development of the right to self-determination is to be found not only and perhaps not even primarily in what this pronouncement is stating explicitly but also, and perhaps predominantly, what it is only inferring, what can be read between its lines and what was evidenced in the Separate Opinions and Declarations in this case.¹⁶

Whose right is the right to self-determination: that of a territory or an anonymous state or that of a people and eventually that of individuals?

As obvious as the answer might seem, international law has not really become clear about this issue. While it might be compelling to state that in

15 See P. Hilpold, “Self-determination at the European Courts: The Front Polisario Case” or “The Unintended Awakening of a Giant” (2017) 2(3) European Papers, 907.

16 See, for example, the Separate Opinion by Judge Gaja who emphasized to right to self-determination of the Chagossians and even made a short reference to the Western Sahara case:

“6. In contemporary international law, decolonization implies the implementation of the principle of self-determination. As the Court noted in its Advisory Opinion on Western Sahara, ‘[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized’ (ICJ Reports 1975, p. 36, para. 71). By referring in its two questions to three resolutions of the years 1965 to 1967 which stress the requirement of maintaining the integrity of what was the colonial territory, the General Assembly may have considered that, as the result of the process of decolonization, the Archipelago would become part of Mauritius. However, the General Assembly may revisit the issue and in particular take into account the will of the Chagossians who were expelled by the administering Power and of their descendants. The compensation that many of them received for their displacement does not make their will insignificant under the perspective of self-determination. What may weigh against their consultation is rather their limited number and their present dispersion.”

The rights of the Chagossians was also advocated in Judge Sebutinde’s Separate Opinion referring to the “rights inhered in the Mauritian peoples, including the Chagossians” (Sep. Opinion Sebutinde, para. 13). Several judges criticized that the Opinion abstained from addressing the issue of compensation in favour of the Chagossians. See I. Papnicopolulu and T. Burri, ‘Human Rights and the *Chagos* Advisory Opinion’ in T. Burri and J. Trinidad (eds.), *The International Court of Justice and Decolonisation New Directions from the Chagos Advisory Opinion* (CUP 2021), 187–20.

an international order premised on the protection of human rights¹⁷ the right to self-determination should be functional exactly to this end, it should not be overlooked that the modern concept of self-determination was conceived in a time, after WWI, when international human rights protection did not yet exist. When both concepts were incorporated into the UN Charter a way had to be found to reconcile these concepts which seemed to offer considerable room for conflict.¹⁸ In particular, if the right to self-determination is interpreted as a state-centred right, to which individual rights have to be subordinated. The paramount need to complete decolonization as fast as possible might have instilled such a reading of self-determination which is hard to overcome these days. In the meantime, however, international human rights protection has progressed enormously, in particular after the two UN human rights Covenants of 1966 have come into force in 1976, the creation of the post of a Human Rights Commissioner in 1994 and after the reform of the UN human rights in 2006 with the introduction of the Human Rights Council and the Charter-based Universal Periodic Review.¹⁹

During the *Chagos* advisory procedure it became clear as never before that any discussion about self-determination would become meaningless if attention is directed only to the territory and not to the people.

While studiously avoiding addressing this fundamental issue squarely in the opinion the ICJ nonetheless referred to this question as a human rights issue lying in the competence of the General Assembly. There can be no doubt

17 See, for example, C. Tomuschat, *Human Rights – Between Idealism and Realism*, (OUP 2014), 2: “[...] it may be safely said that in the circumstances of today the individual human being takes centre stage within the international system, and that human rights, which define the core legal status of the individual human being, have at the same time advanced to the highest level of the rules and principles making up the international legal order”.

18 In international law textbooks, the development of human rights and of concepts such as self-determination is usually portrayed as a harmonious and at the same time deterministic process where the results, as we know them today, find their roots in the Charter of 1945. In “The Last Utopia: Human Rights in History” (2010), Samuel Moyn delivered a different account according to which the dominant role of human rights became apparent only in the 1970s as the result of an intense struggle which led to broad disillusionment in regard to other utopias like socialism and decolonization. As it seems, however, the relationship between decolonization and human rights has still not been cleared. The “Chagos Islands case” would have offered a unique opportunity to further investigate the intricacies of this relationship but this opportunity was missed. Nonetheless, the fact this persisting conflict has again been made apparent (for those willing to note and to see it) is still important.

19 See on these reforms, J. Connors and S. Shah, ‘United Nations’ in D. Moeckli et al. (eds.), *International Human Rights Law* (OUP 2019), 385–428.

that these two aspects are closely interwoven and to separate them would lead to aberrant results irreconcilable with modern international law.

5 Concluding Remarks

In the *Chagos* case, to ignore the Chagossians as main holders of the right to self-determination was to some extent facilitated by the fact that they are no longer present on the disputed territory, a circumstance that now has been lasting for half a century.

In this factual respect, the case of Western Sahara is different, although also in this case attempts have been made to drive the Sahrawi from their ancestral land and to undermine thereby the very basis of their claim.

In view of the foregoing it should, however, no longer be possible to neglect the fact that the substantive core of the right to self-determination lies in the people of the non-self-governing territory, even if they have been driven from their homes after the right to self-determination has come into being.

Most remarkably, it has been the *Western Sahara* case in which this principle was first stated in unsurpassed clarity. Long before the portrayed “humanization” or “individualization” of self-determination has taken firm hold, Judge Dillard has coined an adage now of pivotal importance for interpreting the modern meaning of self-determination:

It is for the people to determine the destiny of the territory and not the territory the destiny of the people.²⁰

There can be no doubt that in the time passed since this dissenting opinion was issued, many elements have confirmed the truth of this presage. The “obsession with territory”²¹ has characterized the attitude of States long before the right to self-determination has come into being and it still influences basic international principles and concept – as it seems, also the thinking about self-determination. Decolonization has contributed much to the evolution of the principle and the right to self-determination. If self-determination has

²⁰ Western Sahara, para. 114.

²¹ See G. Scelle, ‘Obsession du territoire. Essai d’étude réaliste de droit international’, in J. H. W. Verzijl, *Symbolae* (Nijhof 1957), 347. See also R. Y. Jennings, *The Acquisition of Territory in International Law* (MUP 1963) 1. See also P. Hilpold, ‘Justifying the Unjustifiable: Russia’s Aggression against Ukraine, International Law, and Carl Schmitt’s “Theory of the Greater Space” (“Großraumtheorie”)’ (2023) 22(3) CJIL, 409, <https://academic.oup.com/chinesejil/article/22/3/409/7285836?login=false> accessed 12 June 2024.

acquired the status of *ius cogens* and of an *erga omnes* obligation, this is mainly due to the overwhelming strength of the decolonization movement.²² Nonetheless, these genealogical roots of the right to self-determination should not stand in the way of an interpretation and an application of this right that pays respect to the paramount importance of human rights protection.

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 points out that “all human rights are universal, indivisible and interdependent and interrelated” (1.5), thereby not only evidencing the paramount importance of human rights protection but also emphasizing, at least indirectly, the need to adopt a human rights perspective when applying any international law rule. Human rights are not a luxury good on the shelf of international law items, States are free to choose or to neglect, but they rather permeate all international law. The introduction of the Universal Periodic Review, which activated an all-encompassing Charter based review procedure,²³ gives further testimony to this new approach.

When the Court stated that it “will confine itself [...] to analysing the right to self-determination in the context of decolonisation”²⁴ it restricted its perspective in an impermissible way, cutting out what in the meantime forms constitutive element of the right to self-determination.²⁵ Thereby “the muddy legal and conceptual links between self-determination and human rights” of the 1960 resolutions²⁶ are again evoked.²⁷

If practical application of public international law is, most of the time, a pondering between goals and principles, often in conflict with each other,²⁸ in

22 See the study prepared by Hector Gros Espiell on the Right of peoples to self-determination, Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, E/CN.4/Sub. 405, 20 June 1978. On *jus cogens*, *erga omnes* obligations and human rights protection see E. de Wet, ‘*Jus Cogens* and Obligations *Erga Omnes*’ in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, (OUP 2013), 541–561.

23 See GA Res. 60/251 of 3 April 2006.

24 ICJ *Chagos AO*, 2019, para. 144.

25 See in this sense also J. Klabbers, ‘Shrinking Self-Determination: The Chagos Opinion of the International Court of Justice’ (2019) 28 *ESIL Reflections*.

26 To use a fitting assessment by S. Moyn and U. Özsü, ‘The Historical Origins and Setting of the Friendly Relations Declaration’ in J. E. Vinuales (ed.), *The UN Friendly Relations Declaration at 50* (CUP 2020) 23–47, 43.

27 In literature even the fear was voiced, that this Opinion could be construed against the Chagossians, and therefore against the primary victims of this act of British colonialism. See Papanicolopulu and Burri (n 16), 196.

28 See M. Koskeniemi, ‘What Is International Law for?’ in M. Evans (ed.), *International Law* (OUP 2018) 28–50, 29: “The real problem seems always to be less about whether

the discussion about self-determination, time has come to take a clear stance in favour of the rights and needs of the individuals, even though this may spell out to the detriment of territorial and other political goals and interests.

It is also worrying to see that by ignoring the quality of the Chagossians as bearers of a right to self-determination also their economic rights have fallen into disregard. From this vantage point in the discussion on the right of self-determination for the Sahrawi far more progress has been achieved, even though also in this latter case substantive results are still widely missing.²⁹ In the meantime, however, powerful instruments have been developed in the area of “Business & Human Rights”,³⁰ which allow for targeted interventions particularly in this field. It remains to be seen when these instruments will display all their potential also as to situations of (denied) self-determination.³¹

The *Western Sahara* case and the *Chagos Islands* case have therefore more in common than it might seem at first glance. Both cases concern self-determination issues in a decolonization context, however with very specific connotations. In neither case the decolonization issue is straightforward in the sense that a self-determination claim is brought against an actual or for-

international law should aim for ‘peace’, ‘security’, or ‘human rights’ than about how to resolve interpretative controversies over or conflicts between such notions that emerge when defending or attacking particular policies”.

- 29 See Hans Corell in his legal opinion for the Security Council of 29 January 2002, UN Doc. 8/2002/161. If there is a great gap between official declarations on the one side and actual practice on the other, this holds in particular true for the European Union which would not only be geographically close to the contested and bear a particular historical responsibility for this self-determination issue but have also effective means available to further this self-determination process. See, in this regard, H. Placentino, ‘Accords Commerciaux et Territoires Occupés’ (2020) 2 LIII *Revue Belge de Droit International* 388–419: “Sur le papier, l’Union et ses États membres prétendent soutenir pleinement le processus de paix initié par l’ONU et le cheminement du peuple Sahraoui vers l’indépendance et l’autodétermination. En pratique, l’Union privilégie la *realpolitik* et le maintien de relations très étroites avec le Maroc, au détriment des droits du peuple Sahraoui et du respect du droit international”.
- 30 See H. Corell, ‘Keynote Address on Western Sahara at the 2019 Annual Conference of the Belgian Society of International Law’ (2020) 2 LIII *Revue Belge de Droit International*, 423–433, referring to the “Guiding Principles on Business and Human Rights,” endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011, A/HRC/RES/17/4. See on these principles also P. Hilpold, “Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten – Völkerrechtliche Anforderungen,” in 50 *Berichte der Deutschen Gesellschaft für Internationales Recht, Unternehmensverantwortung und Internationales Recht*, (2020), 182–228.
- 31 Of particular value could be the supply chain legislation now gaining strong momentum especially in Europe. See most recently the Corporate Sustainability Due Diligence Directive (CSDDD), approved by the EU Parliament on 24 April 2024.

mer colonial power – this being a textbook book of a self-determination claim endowed with *jus cogens* power. A closer look at these cases demonstrates that colonization can be the expression of wrongs that might reappear, at least in part of their elements, in different clothes, also in modern times. If colonial self-determination is really rooted, as often portrayed, in human rights protection and gets from this field its main legitimating power, the human rights perspective should apply also beyond “strict”, “classic” manifestations of decolonization. The *Chagos* case has made evident that colonial self-determination needs urgent re-interpretation in a thorough human rights perspective – paradoxically exactly because the human rights perspective was so stubbornly neglected in the Opinion here under review. In the same vein, it has to be said that the human rights element has again to be set into focus in the *Western Sahara* case. It has been present in the past and it has now to come again into play as an indispensable problem solution mechanism, with all the improved enforcement mechanisms and instruments human rights protection has in meantime become endowed with.

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