THE DESTINY OF THE CHAGOS ISLANDS AND ITS PEOPLE

Memorandum Concerning Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965

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Abbreviations

ARISIWA	Draft articles on the Responsibility of States for Internationally Wrongful Acts
BIOT	British Indian Ocean Territory
CESCR	Economic, Social and Cultural Rights Committee
EEZ	Exclusive Economic Zone
GEIC	Gilbert and Ellice Islands Colony
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
LHA	Lancaster House Agreement
MPA	Marine Protected Area
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
TTPI	Trust Territory of the Pacific Islands
UK	United Kingdom
UNGA	United Nations General Assembly
UNCLOS	United Nations Convention on the Law of the Sea
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

Table of cases

Table of treaties and other instruments

UNGA Res 3291 (XXIX) (3 December 1974) UN Doc A/RES/3291

UNGA Res 3385 (XXX) (12 November 1975) UN Doc A/RES/3385

UNGA Res 34/21 (9 November 1979) UN Doc A/RES/34/21

UNGA Res 34/91 (12 December 1979) UN Doc A/RES/34/91

UNGA Res 421 D (V) (4 December 1950)

UNGA Res 49/18 (28 November 1994) UN Doc A/RES/49/18

UNGA Res 545 (VI) (5 February 1952)

UNGA Res 637 (VII) (16 December 1952)

UNGA Res 648 (VII) (10 December 1952)

UNGA Res 65/119 (10 December 2010), UN Doc A/RES/65/119

UNGA Res 738 (VIII) (28 November 1953)

UNGA Res 837(IX) (14. December 1954)

United Nations Convention on the Law of the Sea (adopted 10 December 1982 entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS)

UNSC Res 183 (11 December 1963) UN Doc S/RES/183

Vienna Convention on the Law of Treaties (adopted 23 May 1969 entered into force 27 January 1980), 1155 UNTS 331 (VCLT)

I) Introduction

The memorandum you are reading seeks to reply to the questions concerning the Chagos Archipelago, referred to the International Court of Justice (hereinafter: "the ICJ") by the United Nations General Assembly (hereinafter: "the UNGA") resolution 71/292 in June 2017. By way of giving nuanced and balanced answers, our aim is not to advocate interests of States, groups or others involved, but to enable the interested parties and the ICJ to consult the study in order to obtain an independent third-person opinion.

As we have experienced ourselves, due to its multi-issue nature where there are no straight-forward answers, it is a true challenge for any international lawyer to adequately and thoroughly apprehend all the aspects of the Chagos Archipelago case. Accordingly, it is understandable that not many of them have dedicated their time to the case without being engaged by one of the stakeholders. This memorandum, however, is probably one of the rare independent accounts that cover the relevant issues of the Chagos Archipelago advisory opinion in a thorough and comprehensive way.

The study is a result of voluntary commitment and hard work of a group of students from Faculty of Law of Ljubljana, Slovenia.[1] Through our *pro-bono* work, we hope to clarify the Gordian picture of the Chagos Islands case and contribute a tiny step towards a just resolution of the situation in the Indian Ocean. We do not have any personal interest in the case, except for defending our convictions, namely the rule of law and the protection of human rights.

The document starts by providing a short overview of the factual background. Then preliminary issues concerning the admissibility of the questions referred to the ICJ are discussed. Afterwards, the two questions (question (a) and question (b)) are answered. At the very end of our study, we provide a summary of the conclusions that we drew.

[1] We would like to thank Dr Veronika Fikfak for the suggestion for the project and valuable feedback on our work.

II) Factual background

The Chagos Archipelago is a group of small islands situated in the middle of the Indian Ocean, giving it a fairly important geostrategic location. Since its colonisation by the European colonial powers, it had changed hands many times and ultimately became a part of the British Empire in 1814. It was administrated as a part of colony of Mauritius for more than a century, hosting a permanent population that mostly worked on coconut plantations. This remained unchanged until 1965, when the United Kingdom (hereinafter: "the UK") established BIOT, a new colony which still exists at the present day.[2]

Due to the growing political pressure to decolonize its colonies and the diminution of its strength in international relations in the early 1960s, the UK decided to withdraw its long-standing military and political presence from the Indian Ocean. To fill the political and security vacuum, the United States (hereinafter: "the US") decided to step in. In 1964, the Governments of the US and the UK started discussing the establishment of American defence facilities in the region. They envisaged from the beginning that inhabitants would be transferred or resettled.[3]

In September 1965, the Mauritian Constitutional Conference was held at Lancaster House in London. There, the British and Mauritian representatives discussed the future of the colony of Mauritius. The UK brought the issue of the detachment of the Chagos Islands to the table, seeking the agreement to the excision from the Mauritian side in order to avoid international criticism.[4] As a result of tense negotiations, where the excision of the Chagos Islands was presented as a condition for the future independence of Mauritius,[5] the Lancaster House Agreement was signed by the Governments of Mauritius and the UK. The government of Mauritius gave its consent to the detachment of the Chagos Archipelago in return for 3 million dollars, negotiations for a defence agreement between the UK and Mauritius, rights regarding navigation, fishing and natural resources on and around the Archipelago, certain obligations of effort on the part of British in benefit to Mauritius in relation to the US and a commitment to return the Islands when no longer needed for defence purposes.[6] As a result, in November 1965, the UK created a new colony - BIOT by BIOT Order in Council (SI 1965/120), which established the office of the Commissioner of BIOT and conferred to him the power 'to make laws for the peace, order and good government of the Territory'.[7]

In December 1966, the UK Government signed a military agreement leasing Diego Garcia, the largest island of the Archipelago, to the US for military purposes for fifty years with the option of prolongation for further twenty years. In an attempt to avoid a public outcry by the

[2] *Chagos Islanders v the United Kingdom*, App no 35622/04 (ECtHR, 11 December 2012), para. 3.

[3] Ibid., para 5.

[4] Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (CUP 2018) 87; Stephen Allen, The Chagos Islanders and International Law (OUP 2014) 125.

[5] Peter H. Sand, '*The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics' (2013)* 1 The Global Community Yearbook of International Law & Jurisprudence 125, 126; Trinidad (n4) 85.

[6] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (PCA, 15 March 2015), para. 294.

[7] *Chagos Islanders v the United Kingdom*, (ECtHR) (n2), para. 6.

UNGA and due to the obligations in respect of non-self-governing territories, the UK and the US agreed that it is expedient to show the international community that the islands host no permanent population.[8] On several occasions when matters of decolonization were discussed in the various bodies of the UN, the UK claimed that the population of the Chagos Islands consisted of migrant workers, that the Chagossian position had been fully protected and that they had been consulted in the process.[9]

Mauritius became independent in 1968. In the period between 1967 and 1973, the residents of the Archipelago were banished from their homes and essentially relocated to either Mauritius or Seychelles, where many of them suffered in miserable conditions.[10] No physical force was used, but the islanders were told that the plantation company was shutting down its activities and that they would be left without supplies if they stayed on the Chagos Islands. The evacuation of Diego Garcia was completed in October 1971 and the outer Islands were emptied by May 1973. In 1971, it was declared that any unauthorised visit to the island should be considered a criminal offence.[11] In the same year, the US construction teams had arrived at Diego Garcia, demolished the houses and started building the Defence Base.[12] While some compensation schemes were provided,[13] the UK government never officially accepted any legal responsibility for the harm done to the population of the Islands. The 1971 Immigration Ordinance was declared illegal in 2000 by the English courts, but another one was put in its place in 2004.[14]

Since 1980, Mauritius has claimed that its independence was conditioned upon its consent to the detachment of the Chagos Islands, which constitutes a violation of international law of decolonization.[15] On 1 April 2010, the UK declared the world's largest Marine Protected Area (hereinafter: "the MPA") around the Chagos Archipelago. In response, Mauritius decided to refer the case to the Permanent Court of Arbitration (hereinafter: "the PCA"). The Tribunal constituted under Annex VII of the UN Convention on the Law of the Sea (hereinafter: "UNCLOS")[16] issued its award in *Chagos Marine Protected Area Arbitration* case on 18

[8] *Chagos Islanders v the United Kingdom*, (ECtHR) (n2), para. 7.
[9] *Chagos Islanders v the United Kingdom*, (ECtHR) (n2), para. 9.
[10] Allen (n4) 11.
[11] BIOT Commissioner Immigration Ordinance 1971, No. 1
[12] Ibid., para 8.
[13] In 1973, the UK paid 650,000 pounds sterling (GBP) to the newly independent Government of Mauritius to assist with the costs of resettlement and the sum was later distributed. But no compensation was paid to the evacuees on the Seychelles. In February 1975 Michel Ventacassen, a Chagossian, brought the case in the High Court in London concerning the expulsions and in 1978 the Government made an open offer to settle the claims and later agreed on paying GBP 4,000,000 to the Mauritian Government. With this sum a trust fund was set up by the Mauritius Government. From the trust fund 1984 payments were made to 1,344 Chagossians and the Mauritius Government provided some low-cost housing. Nothing was paid to the Chagossians on the Seychelles. Those receiving the compensation had to effectively give up their right to return to the islands. It is doubtful that those receiving the payments were aware that the settlement involved a renunciation of their rights to return to their homeland (see *Chagos Islanders v the United Kingdom*, (ECtHR) (n2), paras. 10-12).
[14] In the interim period access to the Archipelago was possible with a special permit.
[15] Chagos Marine Protected Area Arbitration (n6) para. 209.
[16] United Nations Convention on the Law of the Sea (adopoted 10 December 1982 entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).

March 2015. It found that the UK's declaration of the MPA disregarded Mauritius' rights, rendering the MPA unlawful. The award led to speculations whether Mauritius has the right to be consulted before the lease between the UK and the US concerning Diego Garcia is prolonged.[17]

In November 2016, the UK Foreign and Commonwealth Office maintained their ban on resettlement of the islands and prolonged the lease for further 20 years. In response, the Prime Minister of Mauritius expressed his country's plan to advance the issue of the Chagos Islands to the ICJ. On 23 June 2017, the UNGA voted in favour of referring the territorial dispute between Mauritius and the UK to the ICJ in order to clarify the legal status of the Chagos Islands Archipelago. The motion was approved by a majority vote with 94 voting for and 15 against.

Timeline:

1814 – the Chagos Islands become a part of the British Empire

1964 – Start of negotiations between the US and the UK

1965 – Lancaster House Agreement is signed, BIOT is established

1966 – The Agreement between the US and the UK is finished

1968 – Mauritius gains independence

1967 – 1973 – Chagossians are effectively relocated from the Archipelago

1971 – BIOT Commissioner Immigration Ordinance 1971, No. 1

1973 – UK sends money to Mauritius for "costs of resettling the Chagossians".

1975 – 2008 - Various proceedings in domestic legal system, regarding the relocation of Chagossians

2004 – BIOT Commissioner Immigration Ordinance 2004, No. 2

2010 – Arbitration concerning the MPA begins

2015 – Arbitration tribunal issues its award concerning the MPA

2017 – Request for the Advisory Opinion

[17]Michael Waibel, '*Mauritius v. UK: Chagos Marine Protected Area Unlawful'* (*EJIL Talk*, 17 April 2015 <https://www.ejiltalk.org/mauritius-v-uk-chagos-marine-protected-area-unlawful/> accessed 31 May 2018.

III) Admissibility

The admissibility of the referral for an advisory opinion to the ICJ is dependent upon two separate issues. First, the question of jurisdiction. It presents more of a technical matter where the court sets out to resolve, broadly speaking, the following three questions: Does the organ asking for an advisory opinion have the capacity to request such an opinion? Does the request concern a legal question? Is the question within the scope of the organ's activity? Second, judicial propriety or discretion of the court; the question that needs to be answered here is whether there are any compelling reasons for the ICJ to refuse to render the opinion.

Chapter III is going to discuss all of these issues as they apply to the request for the Chagos Archipelago advisory opinion. It will try to predict the possible arguments the UK or other interested parties might make to persuade the ICJ that it should refuse to give the advisory opinion. We will argue that the request for the advisory opinion falls within the jurisdiction of the ICJ and that possible arguments of the UK do not present a persuasive reason for the ICJ to reject to provide the requested opinion.

The structure of the article follows the outline of the issues explained above. In the first part, we provide answers to each of the above-mentioned questions concerning jurisdiction, including possible reservation of the parties involved. In the second part we explain the concept of judicial propriety and how it might shape the Chagos Archipelago advisory opinion.

A) JURISDICTION

1) Is the UNGA authorized to make the request?

Article 96 of the UN Charter provides that '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.'

Accordingly, since the advisory opinion can be requested by the UNGA, the first question concerning jurisdiction must be answered in the affirmative.

2) Is the nature of the question legal?

To provide a suitable answer to the second question relating to jurisdiction, it first has to be clarified, how the ICJ interprets the term "legal question". In the *Western Sahara advisory opinion*, the ICJ stated that in order for a question to be of a legal nature, it 'must be framed in terms of law and raise problems of international law.'[18]

Multiple objections can be presented at this point, ranging from the objection that the questions are political rather than legal or that they raise historical issues with no relevance to the work of the UNGA, to the one claiming that the questions concern an issue that had been

[18] Western Sahara, Advisory opinion, I.C.J. Reports 1975, p.12, para. 15.

at least at the time of excision a purely internal question and is as a result not in the jurisdiction of the ICJ according to Article 2(7) of the UN Charter.

Question (a) essentially asks the ICJ to explain international legal rules governing the process of decolonization as they were at the time when Mauritius gained independence. It stresses that the Court should examine the process 'having regard to international law including obligations reflected in General Assembly resolutions 514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967[.]' Chapter XI of the UN Charter deals solely with the process of decolonization and the numerous UNGA resolutions passed on this matter up to this day show that it is clearly an important legal question. Question (a) itself is therefore certainly framed in the terms of law and raises issues of international law. Henceforth, it should be examined.

Question (b) deals with the consequences under international law of the continued administration by the UK of the Chagos Archipelago. It again raises problems through the lens of international law including the resolutions mentioned in question (a). The ICJ will have to point out the relevant international legal norms and assess how they apply to the current administration of the Chagos Archipelago. Accordingly, it can be said that question (b) satisfies the standard put forward by the ICJ in *Western Sahara*.

a) A political nature of the question?

In the advisory opinion procedure, the states usually argue that the question is of a political nature. Dealing with this argument, the approach of the ICJ has been flexible so far. ICJ has jurisdiction to provide an advisory opinion even in a situation where political considerations are prominent, provided that the question is of legal nature. Even when a question has a political aspect or involves a political issue, the approach of the ICJ hitherto has been that it answers only the part of the question that is of a legal nature.

It is very likely that the UK will argue that the question is of a political nature. Nonetheless, it is very improbable that the ICJ will reject rendering its opinion on this basis since it has repeatedly stated that the political nature or motives inspiring a request and the political implications of giving the opinion are of no relevance to establishing jurisdiction.[19] One can most certainly agree with this standpoint of the ICJ, as there are hardly any questions that would not be politically motivated and inspired.

ICJ stated on numerous occasions that the potential political dimensions of the question do not preclude the Court from giving an opinion. The court explained in paragraph 41 of the *Wall case* citing its jurisprudence on the matter that political aspects 'do not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred to it by its Statute'. The court went even further in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* stating that:

[19] Raj Bavishi, Subhi Barakat, *Procedural Issues related to the ICJ's advisory jurisdiction* (2012) < http://docplayer.net/26621519-Procedural-issues-related-to-the-icj-s-advisory-jurisdiction-raj-bavishi-and-subhi-barakat.html> accessed 31 May 2018 7. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 13, 17.

> Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate [...][20]

In other words, it might be helpful to obtain an advisory opinion in cases that have political aspects, precisely due to the importance of differentiating between political and legal aspects of the question when one tries to resolve the issues at hand.

In trying to present the matter as political, the UK would have to show that security interests are the basis for their decisions regarding the territory and that security interests of a nation are not a question of international law but rather of a political consideration in the domain of its executive branch. Furthermore, the argument could go in a way that if the ICJ was to give an advisory opinion, it would without a doubt have to decide on the assessment of security risks posed to the UK and the US at the time, which is in its nature a political decision.

Taking into account the above-mentioned position of the ICJ that the political nature of the question does not necessarily prevent the Court from giving an opinion as to the legal aspects of the issue, it is very unlikely that the Court would reject the requested opinion on these grounds.

b) Historical aspects of the question (a)?

Another possible counter argument of the UK might be that the question is solely historical in nature and that only contemporary legal questions should be regarded as valid.[21] While the second question is without a doubt of a contemporary nature, the first one might be more troubling, since it is referring to the year 1968. Consequently, it is wise to consider this as a possible objection to the jurisdiction of the court.

In *Western Sahara*, Spain argued that in order for a question to be legal within the meaning of Article 65(1) of the Statute, it must not be of a historical character but must concern existing rights or obligations.[22] ICJ quickly dismissed this argument and stated that: '[T]here is nothing in the Charter or Statute to limit either the competence of the General Assembly to request an advisory opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations.'[23] We might reasonably expect the ICJ to confirm the above stance if the UK raises the same objection.

c) Issues of domestic or international law?

Article 2(7) of the UN Charter provides:

[20] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 33.
[21] Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams, *The statute of international court of justice, a commentary* (1st edn, OUP 2006) 1410.
[22] Western Sahara, Advisory opinion (n18), para. 18.
[23] Ibidem.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

On the basis of the cited article, the UK could claim that the issue presented to the Court is essentially one of domestic law. In essence the argument might go along these lines:

Question (a): The detachment of the Chagos Archipelago was conducted simultaneously with the creation of BIOT on November 8 1965 by Order in Council SI 1965/1920, an act under the Royal prerogative power of the UK. BIOT was established in accordance with the UK constitutional law and since there was no international law applicable to the situation at the time, the issue is a purely domestic and cannot be in the jurisdiction of the ICJ.

Question (b): Chapter XI of the UN Charter concerns international law of non-self-governing territories. However, BIOT lacks the criteria, namely the permanent population, to be listed as one. The international law governing this field can therefore not be applicable in the present case and only UK constitutional law is relevant concerning the obligations of the UK in BIOT. Furthermore, the situation in BIOT cannot be regarded as one that falls within the scope of Chapter VII of the UN Charter, entitled: 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. It therefore follows that the ICJ has no jurisdiction to render the opinion on question (b).

The fact that the establishment of BIOT by Order in Council is in essence an act of domestic law is in our opinion irrelevant. The purpose of the advisory opinion is not to judge on the validity of the Order in Council by which BIOT was created. The question concerns the decolonization of Mauritius. The task before the Court is thus to explain the scope of international rules and principles governing the process of decolonization. Although some aspects remain outside the scope of international law, the process of decolonization cannot be regarded as an internal issue. The sheer amount of resolutions that were debated and accepted by the General Assembly concerning the process of decolonization shows the importance of the subject to the international law. Moreover, Chapter XI deals with non-self-governing territories and Mauritius was listed as one when the Chagos Islands were excised in 1965. The task before the Court concerns the decolonization of Mauritius, not the creation of BIOT. It is hence clear that the question (a) constitutes an international legal question. As already explained above, the Court should point out and apply the relevant international rules and principles to the extent that it existed at the time that decolonization occurred.

Question (b) does not limit itself to Chapter XI of the UN Charter or the resolutions mentioned in question (a). Rather, it concerns all international law that might put the UK under obligations as the administrating power of the territory. Even if, as the UK will probably claim, the ICJ should decide that the Chagos Archipelago does not qualify as a non-self-governing territory (which is very unlikely, as it will be explained below), which would render Chapter XI inapplicable, there are certainly other international rules and principles that

do apply. As explained above, it is the task of the Court to explain which these principles are and how they apply in the case of the Chagos Archipelago.

3) Does the question arise from the activities of the organ?

Strictly speaking, this question is only relevant when the advisory opinion is requested by an organ of the UN that is not the UNGA or the Security Council. Nonetheless in some of its previous opinions, some states insisted that the ICJ deals with this issue.[24] Even though it is very unlikely, we cannot completely exclude the possibility of the ICJ taking a closer look at whether the question arises from the activities of the UNGA. While the Chagos Archipelago had not been on the table for a while, there certainly were other similar issues dealing with decolonization before the UNGA. The UNGA showed its concern about the issue of decolonization with the its resolution 65/119[25] from 2010 in which it proclaimed this decade as the third decade to eradicate colonialism and called upon nations to intensify their effort to do so. It thus reaffirmed its commitment to colonial nations and their right to self-determination.

The ICJ stated on a couple of occasions that the question of the activities of the requesting organ holds some importance even for the questions requested by the UNGA. However, in Kosovo Advisory Opinion, the ICJ clearly left the decision on whether the question arises from the activities of the organ to the organ itself: 'The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions.'[26]

It is sometimes unwise to predict the outcome of a pending case, but in our opinion the scope of the activity of the UNGA is so broad that it is almost impossible to imagine a case where the UNGA would be precluded from making a request to the ICJ. The Chagos Archipelago is clearly not one of them.

B) JUDICIAL PROPRIETY

In the process leading to the adoption of resolution 71/292, many speakers stated that a vote for the draft-resolution is a vote for support of completing the process of decolonization, the respect for international law and the rule of law. On the other hand, the representative of the UK questioned the propriety of the question put to the ICJ and stated that the question is of a bilateral matter and that it is inappropriate for the ICJ to adjudicate upon a bilateral dispute between states that have not consented to the jurisdiction of the ICJ by way of giving an advisory opinion concerning that issue. There is no doubt that the question of the appropriateness of the ICJ rendering an opinion will be raised by the UK in the ongoing

[24] Such opinions are: Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950, p. 65; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 11-12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 16-17.
[25] UNGA Res 65/119 (10 December 2010), UN Doc A/RES/65/119.
[26] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 34.

proceedings. This is probably the strongest argument that the UK has in relation to (in)admissibility. Its importance is also proved by the fact that it was already discussed in the academic circles.[27] Accordingly, it is particularly necessary to provide a thorough analysis in this respect.

According to Article 36 of the Statute of the ICJ, the jurisdiction in international disputes (contentious cases) is based on the consent of the parties. While it is clear that the consent of the parties is necessary in contentious cases (see *Monetary Gold case* (Italy v. France, United Kingdom & United States), (1954) ICJ Rep 19), its scope and necessity in the case of advisory opinions is still not entirely clear.[28]

The ICJ considers the question of consent as a part of its discretion not to render an advisory opinion. The question is therefore not one of competence of the Court (which relates to whether the request comes within the criteria stated within the UN Charter and Statute of the Court) to render an opinion but rather the propriety of exercise of the advisory jurisdiction.[29]

We can infer from the practice of both the Permanent Court of International Justice (hereinafter: "the PCIJ") and the ICJ that the question of consent is not entirely irrelevant when it comes down to advisory opinions. But unlike the PCIJ (which refused to give an advisory opinion because Russia has not given its consent in the case concerning the status of Eastern Carelia), the ICJ had never rejected a question on this ground. The PCIJ stated in the *Status of the Eastern Carelia advisory opinion* that:

> It follows from the above that the opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia. As Russia is not a Member of the League of Nations, the case is one under Article 17 of the Covenant. According to this article, in the event of a dispute between a Member of the League and a State which is not a Member of the League, the State not a Member of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, and, if this invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. This rule, moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. [...] The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent.[30]

[27] Dapo Akande, 'Can the International Court of Justice Decide on the Chagos Islands Advisory Proceedings without the UK's Consent?' (EJIL Talk 27 June 2017) < https://www.ejiltalk.org/can-the-international-court-of-justice-decide-on-the-chagos-islands-advisory-proceedings-without-the-uks-consent/> accessed 31 May 2018.
[28] Ibid.
[29] Ibid; Western Sahara, Advisory Opinion (n18), para. 32.
[30] Status of Eastern Carelia, Advisory Opinion of July 23 1923 P.C.I.J. Series B, No. 5 (1923) p. 7, para 33.

There is a fundamental difference between the ICJ advisory opinions and the *Eastern Carelia advisory opinion* of the PCIJ. The *Eastern Carelia advisory opinion* involved a State which was not a party to the Statute of the PCIJ and was not a member of the League of Nations and therefore had not given its (general) consent to the advisory jurisdiction of the ICJ. In the *Western Sahara advisory opinion,* the ICJ stated with respect to Spain:

> In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers.[31]

Nevertheless, in the following paragraphs of *Western Sahara Advisory Opinion*, the ICJ:

> [R]ecognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. […] In certain circumstances [...] the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[32]

It seems that the wording of the ICJ supports the UK argument that Mauritius is trying to circumvent the consent requirement for contentious jurisdiction. However, in *Western Sahara advisory opinion*, the ICJ did not decline to render its opinion since it found that 'the legal questions of which the Court has been seised are located in a broader frame of reference than the settlement of a particular dispute and embrace other elements.'[33] The same could be said for the present proceedings. Furthermore, since the ICJ has never refused to give an opinion on this ground before, it would be unusual if it did so in this case, especially bearing in mind that, with regard to the issue of consent, the question referred to the ICJ is similar to the previous questions referred to it where the Court did not decline to give advisory opinions.

The UK might also argue that the issue in question is of a bilateral matter and should for that reason be resolved between the parties without any interference of the international community. However, in the *Wall Advisory Opinion*, the ICJ acknowledged that Israel and Palestine had expressed radically different views on the legal consequences of Israel's construction of the wall but went on to say that the differences of views on legal issues have existed in practically every advisory proceeding.[34] In that case, the ICJ did not regard the

[31] Akande (n27); Western Sahara, Advisory Opinion (n18), para. 30; Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 31.
[32] Western Sahara, Advisory Opinion (n18), paras. 32-33.
[33] Ibid, para. 38.
[34] Legal Consequences of the Construction of a Wall (n24), para 48.

subject-matter of the UNGA's request as only a bilateral matter between Israel and Palestine. It stated that:

> Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine. This responsibility has been described by the General Assembly as a permanent responsibility towards the question of Palestine until the question is resolved in al1 its aspects in a satisfactory manner in accordance with international legitimacy. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.[35]

The subject matter of the present questions relates to the principle of self-determination and decolonization and the UNGA is without a doubt competent to deal with the issue and might wish to have legal advice on how to act. The UK will probably argue that the UNGA had not dealt with the matter of the Chagos Archipelago for decades and that it is asking a question which clearly arose bilaterally and was then brought to the Assembly only to circumvent the principle of consent.[36] Even though it is true that the UNGA had not discussed the matter of the Chagos Archipelago for a long time, the issues of decolonization and self-determination had always been of direct concern for the United Nations. Completing the process of decolonization is in fact a concern of the whole international community – regardless of the fact that the issue of the Chagos Archipelago had not been discussed recently or that it had been discussed only bilaterally. Respect for decolonization and the principle of self-determination is something that is in the interest of the whole international community and the UNGA hence has the authority to deal with the question. The question on the legality of pre-independence separation of the Chagos Archipelago from Mauritius is currently a particularly acute issue before the UN and the question is located in a much broader frame than a bilateral dispute. Replying to the question would therefore not circumvent the principle of consent and it would be undoubtedly compatible with the judicial character of the ICJ.

C) CONCLUSION

In conclusion, taking into account all the issues the UK will probably raise in the proceeding before the ICJ, it is very unlikely that the ICJ would refuse to answer the UNGA's questions.

[35] Ibid, paras 48-49.
[36] Akande (n27)

IV) Question (a)

The first question submitted to the ICJ by the UNGA provides:

Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?

Question (a) is essentially asking whether the detachment of the Chagos Archipelago constituted a violation of international law resulting in the unlawfulness of the process of decolonization. If the separation of Chagos was contrary to the international law, the process of decolonization of Mauritius was not lawfully completed in 1968. Accordingly, broadly speaking, there are two issues that the ICJ will probably have to resolve. First of all, the ICJ will need to point to the relevant legal rules governing the process of decolonization. Second, the ICJ will have to consider whether the consent given by the Mauritian authorities justifies the detachment.

A) LEGAL RULES GOVERNING THE PROCESS OF DECOLONIZATION

The legal foundations for decolonization were laid by the UN Charter. Chapter XI titled *Declaration regarding non-self-governing territories* refers to 'territories whose peoples have not yet attained a full measure of self-government' and recognizes the principle that the interests of the inhabitants of these territories are paramount as well as the obligation to promote to the utmost, the well-being of the inhabitants of these territories. The Charter imposes upon the members of the UN that are responsible for these territories a series of obligations towards non-self-governing territories and their peoples: to ensure cultural, social, political, economic and educational advancement of the peoples, to develop their self-government and political institutions according to their political aspirations, to further international peace and security, to transmit information relating to economic, social, and educational conditions. Despite these obligations, there was no progress towards decolonization worth mentioning in the years immediately after the Second World War since these obligations, except for the last one, are obligations of effort and not result. Moreover, the administering states viewed the relevant UN Charter provisions only as political guidelines with no binding effect.

Nevertheless, a strong awareness that colonization should come to an end emerged in the 50s. Such sentiment was reinforced in the turn of the decade, when many African colonies became independent and resulted in the UNGA Declaration on Granting of Independence to Colonial Countries and Peoples[37] (hereinafter: "the Colonial Declaration"). In paragraphs 2 and 5, the

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

Colonial Declaration recognized a right to self-determination - a right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development, without any conditions or reservations, in accordance with their freely expressed will and desire. The second important rule - the principle of territorial integrity of colonial territories - was enshrined in paragraph 6 which prohibited partial or total disruption of territorial integrity of colonies. In addition to the a more "technical" uti possidetis principle,[38] these are two leading rules that govern the process of decolonization. Still, they were defined ambiguously and by an UNGA resolution which is not a legally binding instrument. Can they consequently be seen as only political principles and not binding legal rules? A closer scrutiny of their content, their potential customary nature, as well as their mutual relationship is required to give a precise answer to this question. But first, the relevance of the *uti possidetis* principle has to be examined.

1) Uti possidetis

The principle of *uti possidetis* governs the establishment of borders in the process of creating new states. The rule is quite simple: the former colonial borders are transformed into international borders of newly founded states. The relevant moment is the moment of independence.[39]

The *uti possidetis* principle was first observed in 19th century in Latin America, when several independent states emerged from the territory previously administered by Spain. *Uti possidetis* provided that the former administrative borders became international borders. After the Second World war, the principle found a prominent place in the process of decolonization in Africa. There, the international community recognized the colonial territories as entities separate from their administering powers.[40] Since a colony was considered one self-determination unit, the *uti possidetis* principle was not used to delimit parts of a colony in accordance with administrative borders that might have existed within the colony but (only) enabled borders of a colony to become borders of a new state. That was confirmed by resolution 16(1) of Organisation of African Unity, adopted in 1964, where the member states committed themselves to respect colonial borders at the moment of independence.[41]

The importance of *uti possidetis* and intangibility of frontiers was affirmed by the ICJ in the *Burkina Faso/Mali frontier dispute*.[42] The Court noted that the principle had developed into a general concept of contemporary customary international law and was unaffected by the emergence of the right of peoples to self-determination.[43] The purpose of the principle was 'to prevent the independence and stability of the new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the

[38] *Uti possidetis* transforms borders of the colony into boundaries of a newly independent state.
[39] Malcolm N. Shaw, Peoples, Territorialism and Boundaries, EJIL (1997) 478, 495.
[40] Ibid, 493.
[41] Ibid, 494.
[42] Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554.
[43] Shaw (n39) 492.

administering power.'[44] Principle of *uti possidetis* was further affirmed in the work of Arbitration Commission established by the Conference on Yugoslavia.[45]

In relation to Chagos, the *uti possidetis* principle seems to strengthen the UK's claim, that Chagos Archipelago is an integral part of territory under UK sovereignty. At the moment of independence of Mauritius, in 1968, the Chagos Islands constituted BIOT, a different colony, excised from Mauritius in 1965. According to the British line of reasoning, the *uti possidetis* transformed the existing border between the colony of Mauritius and BIOT into an international border between independent Mauritius and BIOT.[46]

In opposition, the Mauritius argues that the principle of *uti possidetis* cannot be invoked to protect the borders that were established in violation of territorial integrity, which forms an essential element of the right to self-determination.[47] Mauritian claim that the principle of *uti possidetis* does not apply in a situation, where the state of affairs concerning borders is a consequence of a violation of a fundamental rule of international law such as self-determination, seems convincing.

In our opinion, the moment of independence – moment when the *uti possidetis* applies – cannot be interpreted too rigidly. As Shaw notes, '[*uti possidetis*] freezes the territorial situation during the movement to independence'.[48] Therefore, in specific cases, such as the case at hand, where the administering power excised a part of a colonial territory in the process of decolonization, only 3 years before the independence, *uti possidetis* does not apply strictly at the moment of independence but rather at the situation during the movement to independence. Henceforth, the UK cannot rely on *uti possidetis* in its favour. Accoridngly, question (a) will probably not be determined upon the principle of *uti possidetis*, but upon self-determination and the principle of territorial integrity which will play a key role in the consideration of legality of the detachment of the Chagos Islands. Therefore, our attention will now focus on them.

2) The principle of self-determination

In this part, we provide an analysis of the evolution of the concept of self-determination, particularly how and if its content varied throughout the relevant time period (from 1945 until 1975). The main concern will be the year of 1965, when the Chagos Islands were detached from Mauritius. We also scrutinize arguments showing that in 1965 the principle of self-determination was already a part of international customary law, giving it a status of a binding legal rule applicable to the UK in 1965.

[44] Ibid, 494.
[45] Ibid, 497 – 500.
[46] Chagos Marine Protected Area Arbitration (n6), Counter-Memorial of the United Kingdom <https://www.pcacases.com/web/sendAttach/1798> accessed 31 May 2018, 193 – 197.
[47] Chagos Marine Protected Area Arbitration (n6), Reply of the Republic of Mauritius, Volume I, 18 November 2013, p. 247 < https://www.pcacases.com/web/sendAttach/1799>, accessed 31 May 2018.
[48] Shaw (n39) 495.

For a principle to become a part of international customary law, two conditions must be met: *opinio juris* and State practice. It is difficult to determine the exact moment when a rule of international customary law emerges, especially since it is more of a process than an actual event. In order for the emerging rule to attain the status of customary international law, it has to be shown that some sort of State consensus existed at the relevant time (1960-1965) and that there was sufficient State practice (concerning self-determination).

a) Opinio juris

Let us first turn to the existence of *opinio juris*. There are several sources of international law that might prove that States considered self-determination to have a binding character in 1965.

i) The Charter of the United Nations

Self-determination found a prominent place in the international community with the adoption of the UN Charter in 1945. The Charter mentions it twice:

> Article 1(2) provides that one of the purposes of the UN is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.

Article 55 provides as follows:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: […]

Even though the Charter established self-determination of peoples as one of the purposes of international community after the Second World War and a guarantee for peaceful and friendly relations among the nations, it provided no definition. The closest the Charter comes to defining self-determination is the wording of Article 73 which binds the Colonial Power inter alia:

> [T]o develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

The Charter is unclear in respect of whether self-determination is a right with legal consequences or a mere principle with political weight. The French text of Article 1(2) – *principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes*, provides a clear reference to the right to self-determination,[49] whereas the equally authoritative English

[49] Literally, the principle of equality of the rights of peoples and their right to dispose of themselves (see Hurst Hannum, *Legal Aspects of Self-Determination*, <https://pesd.princeton.edu/?q=node/254> accessed 31 May 2018)

version refers to the *principle of equal rights and self-determination of peoples*.[50] Therefore, the English version seems to support the principle thesis,[51] while the French version uses the term *right of self-determination*.[52]

In order to strengthen its position, Mauritius argued in the *Chagos Marine Protected Area Arbitration* that 'in the view of some writers the right can be dated back to the coming into force of the Charter'. [53] Oeter states in reference to Article 1(2): "With the new formula, it was put beyond doubt that in principle colonial peoples had a right to self-determination, but it was left to the discretion of the governing powers to decide when these peoples would be ready for full self-government."[54] However, since Mauritius could only provide one author, it cannot be said that the Charter has resolved the dilemma.

What also seems troubling is that the Charter refers to 'self-determination of peoples', but does not define what 'peoples' are. The reference to 'peoples' prima facie includes groups beyond States which at least means non-self-governing territories "whose peoples have not yet attained a full measure of self-government."[55]

Despite these uncertainties, the Charter represents the cornerstone of self-determination and is without exaggeration the very foundation on which self-determination should be construed.

As clearly shown, the aim of the international community in 1945 was to put an end to colonialism and enable self-determination of peoples. However, when the Charter was adopted, colonies still existed and the end of colonialism was probably no more than an aspiration included into the Charter as a consequence of USSR's foreign policy.[56] Therefore, we cannot say that in 1945 the principle of self-determination was already part of a binding international law. Nevertheless, nobody can doubt the significance of the reference to self-determination in the UN Charter. Casesse[57] believes that Article 1(2) of the UN Charter was eventually perceived and relied upon as a legal entitlement to decolonization – the UN served as an international forum promoting the gradual crystallization of legal rules on this subject.

Accordingly, in the decades immediately following the Second World War, the principle embedded in Article 1(2) of the UN Charter evolved in a manner that shifted the emphasis from peaceful relations among states to independence from colonial rule.[58] This was attained through adoption of a series of UNGA resolutions concerning the question of decolonization.

[50] Reply of the Republic of Mauritius (n47) para. 5.6.
[51] In Articles 1(2) and 55, the Charter uses the following wording: "the principle of equal rights and self-determination of peoples".
[52] "droit à disposer d'eux-mêmes".
[53] Reply of the Republic of Mauritius (n47).
[54] Ibid, para. 5.6.
[55] Hannum (n49).
[56] Antonio Cassese, Self-determination of peoples, A legal reappraisal (1st edn CUP 1995) 48.
[57] Ibid, 65.
[58] Ibidem.

ii) Work of the UNGA in 1950s

In 1950 the UNGA referred to the "right of peoples and nations to self-determination", when it mandated the study of means to ensure the right.[59] Two years later, in 1952, the UNGA decided to include a provision on the right in the Covenants on Human Rights, in the following words:

> Whereas the General Assembly at its fifth session recognized the right of peoples and nations to self-determination as a fundamental human right (resolution 421 D (V) of 4 December 1950), [...]
>
> 1. Decides to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms:
>
> All peoples shall have the right of self-determination", and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories […].[60]

Many resolutions referring to self-determination were adopted in the 1950s by the UNGA. Resolution 637(VII) [61] entitled *The right of peoples and nations to self-determination* recommended to the UN Member States to uphold the principle of self-determination, resolution 648(VII) [62] concerned the factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government, resolution 738(VIII) [63] reaffirmed the importance of the right to self-determination in the promotion of world peace and friendly relations between peoples and nations and resolution 837(IX) [64] considered that the preparation of recommendations on measures for promoting the right to self-determination is a matter of immediate concern. A common feature of these resolutions is that on one hand they show a resistance from the colonial powers in the 1950s to recognize the legal importance of self-determination and on the other hand they indicate a clear inclination of the UNGA to recognize self-determination as a binding legal right, since the majority of countries voted in favour of these resolutions.

[59] UNGA Res 421 D (V) (4 December 1950), adopted with 30 states in favour, 9 against and 13 abstentions.
[60] UNGA Res 545 (VI) (5 February 1952), adopted with 42 states in favour, 7 against and 5 abstentions.
[61] UNGA Res 637 (VII) (16 December 1952), adopted with 40 states in favour, 14 against and 6 abstentions.
[62] UNGA Res 648 (VII) (10 December 1952), adopted with 36 states in favour, 15 against and 7 abstentions.
[63] UNGA Res 738 (VIII) (28 November 1953) adopted with 43 states in favour, 9 against and 5 abstentions.
[64] UNGA Res 837(IX) (14. December 1954), adopted with 41 states in favour, 11 against and 3 abstentions.

iii) Colonial Declaration (1960)

None of the UNGA resolutions on the matter of self-determination of colonial peoples were as important as resolution 1514 (XV) containing the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted in 1960. There are two reasons for such importance of resolution 1514 (XV): first, it seemed to define self-determination; second, it was adopted without dissent.

Article 2 of resolution 1514 (XV) provides:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As the reader has probably noticed, the Colonial declaration does not speak of a *principle*, but recognizes a *right* to self-determination. By virtue of that right the peoples are free to determine their political status and freely pursue their economic, social and cultural development.[65]

Article 2 shows that there was a tendency in the international community that colonization should be put to an end and that colonial peoples should be granted the right to self-determination. In assessing the legal status of the Colonial Declaration, it should be acknowledged that the language used in the Declaration is of a mandatory nature and, *prima facie*, it evinces a clear intention that its provisions were meant to have normative significance.[66] The Colonial Declaration is said to possess a 'quasi-constitutional status in international law, which is comparable to the Universal Declaration of Human Rights and the UN Charter.' [67] Even though in principle, UNGA resolutions do not impose binding obligations on the States, they are capable of forming rules of customary international law. As already mentioned, the UNGA resolution 1514 (XV) was adopted without dissent with 89 states voting in favour and 9 states abstaining, one of them being the UK. The wide support with no dissenting states shows a shift in thinking especially among the states that had previously opposed self-determination since they changed their vote from against to abstain. The vote could be interpreted as a clear proof of *opinio juris* in the supporting countries and a sign of acquiescence to the right of self-determination in the abstaining states, and accordingly, a clear sign of emergence of a customary rule. Therefore, the Colonial Declaration can be said to have formed a vital base for all subsequent resolutions and for an international recognition of a customary rule as well as for the decolonization policy of the United Nations.[68]

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[65] Hannum (n49).

[66] Allen (n4) 177.

[67] Allen (n4) 164; Cf. James Crawford, *The Creation of States in International Law*, (2nd edn OUP 2006) 604.

[68] Christian Walter, Antje von Ungern-Sternberg, Kavus Abushov, 'Introduction' in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), *Self-Determination and Secession in International Law* (OUP 2014) 2.

iv) Resolution of the UN Security Council

In the 1960s the UN Security Council adopted an important resolution as well. In its resolution 183 (1963) of 11 December 1963 the Security Council explicitly reaffirmed the interpretation of self-determination laid down in paragraph 2 of the Colonial Declaration.[69] Even though, Security Council resolutions are generally not a source of customary law, resolution 183(1963) is important as it indicates that self-determination was important not only before the UNGA, but also before the UNSC and because the UK voted for the adoption of this resolution.

v) Other UNGA resolutions from 1960 to 1966

The fact that a series of UNGA resolutions that concern self-determination followed the Colonial Declaration indicates that the self-determination was forming a custom. Many of them are of direct concern for the Chagos Islands, since they all emphasize the right of self-determination and point out that this right is granted by the Colonial Declaration of 1960.

The first is UNGA resolution 1541 (XV) from December 1960.[70] The resolution does not directly refer to self-determination, but it is important for identification of non-self-governing territories as self-determination units.

In December 1965 UNGA resolution 2066(XX), entitled Question of Mauritius, recognized the undivided territory of Mauritius as the unit of self-determination. It provides:

> [N]oting with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular paragraph 6 thereof […]
>
> [R]eaffirms the inalienable right of the people of the Territory of Mauritius to freedom and independence in accordance with General Assembly resolution 1514(XV).[71]

Resolution 2066 (XX) was adopted as a consequence of the detachment of the Chagos Islands in November 1965 and it criticized the actions of the UK in violation of the provisions of Colonial Declaration. This resolution clearly reaffirmed the Mauritian people's inalienable right to freedom, independence and the integrity of their national territory. In this respect, it stated that the detachment of the Chagos Islands from Mauritian territory would contravene paragraph 6 of the Colonial Declaration.[72] Resolution 2066 (XX) was unopposed, adopted with 89 votes in favour and 18 abstentions.[73]

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[69] UNSC Res 183 (11 December 1963) UN Doc S/RES/183. The resolution was adopted by 10 votes to none with France abstaining.
[70] UNGA Res 1541(XV) (15 December 1960) UN Doc A/RES/1541, adopted with 69 states in favour, 2 against (Union of South Africa and Portugal) and 21 abstentions (among which the UK).
[71] UNGA Res 2066(XX) (16 Debember 1965) UN Doc A/RES/2066.
[72] Allen (n4) 206.
[73] Peter H. Sand, *United States and Britain in Diego Garcia: The Future of a Controversial Base* (Palgrave Macmillan US 2009) 4.

In the following years, the UNGA adopted two additional resolutions that concerned Mauritius: UNGA resolution 2232(XXI) [74] of December 1966 and UNGA resolution 2357(XXII)[75] of December 1967. In these resolutions UNGA once again recalled Colonial Declaration and emphasized 'the inalienable right of the peoples of these Territories to self-determination and independence.' The resolutions repeated the claim to maintain the territorial integrity of non-self-governing territories and pointed out the situation being 'in contravention of the relevant resolutions of the General Assembly'.[76] Resolution 2232 (XXI) was unopposed, with 93 votes in favour and 24 abstentions. Resolution 2357 (XXII) was adopted with 86 states voting in favour, 0 against and 27 abstentions.

As shown, the UNGA continued to condemn the dismemberment of this non-self-governing territory and the militarisation of Diego Garcia as it adopted a series of resolutions in respect of the situation of Mauritius until Mauritius became independent in 1968.[77] Therefore it is clear that in UNGA's opinion, the UK persistently breached Mauritius' right to self-determination. UNGA was not alone. In 1980, Organisation of African Unity unanimously adopted a resolution[78] in which it recognized that Diego Garcia which has always been an integral part of Mauritius should be unconditionally returned.

It can be stated that these resolutions confirm the binding status of self-determination in 1965, since the international community actively (and without dissent) condemned the UK for the excision of the Chagos Islands which shows that self-determination was of a strong legal significance.

vi) The 1966 Covenants on Human Rights

UNGA's work on self-determination continued with the adoption of the two Covenants in 1966: International Covenant on Economic, Social and Cultural Rights (hereinafter: "the ICESCR") [79] and International Covenant on Civil and Political Rights (hereinafter: "the ICCPR"). [80] Accordingly, the right to self-determination was given an even stronger significance.

Article 1(1) of both Covenants 'established a permanent link between self-determination and civil and political rights'.[81] The term "freely" has two meanings: first, 'it requires that the people choose their legislators and political leaders free from any form of manipulation or undue influence from the domestic authorities themselves'[82] which is known as *internal self-determination*, and second, 'it requires that the State's domestic political institutions must be

[74] UNGA Res 2232(XXI) (20 December 1966) UN Doc A/RES/2232.
[75] UNGA Res 2357 (XXII) (19 December 1967) UN Doc A/RES/2357.
[76] Chagos Marine Protected Area Arbitration (n6), Memorial of Mauritius, 6.21. <https://www.pcacases.com/web/sendAttach/1796>, accessed 31 May 2018.
[77] Sand (n73) 11.
[78] AHG/Res. 99 (XVII) (4 July 1980)
[79] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3 (ICESCR).
[80] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[81] Cassese (n56) 54.
[82] Ibid, 53, 65.

free from outside interference', known as *external self-determination*.[83] Since Article 1(3) of the Covenants needs to be read in conjunction with Chapters XI and XII of the UN Charter, it subsequently 'writes the principle of self-determination into the chapters governing dependent territories. It cannot amend those Chapters but only supplement them for those Member States of the UN which have ratified the Covenants.'[84]

ICCPR and ICESCR do not only provide a thorough definition of self-determination but could also help establish whether self-determination was already a part of customary international law in 1965. Even though they were adopted in December 1966, i. e. one year after the excision of the Archipelago, and entered into force in 1976, they are a valuable source of *opinio juris* in 1965.

The fact that the Covenants were adopted without a vote[85] indicates a general consensus in international community with regards to self-determination as a right, and a strong argument towards self-determination being a part of international customary law in 1966. One could argue that their adoption was only completed in 1966 and consequently cannot reflect the customary rules in 1965. However, as it will be shown, the first drafting dates back to 1950, when the process of reaching States' consensus on self-determination started and was completed by 1966, proving that this right had already been strongly rooted in international community even before that year.

Cassese claims that the Soviet Union proposed an inclusion of a provision dealing with self-determination in the Covenant of Human Rights in 1950. [86] The primary concern was the right of self-determination of colonial people, the second one was the rights of minorities. On the other hand, the Western States, with the UK being among the staunchest opponents, opposed any provision on self-determination. Their arguments went from insisting that self-determination is a political principle and not a justiciable right, to the lack of necessity for the inclusion of such a provision in Covenants, since it was already embedded in the UN Charter. In 1955 the Article on self-determination was finally adopted by 33 votes to 12, with 13 abstentions. An interesting fact is, that the UK voted in favour. Despite the disagreement over whether self-determination should at that time be translated into a legally binding article or not, all sides proclaimed general support for the principle itself. [87] That was probably the reason for relatively tight voting results concerning this article, since the States had several disputes over its legal validity and the form which the principle should take. The supporters of the article, i. e. Asian, Arab and Socialist states, wanted self-determination to be a legally binding right since, in their view, it this was vital for maintenance of international peace. The opposing side thought that self-determination was a mere principle and that it was almost impossible to define it as a legal obligation, due to its ambiguous nature.[88] Nevertheless, with years passing, more and more States expressed their support for the article on the right to self-

[83] Ibid, 55, 66.
[84] Ibid, 58.
[85] Christian Tomuschat, *International Covenant on Civil and Political Rights (1966)* (Max Planck Encyclopedia of Public International Law (MPEPIL) 2010).
[86] Cassese (n56) 48.
[87] James Summers, *Peoples and International Law* (2nd edn Martinus Nijhoff Publishers 2013) 291.
[88] Ibid, 292.

determination. This process culminated in the adoption of the two UN Covenants on Human Rights in 1966.

To conclude, even if we cannot say that the Human Rights Covenants were legally binding when they were adopted, the description of evolution of a right of self-determination in the process of their adoption, shows its clear transition from a vague principle contained in the UN Charter to a legally binding rule of customary international law. It cannot be denied that the culmination was reached in 1966 when the Covenants were formally adopted, but this could not have been done with no prior consent of the States Parties when the Covenants' provisions (even on self-determination) were forming, that is since 1955, when the first agreement on the article on self-determination was achieved, until 1966, when it was firmly established and enshrined in the Covenants. Therefore, according to the Covenants, the emergence of self-determination as customary law and the States' recognition of it can be dated back to 1955, when the first agreement of the States was reached in adopting the article on that right and it only continued gaining its weight until 1966.

vii) Conclusion

To sum up, the UN Charter established self-determination as an important purpose of the post-war international community. The 1950's UNGA resolutions show that the UNGA was devoted a lot of effort to the development of self-determination. Colonial Declaration of 1960 defined the right and accelerated the UNGA's work on decolonization. The response of the international community to the detachment of the Archipelago shows that self-determination had been considered a binding rule in 1965. The customary nature of self-determination was reinforced in 1966 with the adoption of UN Human Rights Covenants that provided a more detailed definition and linked self-determination to the protection of human rights.

b) State practice

Until 1965 most of the former colonial States were granted independence, even the ones that were under the UK sovereignty (e.g. Sierra Leone in 1961, Kenya in 1963, Gambia in 1965, Malawi in 1964).[89] According to the ICJ in Nicaragua case,[90] for a rule to become a custom and fulfil the State practice condition, not all the States have to act in accordance with such rules. The fact that so many colonies became independent at that relevant time, is a strong indication that such State practice was present even before 1965.

In conclusion, we believe that because of the fact that so many colonies were granted independence before 1965, the right of self-determination was regularly exercised by the

[89] The List of Trust and Non-Self-Governing Territories (1945-1999) <https://www.un.org/en/decolonization/nonselfgov.shtml> accessed 31 May 2018.

[90] In *Nicaragua* the ICJ stated: '[F]or a rule to be established as customary, [the Court does not consider that] the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.' (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, para. 98.)

states at the time. From this it can be derived that the general opinion of the international community in 1965 was that the right of self-determination should be granted to colonies and that the States which had sovereignty over them were bound to follow this newly emerged international customary rule.

c) Jurisprudence

Our analysis is supported by the jurisprudence of the ICJ and the PCA.

First, in *Namibia Advisory Opinion* from 1971, the ICJ examined the development of self-determination. The Court held that '[t]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.'[91]

Based on the Court's reasoning, non-self-governing territories are eligible to exercise the principle of self-determination. Building on that, '[a]ll peoples subjected to colonial rule have a right to self-determination, that being, to "freely determine their political status and freely pursue their economic, social and cultural development"[92]'.[93] Interestingly, based on the judgement the concept of self-determination only includes external self-determination[94] and 'belongs to the people as a whole'.[95]

The term "subsequent development" used by the Court as quoted above is explained by Cassese. Close scrutiny of resolution 1514 (XV), resolution 1541 (XV) laying out the *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73(e) of the Charter of the UN*, the 1970 Declaration on Friendly Relations and of the statements made by States in the UN both before and after their adoption, as well as the practice of the UN in the area of decolonization, 'warrants the conclusion that in the 1960s there evolved in the world community a set of general standards specifying the principle of self-determination enshrined in the UN Charter, with special regard to colonial peoples'[96].

However, the ICJ does not refer to all the legal instruments mentioned by Cassese in *Namibia Advisory Opinion*. It only refers to Article 73 of the UN Charter and the Colonial Declaration which led Allen to conclude that 'the ICJ considered the central provisions of the Colonial Declaration – that all colonial peoples possess the right of self-determination – to be representative of CIL in this area.'[97]

Accordingly, it can be argued on the basis of *Namibia Advisory Opinion* that self-determination was a rule of customary nature in 1960. *A fortiori*, if self-determination had

[91] Namibia Advisory Opinion (n31) para. 52.
[92] UNGA Res 1514 (XV) (n33) para. 2.
[93] Cassese (n56) 72.
[94] A major contributor to this result was the fact that no attention was paid to internal self-determination (Cassese (n56) 74).
[95] Ibid, 72.
[96] Ibid, 71-72.
[97] Allen (n4) 178; It should be noted that Allen takes a stance that self-determination was not a part of CIL by 1965.

been of such importance in 1960, it must have been of an ever stronger importance in 1965, given that self-determination was evolving as a customary rule ever since the UN Charter was adopted.

Second, in *Western Sahara Advisory Opinion* from 1975 the ICJ similarly recalled the Colonial Declaration and stated:

> The principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV). [98]

In *Western Sahara*, the ICJ defined the right of self-determination in a colonial context as 'the need to pay regard to the freely expressed will of peoples'.[99] Such understanding of self-determination, which is based on paragraph 5 of the Colonial Declaration and on Friendly Relations Declaration, confirms the existence of a duty for other States to respect self-determination of peoples, which was explicitly declared in the Friendly Relations Declaration in 1970.[100]

It can be inferred from both cases that the ICJ seems to put significant weight onto the Colonial Declaration. Moreover, the ICJ's unambiguous and unconditional wording can be interpreted as to reflect a conviction of the judges, that the right of self-determination formed a part of customary law from 1960 onwards.

The ICJ is not the only judicial body that seemed to believe that self-determination was already part of the customary international law in 1965. While the majority in *Chagos Marine Protected Area Arbitration*,[101] did not deal with the issue of self-determination, Judges Kateka and Wolfrum addressed it in their Dissenting and Concurring Opinion:

> The United Kingdom argues that the principle of self-determination developed only in 1970 […] In our view, the principle of self-determination developed earlier […] Between 1945 and 1965 already more than 50 States gained independence in the process of decolonization. It is clearly stated in General Assembly resolution 1514 that the detachment of a part of a colony (which in this case includes the dependency of the Chagos Archipelago) is contrary to international law.[102]

d) Doctrine

In 1963 Dame Rosalyn Higgins stated that self-determination 'as a legal right [is] enforceable here and now' and that it 'seems inescapable that self-determination has developed into an international legal right.'[103] Secondly, in 1986, Malcolm N. Shaw said that the right of self-

[98] Western Sahara, Advisory Opinion (n18) para. 55.
[99] Ibid, para. 59.
[100] Ibid, para. 59.
[101] Chagos Marine Protected Area Arbitration (n6).
[102] Ibid, Dissenting and Concurring Opinion of judges James Kateka and Rüdiger Wolfrum, par. 71-72.
[103] Memorial of Mauritius (n76) para. 6.13.

determination started evolving as a series of UNGA's initiatives (such as adoption of a series of resolutions condemning colonialism) from the early 1950s onwards and that the right crystallized into customary international law during decolonization.[104] In his opinion, the concept of self-determination transmuted from a political and moral principle to a legal right and consequent obligation.[105] Even more, Shaw believes that 'the weight of international opinion appears to suggest that the right may be part of *ius cogens*.'[106] His view on the matter is that self-determination is derived straight from the UN Charter alone, with subsequent resolutions presenting mere authoritative interpretations of it, but can be in some cases binding.[107] Thirdly, James Crawford is of opinion that 'the Colonial Declaration has achieved a quasi-constitutional status in international law, which is comparable to the Universal Declaration of Human Rights and the UN Charter.'[108] Similarly to Shaw, he believes that in 'Namibia Advisory Opinion, the ICJ acknowledged that the institutional initiatives of the General Assembly in the colonial context – with specific reference to the Colonial Declaration – have facilitated the development of the principle of self-determination, which was rendered applicable to all non-self-governing territories as a result.'[109]

Lastly, the words of professor Christian Tomuschat are worth mentioning:

> 'Self-determination became a driving legal force as from 1960. […] The existing structural network of international relations was profoundly shaken by that almost revolutionary act [(Colonial Declaration)]which proclaimed the right of all peoples to self-determination'[110].

In conclusion, it can be inferred from the above described jurisprudence and doctrinal sources that the customary nature of self-determination in 1965 had a solid base in both case law and legal theory.

e) Persistent objector

The arguments provided above show that the right to self-determination was a part of international customary law in November 1965, when excision of Chagos took place. The UK was therefore bound by the customary rule, except if it acted as a persistent objector.

When a state does not want to be bound by a customary rule, it has to act as a persistent objector. In *Asylum*[111] and *Fisheries cases*,[112] the ICJ dealt with the question of an emerging custom within the international law and the persistent objector rule. The jurisprudence of the

[104] Allen (n4) 165.
[105] Kenneth O. Okwor, *Arguments on the Legal Significance of Resolutions of the United Nations General Assembly and the Vexed Question on Whether They Constitute a Source of International Law with Binding Effects* (2014) 7.
[106] Memorial of Mauritius (n76) para. 6.14.
[107] Allen (n4) 165; Cf. Malcolm N. Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986) 73-76.
[108] Allen (n4) 164; Cf. Crawford (n67) 604.
[109] Allen (n4)164.
[110] Memorial of Mauritius (n76) para. 6.13.
[111] Colombian-Peruvian asylum case, Judgment of November 20th 1950: I.C. J. Reports 1950, p. 266.
[112] Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116.

ICJ appears to support the idea that an existing customary law rule would not apply to a state if (1) it objected to any outside attempts to apply the rule to itself – (a) at the initial stages and (b) in a consistent manner, and (2) if other states did not object to her resistance.[113] Henceforth, it does not suffice to be silent. The objection must be communicated openly and clearly to other subjects of international law and not only internally between domestic organs.[114] States that are silent during the formation of customary law are bound by their silence – we call this tacit acceptance or acquiescence.[115]

The idea behind such a requirement is that the position of a State is known as soon as possible and that it deflects any possibility of *ex post* objections to the customary rule.[116] It does not, however, matter whether the objection is expressed through words or deeds as long as it is clearly communicated to other States.[117] The International Law Association elegantly phrased the need for this mechanism:

> As a matter of policy, the persistent objector rule could be regarded as a useful compromise. It respects States' sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law's progressive development can move forward without having to wait for the slowest vessel.[118]

In *Chagos Marine Protected Area Arbitration*, Mauritius argued that the UK could not validly object to self-determination since the latter constitutes a fundamental principle of international law. The Mauritian argument is therefore, that a state cannot object to a fundamental principle of international law.[119] The UK did not provide any explanation in this respect.

In order to determine the weight of the argument, we must first and foremost answer the following question: what is a fundamental principle of international law? Fundamental principles of international law can only be derived from the existing international practice.[120] As Brownlie notes: 'In many cases these principles are to be traced back to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice.'[121] If we were to frame it in different terms, one might say that these principles are in general just rules of international customary law with state practice so extensive and with the accompanying

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[113] Ruwanthika Gunaratne, *Who is a Persistent Objector? (Updated)* <https://ruwanthikagunaratne.wordpress.com/2011/04/22/persistent-objector/> accessed 31 May 2018.
[114] James Green, *The persistent objector rule in international law* (OUP 2016) 71.
[115] Malcolm Shaw, *International law* (6th edn CUP 2008) 90; cf. Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 11.
[116] Green (n114) 73.
[117] Ibidem.
[118] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* <https://ruwanthikagunaratne.files.wordpress.com/2011/04/ila-customary-law-study.pdf> accessed 31 May2018, 28.
[119] Reply of the Republic of Mauritius (n47), paragraph 5.10. The same argument is used by the UK in the Fisheries case (n112), Pleadings, Oral arguments, Documents, Fisheries Case, p. 429.
[120] Shaw (n115) 99.
[121] Brownlie (n115) 19.

opinio juris so well established and undisputed that the states accept them as being fundamental principles of international law, therefore gaining another dimension.[122]

If one accepts definition, there can be no doubt that it is impossible to be a persistent objector to such rules. However, this impossibility does not derive from a higher rule of international law forbidding such objections, but from a logical conclusion that if fundamental principles gain such qualification only through extensive state practice and general acceptance, then it would be too late for a state to object to such principle, because it would not satisfy the standard of objecting in the process of the emergence of the rule.

Another possibility might be that the validity of the objection ceases when the rule reaches the necessary *opinio juris* to qualify as a fundamental principle of law, akin to how any reservation on *jus cogens* rules are not in accordance with international law or how treaties that go against *jus cogens* are void.[123] There is, however, no need to go that far in the present case. As we will show below, the facts of the case do not support the view that the UK acted as a persistent objector to the emerging rule of customary international law.

The UK could argue before the ICJ that while it did not expressly object to self-determination in the process of adoption of the Colonial Declaration it did not, however by any means support self-determination and its abstention cannot be considered to represent a tacit acceptance. Moreover, the UK's position on the question of customary character of self-determination could be claimed to be represented by its acts in 1965: the excision of the Chagos Archipelago and creation of BIOT. These acts could be seen as objections to the customary rule, exempting the UK from its application.

We do not agree with this line of reasoning. We claim that UK's actions satisfy neither the conditions set in the jurisprudence of the ICJ, nor the conditions developed by the doctrine and that this can be showed by their past acceptance of a different standard and failing to meet the standard in the present case. As James Green shows in his book, the UK accepted the standard of clear communication for persistent objection in the Fisheries case.[124] The theoretical background described above proves that the ICJ and legal doctrine accept the same view without much dispute. It therefore follows that the UK cannot claim to have given a valid objection to the customary rule neither in 1960 when the Colonial Declaration was adopted since being passive is anything but evidence of clear disagreement, nor in 1965, when the UK excised Chagos, because the UK sought agreement of the representatives of Mauritius and misrepresented the Chagos Islands to the international community as having no permanent population due to fear of disapproval of the detachment. These facts seem to show that the UK in fact considered self-determination to be of a binding nature. Therefore, the facts of the case support the Mauritian position in its pleadings in the *Chagos Marine Protected Area Arbitration*.

[122] However, the fundamental principles of international law have to be distinguished from *jus cogens* rules even though the two categories might overlap.
[123] Vienna Convention on the Law of Treaties (adopted 23 May 1969 entered into force 27 January 1980), 1155 UNTS 331 (VCLT) art 53.
[124] Green (n114) 72.

In conclusion, if the UK wanted to be exempted from respecting the right of self-determination of peoples, it should have acted as a persistent objector in the initial stages of development of customary law - that is at least from 1960 onwards - which it clearly failed to do.

f) Conclusion

Even though in our opinion, the right of self-determination was a part of international customary law in 1965, the ICJ could decide differently. We cannot conclude beyond reasonable doubt that self-determination had the status of international customary law in November 1965 when the UK excised the Chagos Islands from the colony of Mauritius and established BIOT. We are faced with a grey zone where the exact nature of self-determination is yet to be established. Nevertheless, the ICJ's decision in the matter of customary law status of the right of self-determination in 1965 will be of paramount importance for the way that the ICJ will take in relation to the rest of its advisory opinion, especially in relation to question (a). Roughly, there are two possible outcomes:

First (1), if self-determination had the customary international law status in 1965, the answer to question (a) would be that the process of decolonization was not lawfully completed in 1968, due to the unlawful excision of the Chagos Islands, except if the Mauritian approval of the detachment can be considered valid, which will be examined in section B).

Second (2), if self-determination did not have the status of customary international law in 1965, the process of decolonization was lawfully completed in 1968 since the conduct of the UK did not violate the legal rules governing decolonization that were applicable at the time.

3) Territorial integrity

Beside the principle of self-determination which is to be considered the most important guiding legal principle of the process of decolonization, international law assigns significant legal weight to the principle of territorial integrity of colonial territories as well. In relation to sovereign states, the principle of territorial integrity is enshrined in Article 2(4) of the UN Charter, which reads as follows: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN.' It is also contained in Article 2(7) of the UN Charter, which prohibits interference within the domestic jurisdiction of states. UN member states are thus clearly prohibited from interfering with the territorial integrity of another state.

In the context of decolonization, the principle of territorial integrity was first affirmed in the Colonial Declaration UNGA resolution 1514 (XV) which is considered as having a quasi-constitutional character.[125] In accordance with paragraph 6, any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country was deemed incompatible with the purposes and principles of the Charter of the United Nations.

[125] Crawford (n67) 604.

The UK argued in *Chagos Marine Protected Area*, that based on *Kosovo advisory opinion*,[126] paragraph 6 refers only to relations among sovereign states. We would like to clarify the reference to *Kosovo advisory opinion*. In paragraph 80, the ICJ stated that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States.'[127] In spite of apparent clear position of the ICJ, this quote is inapplicable to the context of decolonization. The quote is an answer to the Republic of Serbia which argued before the ICJ that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. What ICJ really meant was that territorial integrity principle cannot be invoked by state in order to preclude people residing in its territory to unilaterally declare independence. The UK position is also contrary to the grammatical interpretation of paragraph 6 which uses the word *country*. Based on the title of resolution 1514 (XV), i. e. Declaration on the Granting of Independence to *Colonial Countries* and Peoples, *country* should not be understood as referring to sovereign states but to colonies. Nevertheless, the interpretation proposed by the UK is possible, but it is very unlikely.[128]

There are different instances where the principle of territorial integrity protects the territory of a colony from being divided.

First, the principle limits the right to self-determination and confines it to the colonial territory as a whole. Accordingly, people residing in the territory as a whole are accorded the right to self-determination. Different ethnic groups living in the colonial territory do not possess a separate right to self-determination. The principle of territorial integrity thus appears to be in conflict with self-determination of peoples. However, it is somehow understandable that some kind of limitation to self-determination, that would ensure stability in the newly independent states, had to be put in place. Hence, the principle of territorial integrity could be regarded as providing a necessary framework ensuring that the process of decolonization does not get out of hand.[129]

Moreover, the fact that the right to self-determination refers to the whole territory of a colonial unit is supported by the case of Mayotte. Mayotte was one of the five islands comprising the Comoros islands, a colony administered by France. In the process of decolonization, a referendum took place. The results favoured independence on all the islands comprising Comoros Islands colony, except Mayotte. Accordingly, the people of the self-determination unit (colony of Comoros Islands) opted for independence. However, France organised another referendum solely on Mayotte, where 99,4% of the population wished to become a French "outre-mer" territory. International community condemned French actions, despite their statements that they were simply aiding the Mayotte population in expressing their self-determination. Since Mayotte was not considered a "self-determination unit", its separation was deemed unacceptable.[130]

[126] Counter-Memorial of the United Kingdom (n46) 185.
[127] Kosovo Advisory Opinion (n26), para. 80.
[128] Cf. Samuel Kwaw Nyameke Blay, 'Self-determination Versus Territorial Integrity' (1986) 18 N.Y.U. J. Int'l L Pol. 441, 443 – 449.
[129] Blay (n128) 447 – 449.
[130] Trinidad (n4) 80.

Second, the principle of territorial integrity precludes the administering state from separating a part of the colony from the rest of the colonial territory.[131] In this respect, the principle of territorial integrity can be regarded as an essential element of self-determination. If the administering power could freely dismember the territory of the colony, self-determination would not have much sense. This was confirmed by UNGA resolution 2066 (XX), entitled *The question of Mauritius*. The resolution invited UK to 'take effective measures with a view to the immediate and full implementation of resolution 1514 (XV)' and to 'take no action which would dismember the Territory of Mauritius and violate its territorial integrity'. In the preamble of the resolution, the UNGA also noted 'with deep concern that any step taken by the administering power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration'. The principle of territorial integrity was once again reaffirmed in resolution 2232 (XXI). In this resolution, the UNGA reiterated 'its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and *the establishment of military bases and installations*[132] in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV).'

Nonetheless, legal scholars agree that the principle of territorial integrity in the context of decolonization is not absolute. Shaw provides two exceptions to the principle: 'consent, where the situation was deemed to require this and interests of peace and security'.[133] Crawford similarly states that '[o]nly if the continued unity of the territory is clearly contrary to the wishes of the people or to international peace and security will schemes for partition meet with approval of United Nations organs.'[134] Dugard, mentions the question whether the principle of territorial integrity in the context of decolonization is a peremptory norm, doubting that it possesses such quality except potentially in a case where the territorial integrity is disrupted 'without the free consent of the people of the unit'.[135]

The practice shows that the first exception - interests of peace and security - refers to situations where the principle of territorial integrity had to be pushed aside due to potential ethnic clashes within the self-determination unit. In Ruanda-Urundi, a trust territory administered by Belgium, there was a significant risk of a major ethic clash between Hutu and Tutsi. The UNGA eventually allowed that two independent states - Rwanda and Burundi - emerged from Ruanda-Urundi.[136] The second exception – consent – is applicable in situations where the people of the colony agreed with the partition of "their" territory. Some examples are: TTPI, Cocos (Kelling) and Christmas Islands, The Gilbert and Ellice Islands Colony, British Cameroons and Trust Territory of Pacific Islands.

In the light of the facts of the present case, the second exception seems to be applicable to the detachment of Chagos which was carried out after the Mauritian side consented to the

[131] Crawford (n67) 336.
[132] Emphasis added.
[133] Shaw (n39) 493 - 494.
[134] Crawford (n67) 336. See also: Trinidad (n4) 91.
[135] Trinidad (n4) 91.
[136] Ibid, 93 - 94.

excision in 1965. Nevertheless, Mauritius claims that the consent was not validly given. The issue of validity of consent is one of the key aspects of question (a) that will be discussed and elaborated in more detail below.

B) THE QUESTION OF THE VALIDITY OF MAURITIAN CONSENT TO DETACHMENT OF THE CHAGOS ISLANDS

As shown above, the principle of territorial integrity, an essential element of self-determination prohibits total or partial disruption of territorial unity of colonies. However, the principle is not absolute and can be disregarded when the people concerned consent to the partition of the colony. The Mauritian representatives indeed gave their consent to the detachment of the Chagos Islands. How does the consent influence the legal position concerning Chagos? The consent precludes wrongfulness of the detachment except if it could be established that the consent was not valid.

Before we turn to different arguments relating to validity of consent, we would like to clarify an important point from the *Chagos Marine Protected Area Arbitration*. The Tribunal explained that the Lancaster House Agreement (hereinafter: "LHA") was governed by British constitutional law until the independence of Mauritius in 1968 which 'had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement.'[137] The Tribunal went on hold that obligations contained in the Lancaster House Agreement are binding on the UK.[138] Bearing in mind that LHA is an international agreement and that obligations from the Lancaster House Agreement are due to Mauritius, could it be said that by implication, the consent given to conclusion of LHA (under which the Mauritan side agreed to the detachment of Chagos) was perfectly valid?

The answer to this issue was given by the Tribunal in paragraph 428, where it stated:

> Moreover, since independence the United Kingdom has repeated and reaffirmed the Lancaster House Undertakings on multiple occasions. This repetition continued after Mauritius began proactively to assert its sovereignty claim in the 1980s, and even after such a claim was enshrined in the Constitution of Mauritius in 1991. As the Tribunal will set out in the sections that follow, the United Kingdom's repetition of the undertakings, and Mauritius' reliance thereon, *suffices to resolve any concern that defects in Mauritian consent in 1965 would have prevented the Lancaster House Undertakings from binding the United Kingdom*.

As we can see, the Tribunal cleverly avoided the issue of validity of consent and based its findings on the fact that the UK consistently repeated the undertakings, written in the LHA. We hope that the ICJ will not act in a similar way and that the issue of validity of consent will be resolved.

[137] Chagos Marine Protected Area Arbitration (n6) para. 424.
[138] Waibel (n17).

The ICJ could be faced with several different claims concerning the invalidity of consent. First, it could be said argued that the consent was given under duress. Second, the consent could be argued to be obtained in circumstances that violated the Mauritian right to self-determination. Third, the Mauritian representatives could be said to lack legitimacy to represent the people of the colony. Forth, it could be asserted that the representatives of Mauritius did not have the legal capacity to conclude binding agreements that have effects in international law.

1) Consent to the detachment was given under duress

a) The concept of coercion in international law

Historically speaking, coercion of a state by means of threat or use of force was not recognised as a reason for *ipso iure* nullity of a treaty until the United Nations (UN) Charter came into force. Development of coercion as a part of customary international law started around 1920s with the Covenant of the League of Nations and Treaty of Paris. There is even a bilateral treaty between Russian Soviet Federative Socialist Republic and Turkey dating back to 1921, where parties laid down that they will not recognise the validity of any peace treaty or other obligation imposed on the other by force. However, only one bilateral treaty is not enough for forming an obligation of international customary law.[139] When adopting Vienna Convention on the Law of Treaties (hereinafter: "the VCLT"),[140] there was a disagreement between states on the question which date should be recognised as the "D day" when coercion became a part of *erga omnes* binding customary international law.[141] Many states argued that coercion became a part of customary international law some day between the two World Wars.[142] In the end, the majority of states shared the view of the International Law Commission (hereinafter: "the ILC"), that the relevant date is the day when the UN Charter came into force.[143] Consequentially, it is undisputable that when adopting the Lancaster House Agreement (LHA) in 1965, coercion was a part of customary international law.

Article 51 of the VCLT governs the situation of physical coercion of representative of the state. Since the Mauritian representatives were clearly not physically assaulted or in any other way physically forced to agree to the detachment of the Chagos Islands, Article 51 does not apply to the case at hand. However, Article 52 prohibits coercion of a state by *the threat or use of force.* Could Mauritius rely on Article 52 to show that the consent given was not valid?

Wording of the Article 52[144] is simple and clear in some respects. Phrase 'violation of the principles of international law embodied in the Charter of the United Nations' shows that this violation is not only possible by the member states of the UN but can be done by any state or

[139] Stuart S. Malawer, 'A New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention of the Law of Treaties' (1970) 4 Vand. Int'l 1 1970-1971 1, 14.
[140] Vienna Convention on the Law of Treaties (n123).
[141] Ibidem.
[142] Ibid, 15.
[143] Ibidem.
[144] Article 52 of the Vienna Convention (Coercion of a State by the threat or use of force): 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'

other subject of international law.[145] When it comes to the interpretation of the phrase 'the threat or use of force', things become more complicated. There are two views on how this phrase could be interpreted. The broad interpretation considers that economic and political pressures apply in addition to military and physical force. The narrow view only includes strict military or physical force which leads to the conclusion of an international treaty.[146] Commentary of the VCLT, which was published in 1966 Yearbook of the ILC, is stating that some members of ILC were in favour of including economic and political pressure in the wording of the article.[147] Arab states, Afro-Asian, Soviet bloc and the Latin America states were proposing a broad definition of coercion as well.[148] Stuart S. Malawer said in his work:

> A draft amendment (the Nineteen-State Amendment) introduced by these states at the First Session requested that Article 49 [52] explicitly include in the Charter Article 2(4) phrase, economic and political pressure. For failure of [wider] support, however, this draft amendment was never pressed to a vote.[149]

Even some legal scholars and judges in international courts shared the view with the above mentioned group of states. Judge Padilla-Nervo wrote in his dissenting opinion in *Fisheries Jurisdiction case*:

> A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting in having its view recognized and accepted. It is well known by professors, jurists and diplomats acquainted with international relations and foreign policies, that certain "Notes" delivered by the government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force. There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda*.[150]

At first sight even Commentary of ILC from 1966 left things quite undefined with wording that 'precise scope of the acts covered by this definition [of threat or use of force in violation of the principles of the Charter] should be left to be determined in practice by interpretation of the relevant provisions of Charter.'[151] But if we read previous discussions and rapports which were the base for the draft article 49 (Article 52) of VCLT, we can see which opinion ILC really represented. The majority of members disagreed with the broad interpretation of coercion since it would enable states to invalidate treaties more easily which might cause severe tensions in relations among states. What kind of economic and political pressure is still within the limits of the law and which goes beyond these boundaries and consequentially

[145] ILC, 'Draft Articles on the Law of Treaties with commentaries' YILC 1966 Vol II 187, 247.
[146] Malawer (n139).
[147] ILC, 'Draft Articles on the Law of Treaties with commentaries' (n145) 246 – 247.
[148] Malawer (n139) 17.
[149] Ibidem.
[150] Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, Dissenting Opinion of Judge Padilla – Nervo, p. 47.
[151] ILC, 'Draft Articles on the Law of Treaties with commentaries' (n145) 246.

violates Article 52 would be an additional problem. Although the ILC did not explicitly state this opinion, we can say that it tacitly favoured the narrow interpretation. Western countries shared the same view. Accordingly, we can conclude that without any doubt economic and political pressures are unlikely to be regarded as coercion since only threat of military force enables a state to declare a treaty invalid *ab initio*[152].

The second possibility for Mauritius to declare its consent invalid and LHA void could be a statement that it is a general principle of law that political pressure is a form of coercion. Article 38 of ICJ Statute states that the general principles of law recognised by civilized nations are a source of international law. The problem is that in 1965, the broad concept of pressure was not institutionalised in the national legal orders. Therefore, it cannot be incorporated into international law via Article 38(1)(c).[153]

b) Was Mauritius coerced to conclude the LHA and therefore forced to consent to the detachment of Chagos Archipelago?

In 1982, Mauritius established a special a special committee with the task of investigating the circumstances surrounding the excision of the Chagos Islands from Mauritius.[154] In its final report, the committee concluded that Mauritian independence was conditioned upon giving the Chagos Archipelago to the UK. If Mauritius had not signed the LHA, its independence would have been postponed.

The record of negotiations shows that the UK Prime Minister Harold Wilson warned the Mauritian Premier Sir Seewoosagur Ramgoolam that he and his colleagues could return to Mauritius either with independence or without it and that the Chagos Archipelago could either be detached by Order in Council or with the agreement of the Mauritian side.[155] It is noteworthy that the UK paid compensation amounting to 3 million pounds for the excision and promised to protect stability of Mauritius in the event of internal clashes, to afford rights regarding navigation, fishing and natural resources in the area of Archipelago and to return the Islands when no longer needed for defence purposes. Nevertheless, these undertakings seem to be hiding the fact that the UK should let Mauritius become independent freely without any reservations or conditions.[156] The symbolic payment shows a great inequality between parties of the LHA. These arguments let the dissenting judges Kateka and Wolfrum to conclude that the consent was given under duress.[157]

[152] Malawer (n139) 22-25.
[153] See Allen (n4) 102-130.
[154] Chagos Marine Protected Area Arbitration (n6) para. 102.
[155] Ibid, para 73.
[156] UNGA Conial Declaration (n32), para. 5: 'Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.'
[157] Chagos Marine Protected Area Arbitration (n6), Dissenting and Concurring Opinion of judges James Kateka and Rüdiger Wolfrum, para. 77.

But as we have already stated, even such blatant kind of political pressure is not enough for a state to declare a treaty invalid. Chances that the ICJ will change its opinion[158] and start applying the broad interpretation of coercion are very low. Even if it did, the burden of proof of showing the connection (*nexus*) between its consent and the political pressure from the UK would be on the part of Mauritius. In addition, international tribunals have set a very high evidential standard for the purpose of proving an allegation of coercion as a matter of international law.[159] Taking into account these requirements, it is hard to imagine Mauritius succeeding with the argument that it was coerced into detaching the Chagos Islands.

2) Consent to the detachment was given in violation of the right to self-determination

Even though in the *Chagos Marine Protected Area Arbitration* the dissenting judges Wolfrum and Kateka estimated that the consent was given under duress, we have shown that their opinion which supports the Mauritian claim is not very strong. Professor Crawford, who appeared before the Tribunal as a legal counsel of Mauritius, seemed to be aware of his party's weakness.. In the written submissions, Mauritius confidently invoked *duress*, whereas in the oral part of the proceedings, Professor Crawford talked about 'a situation amounting to duress, or at least analogous to duress'.[160]

However, at the same time, Professor Crawford argued that the consent was not a genuine expression of free will of the people of Mauritius. According to Mauritian reasoning, based on paragraphs 2 and 5 of the Colonial Declaration, self-determination ensures the people of a non-self-governing territory (i. e. the colony of Mauritius) to freely determine their political status and freely pursue their economic, social and cultural development without any conditions or reservations imposed by the administering state, in accordance with their freely expressed will and desire.[161] The principle of territorial integrity is an essential element of self-determination, since if the colonial Power could freely dismember a self-determination unit, self-determination would be an empty shell, as it was described by Professor Crawford.[162]

When reading the Mauritian arguments from the *Chagos Marine Protected Area Arbitration*, one gets the impression that Professor Crawford's intention was not to explain the claim in further detail - probably a strategic move of Mauritius. But we decided to dig a little deeper into what Mauritius is proposing and came to interesting conclusions.

The Mauritian line of reasoning is founded upon the principle of territorial integrity, considered to be an essential element of self-determination. Accordingly, the colonial territory can only be dismembered in accordance with the freely expressed will of the people. In other

[158] ICJ frequently stated that only military and physical force is understood as pressure. Examples: Fisheries Jurisdiction (n142), Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.
[159] Allen (n4) 109-114.
[160] Chagos Marine Protected Area Arbitration (n6), Hearing Transcript (Day 3) <https://www.pcacases.com/web/sendAttach/1573> accessed 31 May 2018, p. 248, 25.
[161] Ibid, p. 247 – 248.
[162] Ibid, p. 246, 9-11.

words, only if people residing on the self-determination unit decide to divide "their" territory through exercise of right to self-determination, the disruption of territorial unity would be valid. Since pressure was exercised upon the Mauritian side, their consent to the detachment cannot be said to represent a freely expressed will. Furthermore, independence, one of the three outcomes of self-determination in the context of decolonization, was conditioned upon agreement to the detachment. Hence, if exercise of self-determination itself was conditioned upon acceptance of excision of Archipelago, how could it be argued that the consent given was a genuine exercise of the right to self-determination?

The Mauritian argumentation not only holds water but also seems quite convincing. However, if we look at it more carefully, we come across several problematic points that might stop the ICJ from following the Mauritian proposition.

First, Mauritius seems to implicitly propose that self-determination in the context of decolonization lowers the threshold of negative influence which constitutes duress invalidating consent. Accordingly, in the context of decolonization where the exercise of self-determination is at stake, there is a different standard of duress than in other instances. The *freely expressed will* standard, a prerequisite for validity of detachment, will be violated not only when the representatives of people were threatened with physical or military force, but also when the threat is of political nature.

It goes without saying that such interpretation of self-determination in the context of decolonization would be a novelty. According to our research, no international tribunal has ever interpreted self-determination in such way. Likewise, the importance of consent given by Mauritius would be significantly reduced which seems a quite progressive approach, especially bearing in mind that the ICJ is a conservative court, generally preferring to adhere to the fundamental postulates of international law.

Second, the ICJ might be willing to follow the proposed line of reasoning on the basis of inequality argument: there was such difference between Mauritius, a colony hoping to break the bonds of colonialism and the UK, a colonial super power, upon which Mauritius was economically and politically dependent, that the proposed lower standard of duress in the context of colonial self-determination is justified. However, there are many examples of serious discrepancy in negotiations between sovereign states. Could weaker and smaller states by analogy invoke a different standard of duress as well? The answer is probably negative, since the proposed standard applies only to the situation decolonization. However, could an approval of a different standard for an exceptional case (decolonization) trigger a wide range of claims that a new exceptional case merits similar consideration?

Third, a tempting suggestion for the ICJ could be that Mauritian side actually cannot be said to be deprived by the Lancaster House "deal". The UK agreed to pay compensation of 3 million pounds, to protect Mauritius in the event of internal clashes, to afford rights regarding navigation, fishing and natural resources in the area of Archipelago and to return the Islands when no longer needed for defence purposes. What was at stake for Mauritius – stranded Islands in the middle of the Indian Ocean. Why would the ICJ step in with a new

interpretation of self-determination threatening the stability of international relations if the outcome of the Lancaster House Conference was not that detrimental for Mauritius?

Despite all points of controversy, in our opinion, the ICJ should follow the Mauritian line of reasoning. The Mauritian representatives should not have been put in a position, where they had to decide between independence and the Chagos Islands, in the first place. As the administering power, the UK should have promoted the colonial territories and its inhabitants in accordance with Article 73 of the UN Charter. To the contrary, the UK took advantage of its superiority in order to enforce its own interests, in complete disregard of its duties as the administering state. As a consequence, at the peak of decolonization, BIOT, a new colony, was established.

Self-determination is one of the most important principles of contemporary international law that played the key role in creation of many new states in the process of decolonization. The UK conditioned its exercise upon agreement to the detachment when two options that both violated the right to self-determination were put before the Mauritian side. First, if Mauritius decided for independence, it had to give up the Chagos Islands; second, if it decided for the Archipelago, their independence would be at stake. Does international law really allow such bargain?

The question answers itself. Our view is supported by the response of international community to the detachment of the Chagos Islands. The UNGA condemned the excision in resolutions 2066 (XX), 2232 (XXI) and 2357 (XXII). Furthermore, the international practise confirms our opinion as well, since it shows a certain pattern: where the partition of a self-determination unit was in accordance with the wishes of the people, international community did not oppose to the disruption of territorial integrity,[163] whereas where the people's wishes were ignored, the international community condemned the division.[164] Let us provide several examples.

a) Mayotte

The situation in Mayotte was already described in a previous part of this document where we talked about the principle of territorial integrity. Nevertheless, in order to provide a better review of the international practise, several key facts will be provided.

Mayotte is a small island which was a part of French colony of the Comoros Islands. In the process of decolonization, a referendum was held on the territory of the colony. The majority decided for independence. However, on one of the Islands comprising the colony – Mayotte, the majority of people voted for association with France. The latter seized the opportunity and enabled Mayotte to become one of the French Oversees Territories. The international

[163] Examples: British Cameroons, Trust Territory of Pacific Islands, The Gilbert and Ellice Islands Colony, Cocos (Kelling) Islands and Christmas Islands. For a more detailed description of examples, see: Trinidad (n4).
[164] Examples: Comoros Islands and Mayotte, Madagascar and Scattered Islands. For a more detailed description of examples, see: Trinidad (n4).

community condemned the French actions.[165] Self-determination in the context of decolonization is given to the people of the colony as a whole as we explained above and not to more groups of people living in the territory of the colony. Accordingly, France as the colonial power acted contrary to the wishes of the people of the colony since the people decided for independence.[166]

Scattered Islands

In April 1960, less than three months before Madagascar gained independence, France arbitrarily excised Scattered Islands which formed a part of the colony of Madagascar. At first, the international community did not oppose the excision. The most suitable explanation would probably be that the excision took place before the Colonial Declaration was adopted. Interestingly, after 19 years, in 1979 the UNGA started to criticize the excision.[167] Actions of the UNGA were encouraged by the French declaration of Exclusive Economic Zone (hereinafter: "the EEZ") around the islands.[168]

The case of Scattered Islands shows that it is never too late for the international community to intervene. Of course, the international community's attention will have to be caught by some event, such as the declaration of EEZ. The creation of the Chagos MPA could said to represent such event that triggered international response concerning the excision of the Chagos.

b) The Trust Territory of the Pacific Islands

After the Second World War, the US was designed for the administering authority over the Trust Territory of the Pacific Islands (hereinafter: "the TTPI"). The TTPI was composed of four groups of islands. In 1994, the trusteeship was terminated since three groups of islands gained independence (Palau, Marshall Islands and Federated States of Micronesia) and one group of islands decided for a political union with the US (Northern Marianas). According to Trinidad, who cites professor Crawford's book The Creation of States in International Law, 'the basis for these arrangements was that "the relevant populations clearly supported the proposed division".'[169]

c) The Gilbert and Ellice Islands Colony

In 1975, the UK divided the Gilbert and Ellice Islands Colony (hereinafter: "the GEIC") into two parts. In 1978 the Ellice Islands became independent as Tuvalu. The Gilbert Islands followed in 1979 when they became the independent State of Kiribati. The dismemberment of

[165] UNGA Res 3161 (XXVIII) (14 December 1973) UN Doc A/RES/3161; UNGA Res 3291 (XXIX) (3 December 1974) UN Doc A/RES/3291; UNGA Res 3385 (XXX) (12 November 1975) UN Doc A/RES/3385. For other relevant resolutions, see UNGA Res 49/18 (28 November 1994) UN Doc A/RES/49/18.
[166] For a more detailed description of the situation concerning Comoros and Mayotte, see: Trinidad (n4) 74-80.
[167] UNGA Res 34/21 (9 November 1979) UN Doc A/RES/34/21; UNGA Res 34/91 (12 December 1979) UN Doc A/RES/34/91.
[168] For a more detailed description of the situation concerning Scattered Islands, see: Trinidad (n4) 80-83.
[169] Trinidad (n4) 71; For a more detailed description of the situation concerning the TTPI, see: Trinidad (n4) 94-95.

the colony was a consequence of the wishes of the people living in the Ellice Islands. They feared that their distinct identity would be at stake if the colony emerged into one state, since they were significantly outnumbered by the population of the Gilbert Islands.[170] The prospect of separation was welcomed by the representatives from the Gilbert Islands in early 1970s.[171]

d) British Cameroons

The UN considered the people living in the northern part of British Cameroons to be different from the people living in the southern part, since they had a distinct history and development. Accordingly, in 1961, the UN organized two referendums – one for the northern and one for the southern part. The northern part decided to integrate with Nigeria, whereas the southern part voted for integration with Cameroon. The people of the non-self-governing territory seemed to agree with the division.[172]

e) The Cocos (Kelling) Islands and the Christmas Island

The Cocos (Kelling) Islands and the Christmas Island were administered as a part of Singapore, then a British colony. The UK asked the Singaporean government to approve the detachment of these islands and a subsequent transferal of the Islands to Australia. There was no pressure exercised upon the Singaporean Government which agreed to the detachment in 1955. In 1958, the UK transferred the islands to Australia. There was no response from the international community. [173]

The passiveness of the international community could be explained by the fact that the Cocos (Kelling) Islands and the Christmas Island were excised prior to adoption of the Colonial Declaration. However, the excision of the Scattered Islands took place before the adoption of the Colonial declaration as well. This did not stop the international community to condemn the partition. Accordingly, the time of the excision cannot be said to be the reason why the excision of the Cocos (Kelling) Islands and the Christmas Island was not condemned. It is the consensual nature of the excision that prevented criticism, since the Singaporean government freely agreed to the partition. By the same token, the unilateral nature of the excision of the Scattered Islands, not the time of the excision, was the reason for a negative response from the international community.

f) Akrotiri and Dhekelia

However, it is fair to say that the pattern is not entirely consistent. The independence of Cyprus was conditioned upon retention of Akrotiri and Dhekelia, two pieces of land where the British had established military bases. The Turkish and Greek representatives agreed to the conditions set by the UK and Cyprus became independent in 1960. There was no response by

[170] Population of Ellice Islands was said to be only 7.000 comparing to 63.000 Gilbert Islanders (Trinidad (n4) 95.)
[171] For a more detailed description of the situation concerning the GEIC, see: Trinidad (n4) 95-96.
[172] For a more detailed description of the situation concerning British Cameroons, see: Trinidad (n4) 92-93.
[173] For a more detailed description of the situation concerning the Cocos (Kelling) Islands and the Christmas Island, see: Trinidad (n4) 96-102.

the UNGA, which might be explained by the fact that the Colonial Declaration was adopted some months after the Cyprian independence.

To conclude, even though the Mauritian representatives were not coerced in the classical meaning of the term, their agreement cannot be said to represent the freely expressed will of the people. Therefore, the excision of the Chagos Islands and creation of BIOT violated the Mauritian people's right to self-determination. The ICJ has the possibility to remedy the wrong that was done when a new colony was created during the peak of the decolonization process before the eyes of international community and show to the world that the time of colonialism has truly come to an end.

3) Legitimacy of the Mauritian Representatives

Since Mauritius was a not a sovereign state, but a colony under control of the UK and without a proper government and legislator, it could be argued that the Mauritian representatives were not legitimate representatives of the people of Mauritius. Accordingly, the process of selection of Mauritian representatives and the role of the UK within should be studied in order to ascertain whether the Mauritian people were appropriately represented.

Under the Mauritian pre-independence constitution, the authority was vested into the British Governor, the Council of Ministers and the Legislative Assembly. The latter was democratically elected. One of the members of the Legislative Assembly was nominated by the Governor to become the Premier of Mauritius and the head of the Council of Ministers. Other members of the Council of Ministers were as well nominated by the Governor, but were proposed by the Premier.[174]

The Lancaster House Conference was attended by the representatives of all 5 major political parties that were forming a coalition government at the time.[175] The delegates were democratically elected members of the Mauritian Legislative Assembly.[176] Only the second largest party, i. e. PMSD expressed its disapproval of the transaction when it withdrew from the coalition because it realized that the UK suddenly changed its position and started to support the independence. However, even PMSD was in principle not opposed to the detachment but only considered the compensation to be insufficient.[177]

Consequently, it is to be concluded that since the Mauritian representatives were democratically elected, they had the legitimacy to represent the people of Mauritius. Moreover, it is important to note, that since only members of the PMSD were against the detachment, a vast majority of Mauritian people were represented when the representatives agreed to the excision.

[174] Allen (n4) 79.
[175] Ibid, 84.
[176] Ibid, 119.
[177] Ibid, 93.

However, could it be asserted that the right to self-determination requires a direct consultation with the people (a referendum or a plebiscite) and that the representatives could not decide instead of the people? This was one of the arguments shyly presented by Mauritius in the *Chagos Marine Protected Area Arbitration*.[178] However, as Sir Michael Wood, the legal counsel of the UK, said in his speech, even now, the people can express their will through elected representatives. *A fortiori*, self-determination did not require a referendum or a plebiscite in 1965.[179]

4) Legal capacity of the Mauritian representatives

It could be argued that the Mauritian representatives did not have the legal capacity under British constitutional law to give away a part of Mauritian territory since they did not retain responsibility for external affairs, which was vested in the British Governor of Mauritius, but had only a limited form of internal self-government.[180] Furthermore, when in 1965 the Mauritian side was put before the decision whether to agree to the detachment or not, they clearly did not have the right to dispose with the territory which was under British sovereignty and could not cede a part of colonial territory (*nemo plus iuris ad alium transferre potest quam ipse habet*).[181] As to British law, the excision was not dependent upon the Mauritian agreement, since the UK could and eventually did detach the Chagos Islands with an Order in Council. Therefore, under British law, the consent was in fact redundant.

However, the excision was not only a matter of British law, but was governed by international law. As explained in section A) , the disruption of unity of a non-self-governing territory is allowed when the partition is in accordance with the freely expressed will of the people exercising their right to self-determination. Since the Mauritian representatives had the sufficient legitimacy and because self-determination did not require a direct expression of the will of the people, they had the authority to agree to the excision of the Chagos Islands.

C) CONCLUSION

As we have shown, the two most relevant issues upon which the question (a) will probably be decided are whether self-determination was a rule of customary law binding upon the UK in 1965, when the Chagos Archipelago was excised from the rest of the colony of Mauritius and whether the consent given by the Mauritian representatives could be said to be valid.

In relation to the customary nature of the self-determination, we have presented many arguments that support our claim, namely, that self-determination should be considered a rule of general international law in 1965. The UK will have a lot of trouble in showing that it acted as a persistent objector. Nevertheless, there is some force in the UK assertion that it was not until 1970, when the Declaration on Friendly Relations was adopted that self-determination

[178] Memorial of Mauritius (n76) para. 6.29.
[179] Chagos Marine Protected Area Arbitration (n6), Hearing Transcript (Day 6) <https://www.pcacases.com/web/sendAttach/1576> accessed 31 May 2018, p. 713, 10-17.
[180] Allen (n4) 119.
[181] Trinidad (n4) 87-88.

acquired the status of a customary law rule.[182] Therefore, the decision of the ICJ will not be an easy one.

If the ICJ follows our reasoning concerning the customary nature of self-determination, the consent will be the fundamental issue which will affect the outcome of the proceedings. There are many possible grounds for claiming that the consent is invalid. Nevertheless, our analysis shows, that only the second ground – the assertion that the consent to the detachment was given in violation of the right to self-determination – could, and arguably should convince the ICJ to decide that the consent was not validly given.

[182] Chagos Marine Protected Area Arbitration (n6), Dissenting and Concurring Opinion of judges James Kateka and Rüdiger Wolfrum, para. 71; Cf. Counter-Memorial of the UK (n46), p. 187-190.

V) Question (b)

The second question (hereinafter: "question (b)") submitted by the UNGA to the ICJ reads as follows:

(b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

The answer to question (b) is not fully dependent on the answer given to the question (a). Even if the ICJ decides that the process of decolonization of Mauritius was lawfully completed in 1968, it cannot decline to give an answer to the second question.[183] However, it is evident that the answer given to the first question will play a key role in the determining which consequences under international law arise from the continued administration by the UK of the Chagos Archipelago under question (b).

As already mentioned above, we are aware that the ICJ might not follow our line of reasoning in respect to question (a) and decide differently. Accordingly, even though we believe the question (a) should be decided in the negative, we recognize that it is possible that the ICJ will not agree with us. Henceforth, the answer to the question (b) concerning question (b) will be given under two separate assumptions. Firstly, we will provide an answer to the question (b) presupposing that the answer given in respect of question (a) will be negative. Secondly, we will discuss the consequences under international law of the continued UK administration over Chagos in the event of a positive answer by the ICJ in relation to question (a).

Before we turn to the legal consequences arising from the continued administration by the UK of the Chagos Archipelago, a preliminary issue should be addressed: whether the excision of the Chagos Islands was tacitly accepted by Mauritius since it failed to protest against the partition of its territory until 1980, i. e. 15 years after BIOT was established and 12 years after Mauritius gained independence. In such instance, even though in 1968, the process of decolonization was not lawfully completed, the fact that the Chagos Archipelago is still under British sovereignty and control is not contrary to international law at least in relation to Mauritius, since Mauritius acquiesced to the detachment. Accordingly, the consequences of the administration by the UK of the Chagos Islands in the event that the ICJ answers the question (a) negatively and Mauritius is considered to have tacitly accepted the partition, would be in no way different from the situation where the ICJ would give a positive answer to question (a).

[183] Marko Milanović, *'ICJ Advisory Opinion Request on the Chagos Islands*' (*EJIL Talk*, 24 June 2017) <https://www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/> accessed on 31 May 2018.

A) PRELIMINARY ISSUE: THE QUESTION OF MAURITIAN ACQUIESCENCE TO THE DETACHMENT OF THE CHAGOS ISLANDS

Mauritius achieved independence in 1968 and failed to protest against the detachment of the Chagos Acrchipelago until 1980. Hence, Mauritius did not oppose the British sovereignty over Chagos for 12 years. Could the Mauritian silence be said to have amounted to acquiescence, and Mauritius thereby to have lost sovereignty over the pertinent territory?

In order to examine the potential existence of acquiescence, the conduct of Mauritius after its independence has to be put under scrutiny. Therefore, the relevant issue does not have any effect on the first question of the advisory opinion since question (a) covers only the events until Mauritius gained independence in 1968. Yet, the silence could influence the scope of Mauritius' rights or the UK's potential international obligations that are going to be examined under question (b).

In principle any passing of sovereignty might be executed by way of agreement between two states in question.[184] Such an agreement might either be in a form of a treaty or a tacit acceptance arising from the conduct of the parties.[185] Moreover, '[u]nder certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct à titre de souverain'[186]. These are mostly cases when a state occupies the territory that used to be under sovereignty of another state, and the latter does not act properly to safeguard its sovereignty.

However, the present case does not concern transferal of sovereignty since the UK had sovereignty over the the Chagos Islands as the administering Power. Furthermore, the Chagos Islands were excised by Order in Council arguably on the basis of a treaty – the Lancaster House Agreement. However, since 1980 Mauritius has consistently asserted its rights regarding the Chagos Islands in statements to the UNGA[187] and bilateral communications with the UK.[188]

While the Lancaster House Agreement was concluded between the state and the emerging state (state in *statu nascendi*), and while it is regarded as an international treaty from 1968 onwards,[189] the lack of protest shall be examined under the rules of the VCLT.[190] If a treaty is void, the lapse of time does not have any effect, since a void treaty cannot become valid over time (*Ab initio nullum, semper nullum*). Accordingly, if the Court determines that the consent of the representatives of the Mauritius was procured in the circumstances amounting to duress under Article 51 of the VCLT, the Lancaster House Agreement shall be without any legal effect. However, if the Court holds that the representatives were not coerced, the agreement

[184] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008, p.12, para.120.
[185] Ibid, para.121.
[186] Ibidem.
[187] Reply of the Republic of Mauritius (n47), para 2.85.
[188] Memorial of Mauritius (n76) para. 3.74.
[189] Chagos Marine Protected Area Arbitration (n6) para. 425.
[190] Vienna Convention on the Law of Treaties (n123).

might still be void if the court decides that the right to self-determination was a peremptory norm of general international law in 1965 (Article 53).

While there is a low likelihood that the court will determine either the coercion or the existence of a *jus cogens* norm, Mauritius finds itself in a quite difficult situation. Namely, in accordance to Article 45 of the VCLT, a state may no longer invoke a ground for invalidating a treaty, if its conduct after becoming aware of the facts might be considered as acquiescence to a validity of the treaty. Further, Article 45 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter: "ARISIWA")[191] is analogous to article 45 of the VCLT concerning the loss of the right to invoke a responsibility.[192] The unreasonable delay is the determining criterion for the lapse of the claim.[193] However, international law does not lay down any specific time-limit in this regard.[194]

The relevant consequences of silence have been adjudicated especially vis-à-vis the (in)admissibility of the claims of 'silent' states. Namely, if the state is unreasonably passive, the neglected right extinguishes, and *ergo*, the Court holds such a claim inadmissible. For instance in the *LaGrand* case, Germany did not express disapproval or protest against the US actions for six and a half years[195] and the Court nevertheless held the application to be admissible.[196] In 1970 the Swiss Federal Department suggested a period of 20 to 30 years since the coming into existence of the claim as a criterion for determining acquiescence. Yet, since none of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance[197], '*it is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.*'[198] In the *Nauru* case an important circumstance was the nature of relation between states in question.[199] In the *LaGrand* case the Court took into the account that an irreparable prejudice appeared to be imminent. Further, decisive factors might be: the conduct of the respondent State, the importance of the rights involved and '*whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued*'.[200]

If we apply above stated principles and the relevant case-law to the case at hand, it is evident that the time period in itself does not provide a definite answer. Beside time, the nature of the

[191] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts with Commenraties (2001), YILC, 2001, vol. II. Part Two <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 31 May 2018, 31.
[192] Ibid, 121.
[193] Ibid, 122.
[194] Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminaty Objections, Judgment, I.C.J. Reports 1992, p. 240, para. 32.
[195] LaGrand (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 466, para. 53.
[196] Ibid, para. 57.
[197] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts with Commenraties (n191) 123.
[198] Certain Phosphate Lands in Nauru (n194) para. 32.
[199] Ibid, para. 36.
[200] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts with Commenraties (n191) 123.

relationship and the conduct between Mauritius and UK during that period should be taken into account. Further, the lack of protest has already been disputed between pertinent parties in the abovementioned PCA case. Both parties have invoked the *Nauru* case in their reasoning. Accordingly, Mauritius is expected to justify its indifferent and ambivalent attitude again by recalling the strong economic dependence and possible threats in this regard from the UK.[201] On the other hand the UK might claim that Nauru stated its position regarding the rehabilitation on the phosphate lands on the very day of the independence, whereas Mauritius did not raise the issue for some 12 years after independence and filled its first bilateral protest only in 1998 (almost 30 years after independence!). Additionally, Mauritius might be reproached that its conduct was at best ambiguous.[202]

Nevertheless, even if Nauru's claim on the very day of the independence was on time, that does not mean that Mauritius' protest twelve years after gaining independence was too late, and further, even if the attitude of the representatives of Nauru was firm and determined, that does not mean that Mauritius was too indecisive. The nature of the relationship between states in question may justify the lapse of time and such attitude, and interrelation between the UK and Mauritius certainly had specific features. Last but not least, the ICJ might not be too strict towards Mauritius and might adjudicate in its favor since important rights are at stake (the right to self-determination).

B) ASSUMPTION 1: THE PROCESS OF DECOLONIZATION OF MAURITIUS WAS NOT LAWFULLY COMPLETED IN 1968

The unlawfull separation of the Chagos Archipelago by the United Kingdom raises manifold theoretical and practical questions concerning its consequences under international law. The law of state responsibility has always been somewhat ambiguous. However, in 2001 International Law Commission adopted ARISIWA which clarified the state responsibility in case of a breach of its international obligations. These articles have been well received in international community and have been previously cited by International Court of Justice.[203]

1) <u>The excision of the Chagos Archipelago constitutes a continuous violation of international law</u>

The act of excision of the Chagos Archipelago and the subsequent establishment of BIOT by way of Order in Council under the Crown's prerogative powers amounted to a violation of international law, namely the right to self-determination in relation to the principle of territorial integrity as its essential element. Moreover, the excision of Chagos followed by the establishment of BIOT constitutes a continuous violation of international law in the sense of Article 14(2) of ARSIWA. Accordingly, the excision of Chagos is not a deplorable historical

[201] Reply of the Republic of Mauritius (n47), para 5.31.
[202] Counter-Memorial of the UK (n46), p. 35, para 2.82.
[203] For example: Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, p. 7.

wrong, but constitutes an ongoing violation of international law that stretches from the past into present.[204]

According to the Article 14(2) of ARSIWA, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.' The ILC commentary of Article 14(2) gives several examples of continuous wrongful acts, *inter alia*, 'the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State' and 'maintenance by force of colonial domination'.

When a State has enacted legislative measures that maintain a state of affairs contrary to the international law, the State is in a continuous violation of international law.[205] The BIOT Order in Council (SI 1965/120), which established BIOT and has stayed in force up to this very moment, is a legislative act incompatible with customary international law and constitutes an ongoing violation of international law. Furthermore, even though it is hard to argue that the UK maintains colonial domination by force, the force itself cannot be said to play a decisive role in relation to the continuous character of violation, but can only contribute to the wrongfulness itself. Hence, the maintenance of colonial domination over the Chagos Islands resulting from the BIOT Order in Council (SI 1965/120) is of continuous character.

2) Legal consequences arising out of the excision of the Chagos Archipelago

In general, there are two types of legal consequences in case of a breach. Firstly, the breach creates new obligations for a state, namely duties of cessation and non-repetition,[206] as well as a duty of full reparation.[207] These obligations can be owed to another state, to several states, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.[208] In Article 33(2), it is indirectly hinted that such obligations can also be invoked by non-state actors, such as individuals or international organizations. Secondly, the articles create rights for states, injured by the breach. These states can invoke responsibility,[209] furthermore, they dispose of a limited right to take countermeasures.[210] There is, however, no reference as to whether or not an individual or organization also has these rights.

With respect to cessation, the responsible state has to cease the act should it be continuing, as well as to offer appropriate assurances and guarantees of non-repetition.[211] In *Rainbow Warrior*, the it was held that the wrongful act must have a continuing character in order for the obligation of cessation to apply and the violated rule must still be in force at the date the

[204] Allen (n4) 286.
[205] Ibid, 263.
[206] Article 30 ARSIWA.
[207] Article 31 ARSIWA.
[208] Article 33 (1) ARSIWA.
[209] Articles 42, 48 ARSIWA.
[210] Articles 49-53 ARSIWA.
[211] Malcolm N. Shaw, *International law* (8th edn CUP 2017) 606.

order is given.[212] On the other hand, the principle to offer assurances of non-repetition was discussed by the ICJ in *LaGrand* case.[213]

Turning to the case at hand, since the detachment of the Chagos Islands constitutes a continuous violation, the obligation of cessation applies. Accordingly, the UK has to repeal the BIOT Order in Council (SI 1965/120) which is a legislative act, establishing BIOT in violation of international law.[214] In principle, the obligation to offer appropriate assurances and guarantees of non-repetition could also be applicable. However, according to Article 30(b) of ARSIWA, this obligation applies 'if circumstances so require'. In our opinion, the circumstances of the case do not require the UK to offer assurances and guarantees of non-repetition since due to its unique nature, there is no possibility that the same kind of violation of international law will be repeated.

As to reparation, the Permanent Court of International Justice has emphasized in case *Chorzów Factory* that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.' [215] This principle was reaffirmed *inter alia* in case of *Gabčikovo/Nagymaros Project*. According to Article 31 of ARSIWA, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act and that injury includes any damage, whether material or moral, caused by the internationally wrongful act of a state. Article 34 provides that reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.[216]

Henceforth, the UK Government has the duty to provide reparation in order to wipe out all the consequences of the illegal act and re-establish the situation, which would, in all probabilities, have existed had the act of separation not been committed. This can only mean that the UK has to relinquish its sovereignty over the Chagos Islands and return them to Mauritius, as well as to provide financial reparations for the damage that the wrongful act has caused to Mauritius. This would also raise the question of reparation for any environmental damage done to the islands as a result of presence of the US military base.

[212] Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair, Ruling of 6 July 1986 by the Secretary-General of the United Nations, 82 ILR, pp. 499, 573.
[213] LaGrand (n195). Shaw (n211) 606: 'The Court held that a US commitment to ensure implementation of specific measures was sufficient to meet Germany's request for a general assurance of non-repetition, while with regard to Germany's request for specific assurances, the Court noted that should the United States fail in its obligation of consular notification, it would then be incumbent upon that state to allow the review and reconsideration of any conviction and sentence of a German national taking place in these circumstances by taking account of the violation of the rights contained in the Vienna Convention on Consular Relations.'
[214] Cf. James Crawford, *State Responsibility: The General Part* (CUP 2013) 264: 'Thus, in the case of a continuing breach perpetrated by legislation, cessation entails the repeal of the law in question, thereby ending the breach.'
[215] *Chorzów Factory*, PCIJ, Series A, No. 17, 1928, p. 47–48.
[216] Shaw (n211) 607.

C) ASSUMPTION 2: THE PROCESS OF DECOLONIZATION OF MAURITIUS WAS LAWFULLY COMPLETED IN 1968

If the ICJ considers the UK did not violate international law standards in 1965 when the separation of Chagos Archipelago occurred, the process of decolonization of Mauritius was lawfully completed in 1968. In such a scenario, the excision and creation of BIOT was valid. However, that does not mean that no legal consequences arise from the continued administration of the Chagos Islands by the UK. In fact, there are several important consequences that we consider must be mentioned and merit further elaboration. Before we turn to these consequences, we should first establish the existence of some legal prerequisites for the consequences that will be set out below.

1) Prerequisites

a) Chagos Archipelago constitutes a non-self-governing territory

Chapter XI titled *Declaration regarding non-self-governing territories* refers to 'territories whose peoples have not yet attained a full measure of self-government' and recognizes the principle that the interests of the inhabitants of these territories are paramount and the obligation to promote to the utmost, the well-being of the inhabitants of these territories. Article 73 of the UN Charter imposes certain obligations on 'Members of the UN which have or assume responsibilities for the administration of [non-self-governing territories]': to ensure cultural, social, political, economic and educational advancement of the peoples, to develop their self-government and political institutions according to their political aspirations, to further international peace and security, to transmit information relating to economic, social, and educational conditions. For the obligations under Article 73 of the Charter to apply to the case at hand, it has to be established that the Chagos Islands constitute a non-self-governing territory. According to article 73 of the UN Charter, there are two conditions that have to be met cumulatively in order for the obligations to be applicable:

- specific territory
- people that have not yet attained a full measure of self-government

The UNGA clarified the specific territory condition in resolution 1541 (XV),[217] where it laid down *Principles which should guide Member states in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73 e of the Charter of the United Nations*. Principle IV of resolution 1541 (XV) provides:

> Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Hence, territory shall be understood pursuant to Principle IV as *territory, which is geographically separate and is distinct ethnically and/or culturally from the country*

[217] UNGA Res 1541 (XV) (n70).

administering it.[218] Clearly BIOT is geographically separate and ethnically as well as culturally distinct from the UK.

According to the second condition, the territory has to be permanently populated by a people that has not yet attained a full measure of self-government. Nowadays, there is no permanent population on BIOT.[219] However, it is clear that BIOT should have a non-self-governing territory status as soon as the first Chagossians are allowed to return and settle on the Chagos Archipelago. This was confirmed by the United Kingdom House of Lords in *Bancoult no. 2*, par 61:

> The Secretary of State is surely entitled to take into account that once a vanguard of Chagossians establishes itself on the islands in poor and barren conditions of life, there may be a claim that the United Kingdom is subject to a sacred trust under article 73 of the United Nations Charter to 'ensure… [the] economic, social and educational advancement' of the residents and to send reports to the Secretary-General.[220]

Furthermore, we submit that even though there is currently no permanent population, BIOT constitutes a non-self-governing territory for the purposes of Article 73 of the UN Charter at this very moment. The following paragraphs provide a clear line of reasoning behind our claim.

In its report to UNGA's Fourth Committee on 16th of November 1965, the UK Government claimed[221] that Chagos Archipelago consists only of labourers from Mauritius and Seychelles. The UK omitted all reference to any permanent population on the islands. Thus, by using this strategy, UK Government was able to claim that Chapter XI of the UN Charter as well as the right to self-determination were inapplicable to the BIOT, because the second condition, namely the existence of people that have not yet attained a full measure of self-government, was considered to be lacking.

In fact, the UK Government knew that there was a permanent population on Chagos, but willingly perpetuated the fiction of absence of permanent population in order to make way for the US military base. An internal Foreign Office note even admits that the BIOT should be listed as a non-self-governing territory and that there is indeed a small civilian population on the islands. However, the UK officials chose to follow a policy of "quiet disregard". One of them stated in an internal memo from 15 November 1965:

I certainly hope that it will be possible to avoid giving a supplementary answer on whether we should or should not transmit information to the United Nations in respect of the new British Indian Ocean Territory. I have no doubt that the right answer under the Charter is that we should do so for the territory is a non-self-governing territory and there is a civilian

[218] Ibid, Principle IV.
[219] Only several UK officials, US Military Personnel and supporting staff of the US Military base live on Diego Garcia.
[220] Lord Hoffmann in Bancoult, R (On The Application of) v Secretary of State For Foreign and Commonwealth Affairs [2008] UKHL 61 (22 October 2008), para. 55.
[221] Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs Rev 1 [2006] EWHC 1038 (Admin) (11 May 2006), para. 29.

population even though it is small. In practice, however, I would advise a policy of "quiet disregard" – in other words, let's forget about this one until the United Nations challenge us on it.[222]

Therefore, in the normal state of affairs, the UNGA would have listed BIOT on the list of non-self-governing territories on the 8 November 1965, when BIOT was established. At that time Mauritius was on the list of non-self-governing territories (as British Mauritius)[223] and remained so until its independence in 1968. Therefore, in line with UN policy, BIOT should also constitute a non-self-governing territory and should be included on the list, because it was separated from a non-self-governing territory and had a permanent population at the time of excision. However, the UK deceived the international community which seemed to have paid little attention to what was going on on the stranded islands in the middle of the Indian Ocean.[224]

Accordingly, despite the current absence of a permanent population, BIOT constitutes a non-self-governing territory for the purposes of Article 73 of the UN Charter. The UK Government secretly expelled the Chagossians. Consequently, as put by Sand, the claim of the UK, that Article 73 is not applicable to territory by reason of absence of permanent population is evidently not *bona fide* because the UK Government depopulated the islands on purpose.[225] To put it differently, the UK cannot base its claim on the absence of permanent population since the absence is a consequence of its own conduct, namely, the forcible deportation of the Chagossian people in violation of international law. Moreover, as a matter of equity and common sense, a fiction mentained contrary to Article 73(e) of the UN Charter that BIOT did not have a permanent population, which was revealed and proved wrong after the permanent population was expelled in violation of international law, cannot benefit the UK to the detriment of the Chagossian people.

b) *The Chagossians were eligible to the right to self-determination which was violated when they were expulsed*

In Chapter III, we argued that self-determination was a part of customary international law in 1965 when the Chagos Islands were detached from the colony of Mauritius. However, we are aware of possible arguments to the contrary, which might convince the ICJ to decide differently. Nevertheless, if arguments provided in Chapter III prove insufficient to establish that self-determination became part of customary international law by November 1965, it is indisputable that it had that status in 1970 when Declaration on the Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the

[222] Ibid, para. 32.
[223] The List of Trust and Non-Self-Governing Territories (1945-1999) as made available online by the UN: https://www.un.org/en/decolonization/nonselfgov.shtml
[224] Allan claims that it had little interest in recognizing BIOT's non-self-governing status as it viewed it as a part of Mauritius (Allen (n4) 254).
[225] Sand (n5) 146.

Charter of the United Nations (hereinafter: "Declaration on Friendly Relations")[226] was adopted.

In the 1970 Declaration on Friendly Relations, the UNGA delivered a solidly authoritative and comprehensive formulation of the principle of self-determination. Based on this declaration and 'the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations' self-determination encompasses the right of all peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development' as well as the duty of every State 'to respect this right in accordance with the provisions of the Charter'.[227] It also listed various modes of implementing the right to self-determination, namely the establishment of an independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.[228] The Declaration on Friendly Relations was adopted without a vote. Even the UK, seemed to agree that self-determination has become a part of international customary law in 1970.[229]

Turning to the facts of the case at hand, the secret expulsion of Chagossian was not a single event, but was carried out gradually between 1967 and 1973. Since the Chagossians were a permanent population of BIOT, a non-self-governing territory, the Chagossians were eligible to the right to self-determination. Even though, arguably, self-determination was not a rule of customary law in 1965, it acquired such nature at least in 1970, when the Declaration on Friendly Relations was adopted. Henceforth, the expulsion of the population was in contravention with self-determination.

Our line of reasoning is confirmed by decolonization of Cocos (Kelling) and Christmas Islands. Both Islands were administered as a part of Singapore, a British colony. The Singaporean government agreed to the detachment and a transferral of the Islands to Australia was carried out in 1955 and 1958. Cocos (Kelling) Islands were given a non-self-governing territory status since they had permanent population whereas the Christmas Islands were not, because the population was not considered to be permanent as people started permanently living on the Islands only in 1948. The number of people on Cocos (Kelling) Islands was less than 600. Nevertheless, after two UN missions visited the islands, the third mission supervised a referendum in 1984, where the people decided for integration with Australia. As a consequence, the UNGA adopted resolution 39/30[230] proclaiming that 'the people of the Territory have exercised their right to self-determination in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in UNGA resolution 1514 (XV)' and added that the obligation under Article 73(e) of the UN Charter should cease.

[226] UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/26/25.
[227] Ibid, principle 5.
[228] Hannum (n49).
[229] Chagos Marine Protected Area Arbitration (n6), Dissenting and Concurring Opinion of judges James Kateka and Rüdiger Wolfrum, para. 71; Cf. Counter-Memorial of the UK (n46), p. 187-190.
[230] Resolution 39/30 (5 December 1984), UN Doc A/RES/39/30.

2) Consequences under international law

Accordingly, we agree with Allen who claims that the UNGA should re-evaluate BIOT's status, notwithstanding the current absence of permanent population.[231] The UNGA should overlook the fact that BIOT has no permanent population and add BIOT to the list of non-self-governing territories, since the UK Government intentionally depopulated the Archipelago. The mere fiction that BIOT did not have permanent population cannot prevail in light of the international obligations of the UK, as the United Kingdom had a duty to inform the UNGA pursuant to Article 73(e) of the UN Charter. If the UK would fulfil its obligation under 73(e) and provided the correct information concerning the population living in the Islands, the UNGA would include the BIOT on the list of non-self-governing territories in the first place. However, the UK deceived the international community which led to the fact, that BIOT was not included. Hence, the UK cannot invoke the absence of the permanent population which is due to its own actions in violation of international law.[232]

Since BIOT constitutes a non-self-governing territory, Chapter XI obligations apply to the UK which has to decolonize the territory according to the wishes of the Chagossian people determined through the exercise of their right to self-determination. The UN has an important role as a guardian of Chagossian rights and should act similarly as it did in relation to Cocos (Kelling) Islands.

3) Other consequences arising from the continued administration by the UK of the Chagos Archipelago: Human Rights Covenants

Since under our second assumption, the process of decolonization was lawfully completed in 1968, the UK is going to continue to administer the Archipelago for the following years until the Chagossians potentially decide for independence. Definitely, the process of decolonization will take some time. Until the definitive expression of the will of the people, it is important that the UK complies with other international obligations in relation to BIOT. In the past, the UK has consistently refrained from honouring its obligations under several international treaties by excluding their applicability for BIOT. In our opinion, question (b) could encompass the issue of applicability of these treaties and relate to obligations steaming from them since this arguably represents one of the key aspects of continued administration by the UK of the Chagos Archipelago.

As a consequence of contended inapplicability of many international treaties as well as national laws, the Chagos Archipelago has been called a legal black hole in the Indian Ocean.[233] In addition to environmental treaties, human rights treaties could be regarded fundamental and their inapplicability most problematic. Therefore, in our Memorandum, we focus on human rights treaties that are of the highest importance: the International Covenant

[231] Allen (n4) 254.
[232] Trinidad (n4) 96 – 102.
[233] Peter H Sand, 'Diego Garcia: British-American Legal Blackhole in the India Ocean?' (2009) 21(1) Journal of Environmental Law 113.

on Civil and Political Rights (ICCPR)[234] and the International Covenant on Economic, Social and Cultural on Human Rights (ICESC)[235].

a) Applicability of the Covenants

Vis-a-vis the applicability of the Covenants the UK acclaims two objections. First, the UK states that acts of involuntary displacement of the Chagossian people had been carried out before ICCPR came into force in 1976 (temporal argument). Second, the UK's declaration that listed the territories to which covenants apply did not include BIOT (reservation relating the temporal application of the treaty).[236] The reasons why the temporal argument should be rejected and why the UK is not entitled to such reservation for the Chagos Archipelago are examined below.

i) Temporal argument

The main question put before us is: Why the UK has to guarantee the covenants' rights on the, save for Diego Garcia US's military base, uninhabited Chagos Archipelago?

The acts of involuntary displacement of the Chagossian people had been carried out between 1965 and 1973 and the Covenants came into the force no earlier than in 1976. That is to say, from the date of the Covenants' entry into the force and onwards, there have been no individuals at the Chagos Archipelago to whom the treaties could apply. Accordingly, it is quite reasonable that the UK has invoked the inter-temporal principle. The argument goes simply that the UK cannot be held responsible for breaches of the covenants' obligations before the Covenants entered into the force (1976). Namely, actions carried out in one period cannot be judged by the legal standards of another.[237]

Despite the UK's objections, 'the maintenance of any legislative measures violative of the Covenant would attract responsibility because they would evidence the continuing character of a breach of an international obligation [in the sense of Article 14(2) of the International Law Commission's Articles on State Responsibility[238]].'[239]

Deportation of Chagossians was based on a BIOT Immigration Ordinance enacted under royal prerogative in April 1971.[240] The ordinance made it unlawful for any person to enter or remain in the territory without an official permit.[241] In other words, Chagossians were, first, forced to leave the Chagos Archipelago, and second, the Ordinance has prevented their return from 1971 onwards. Therefore, from 1976 on, the BIOT Immigration Ordinance 1971 – and the subsequent 2004 Order are in contravention of international obligation enshrined in the

[234] International Covenant on Civil and Political Rights (n66).
[235] International Covenant on Economic, Social and Cultural Rights (n65).
[236] Allen (n4) 262.
[237] Ibid, 263.
[238] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts with Commenraties (n191) 59.
[239] Allen (n4) 263.
[240] Sand (n233) 132.
[241] Ibidem.

Covenant since they violate the Chagossians' right to self-determination (Article 1 of the ICCPR) and, accordingly, they constitute an ongoing wrongful act.

To sum up, the maintenance of any legislative measures, such as BIOT Immigration order, violates the Covenant and attracts international responsibility. From the above stated it can be concluded that under the ICCPR the UK cannot be held responsible for the acts of involuntary displacement, since the displacement had taken place before the Covenant came into force, nevertheless, the UK shall be responsible for preventing Chagossians to return.

ii) Reservation regarding the territorial application of the treaty

The UK's declaration that listed the territories to which covenants apply did not include BIOT.[242] This is along the temporal argument the main argument of the UK government in order to avoid the application of the Covenant.[243] Non-inclusion of Chagos Archipelago has the nature of the reservation of territorial application of the treaty.

In this respect, the VCLT[244] presents the relevant legal regime dealing with reservations to treaties under international law. Article 19(3) of the Treaty requires that reservations to treaties are compatible with the object and purpose of those treaties. Further, regarding the international human rights treaties the general principle is that human rights obligations are not owed to territories or citizens, but to individuals and are based rather on humanity than nationality.[245] In connection with the both above stated principles and the application of ICCPR the Human Rights Committee generally takes the view in its General Comments that any reservation to Article 2(1) or the right to self-determination contained in Article 1 would be incompatible with the objects and purposes of the Covenant.[246]

The BIOT is a territory of the UK, at least under UK constitutional law, and has never had any autonomy or anything which could properly be described as a government;[247] it is as a matter of fact entirely controlled by London.[248]

As regards the non-application of a human rights treaty to part of the internal territory of a Member State there is no relevant case-law; especially in relation to cases where the state does not include part of its territory to the list to which the international human rights treaty applies. Nonetheless, the ICJ and other international tribunals have already adjudicated upon the question of extraterritorial application of a treaty. Furthermore, the state responsibility for violation of international law has already been established by international tribunals for

[242] Allen (n4) 262.
[243] Ibidem.
[244] Vienna Convention on the Law of Treaties (n123).
[245] Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 Mich. J. Int'l L. 739, 791.
[246] General Comment 12, 13 March 1984, HRI/GEN/1/Rev 7, 134; 1-2 IHRR 10 (1994).
[247] Chagos Islanders v the United Kingdom (n2) Submissions on the Behalf of Interveners, Human Rights Watch, Minority Rights Group International, <http://minorityrights.org/wp-content/uploads/2016/11/Chagos-Submissions-Final.pdf> para. 5 (1).
[248] Marko Milanović, *Update on the Extraterritorial Application of Human Rights Treaties* (*EJIL Talk*, 21 May 2013) <https://www.ejiltalk.org/update-on-the-extraterritorial-application-of-human-rights-treaties/> accessed 31 May 2018.

breaches of international obligations outside the state's territory. The situations are not the same, yet, they have similar impacts; the state tries to circumvent an international obligation, either on internal or on external territory, where it *de facto* performs sovereignty. Since the effects in both situations are the same we contend that by analogy the reasoning vis-a-vis the extraterritorial application of international human rights treaty applies also to UK's reservation relating to the Chagos Archipelago.

The ICJ held in the advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[249] that it derives from the ICCPR's that the drafters of the Covenant did not intend to allow States to escape their obligations if they exercise jurisdiction outside of their national territory.[250] It went on to say that 'considering the object and purpose of the Covenant, it would seem natural that even when such is the case, exercising jurisdiction outside of their national territory, State parties to the covenant should be bound to comply with by its provisions.'[251] Furthermore, the Court invoked the constant practice of the Human Rights Committee (hereinafter: "the HRC") that supports its finding. In the *Lopez Burgos and Celiberti de Casariego communications*[252] the Committee offered a principled basis for conceiving human rights obligations extraterritorially: 'it would be "unconscionable" if a double standard, whereby activities legally prohibited when committed within the State's territory but not legally prohibited if committed extraterritorially, subsisted merely by virtue of the extraterritorial locus.'[253] Last but not least, to apply international human rights treaties only territorially, in circumstances, where a state takes extraterritorial action, produces a distinction in protection between nationals and aliens. For instance, in the present case that would be a distinction between Chagossians and other UK citizens. As Wilde[254] points out the majority of individuals affected by territorial state actions are the State's own nationals, and the majority of such individuals affected by extraterritorial state action are aliens. That unequal treatment is arbitrary since it is based only on the lack of territorial sovereignty[255] and not any other justifiable ground.

Accordingly, we contend that since the UK does not guarantee human rights on its own territory, it finds itself in an even worse situation than the one, where a country fails to guarantee human rights on a foreign territory. In fact, the UK applies international human rights treaties to some parts of its territory (e.g. England), but not to others (e.g. Chagos Archipelago). This difference in treatment is arbitrary since it is not based on any justifiable ground. To apply by analogy what ICJ said in *Wall case*, we can deduce that if a state is not allowed to be exempted from applying ICCPR outside of its national territory where it has jurisdiction over it, then *a fortiori* a simple declaration cannot constitute a valid basis for an

[249] Legal Consequences of the Construction of a Wall (n24).
[250] Ibid, para. 109.
[251] Ibidem.
[252] Sergio Ruben Lopez Burgos v Uruguay, Communication No. R.12/52, Hum. Rgts. Comm., Supp. No. 40, at 176, para. 12.3, U.N. Doc. A/36/40 (1981); *Lilian Celiberti de Casariego v. Uruguay*, CCPR/C/13/D/56/1979, UN Human Rights Committee (HRC), 29 July 1981 <http://www.refworld.org/cases,HRC,4028af854.html> accessed 31 May 2018, para. 10.3.
[253] Wilde (n245) 791.
[254] Ibidem.
[255] Ibidem.

exemption of the state from guaranteeing human rights on (the part of) its national territory over which it has jurisdiction.

To conclude, the exclusion of the Chagos Archipelago is at odds with purpose and the goals of the Covenants. The consequence is that the incompatible reservation may be severed from the state's instrument of ratification; therefore, the Court ought to treat the UK as a party to the covenants without the benefit of its proposed reservation.[256]

b) Claims arising from the Covenants

i) Possible claims under ICCPR

According to the Article 1(1) of the Covenant 'all peoples are entitled to freely determine their political status and freely pursue their economic, social and cultural development'. The next paragraph stipulates that 'people may, for their own ends, freely dispose of their natural wealth and resources … In no case may people be deprived of its own means of subsistence.' Last but not least, it derives from Article 1(3) that a state party has an obligation to promote the realization of this right (the right to self-determination) in conformity with the UN Charter.

By the year 1973, all the Chagossians were deported from the Chagos Archipelago. Since then they have been unable to effectively exercise their right to self-determination. In order to make the Chagossians' right to self-determination practical and to fulfil its obligations under the Covenant the UK shall: first, enable them to return[257], second, compensate the displaced people for the lengthy denial of the right to abode in the BIOT[258], and third, to progressively facilitate their economic development of the dependent people in the event of resettlement.[259]

ii) Possible claims under ICESC

Its application may be more problematic since the alleged programmatic nature of second-generation rights.[260] These are so called "progressive rights" and require government programs according to the availability of state resources in order to fulfil state's obligations.[261] However, the UK government has acknowledged the interdependence of the Covenants and that civil and political rights are not superior to economic and social rights.[262]

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[256] According to *the severability doctrine* an incompatible reservation may be severed from the state's instrument of ratification, leaving it as a party to the treaty without the benefit of its reservation. (Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5(1) Melbourne Journal of International Law 155.

[257] UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: United Kingdom and UK Overseas Territories*, 6 December 2001, CCPR/CO/73/UK <http://www.refworld.org/docid/3cbbec3d2.html> accessed 31 May 2018, para. 38.

[258] Ibidem.

[259] Allen (n4) 264.

[260] Allen (n4) 267.

[261] H. Victor Conde, *A Handbook of International Human Rights Terminology* (2nd edn University of Nebraska Press 1999) 236.

[262] Allen (n4) 267.

The ICESC guarantees broad spectre of the rights relating to housing, healthcare, education, culture, welfare … that would come in to the account in the case of the resettlement of the outer Chagos Islands. The Economic, Social and Cultural Rights Committee (hereinafter: "the CESCR") is of the view that a minimum core of an obligation of a Member state is to provide a basic shelter, essential primary healthcare and that there is no significant number of people deprived of food.[263] According to Allen, therefore, there would be a prima facie breach of the Covenant 'if the Chagossian people were allowed to resettle this remote archipelago with its dilapidated infrastructure and with no public money being made available to fund a programme of resettlement.'

To summarize, to meet minimum standards under the Covenant the UK should at least publicly found the resettlement of the Chagossians.[264]

[263] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, <http://www.refworld.org/docid/4538838e10.html> accessed 30 May 2018, para 10.
[264] Allen (n4) 267.

VI) Conclusion

In the *Chagos Archipelago advisory opinion*, multiple complicated issues will be raised.

First, the ICJ will have to determine the admissibility of the request, namely whether the ICJ is *competent* and whether it is *appropriate* for the ICJ to decide upon the merits of the case. As we have shown, the ICJ is *competent* since according to Article 96 of the UN Charter, the UNGA is authorized to request the ICJ to give an advisory opinion on any legal question. Despite their undisputable political dimension, the questions referred to the ICJ are of legal nature, as they seek to ascertain whether the dismemberment of the colony of Mauritius violated international legal rules governing the process of decolonization and international legal consequences of continued administration by the UK of the Chagos Archipelago. Furthermore, the request clearly arises from the activities of the requesting organ as the UNGA continues to have a prominent role in relation to decolonization.

With regards to *judicial propriety*, the UK will definitely deploy its strongest argument relating to admissibility – that through the UNGA, Mauritius is trying to circumvent the consent requirement for contentious jurisdiction of the ICJ and resolve a bilateral dispute over the Chagos Islands. Even though there is some force in this argument, the questions manage to avoid invoking the sovereignty dispute since they refer to the process of decolonization, a multilateral issue of direct concern for the UNGA and cite relevant UNGA resolutions which are clearly not limited to bilateral relations. Accordingly, the ICJ should be able to overcome the absence of consent of the UK and decide upon the merits of the case.

Second, in respect to question (a), the ICJ will firstly have to determine the international rules governing the process of decolonization. We asserted that the legal framework for the decolonization process is provided by Chapter XI of the UN Charter, the principle of self-determination, the principle of territorial integrity of colonial territories and the *uti possidetis* principle. The central issue is probably going to be whether self-determination was a rule of international law in 1965 when the Chagos Islands were excised. There are persuasive arguments for both outcomes, but on balance we argue that self-determination had a status of customary international law in 1965. The ICJ will secondly discuss whether Mauritius validly consented to the detachment. In spite of four potential grounds for invalidity, only one is in our opinion capable of nullifying the agreement: the fact that the Mauritian side agreed to the detachment in circumstances that amounted to a violation of the right to self-determination. In order to follow the Mauritian line of reasoning, the ICJ will have to determine whether in the context of colonial self-determination, the standard of duress which is traditionally understood as comprising only of physical and military threat should be lowered in order to encompass other kinds of harmful pressure, namely the political pressure such as the one exercised upon the Mauritian representatives. In other words, the ICJ will have to determine whether the British conditioning of independence with the excision of the Chagos Islands amounted to an unacceptable political pressure contrary to self-determination. According to paragraphs 2 and 5 of the 1960 UNGA Colonial Declaration, it is for the people to freely express their will and decide on their future without any conditions or reservations. The Mauritian side found itself

in a situation where it should not have been put in the first place. Either the imposed excision of the Chagos Islands or the indefinite postponement of independence are contrary to self-determination: the former because territorial integrity of a colonial territory constituting an essential element of self-determination cannot be disposed with except when the people exercising their right to self-determination decide otherwise; the latter since an indefinite delay of eventual exercise of self-determination calls into question the self-determination itself. Moreover, the international practice concerning exceptional cases where the principle of territorial integrity of colonies was disregarded, shows that where the people's wishes had been respected, the international community did not condemn the dismemberment of the colonial territories, whereas where the people's will had been ignored, it openly criticized the partition. Henceforth, the ICJ should in our view hold that the Mauritian consent was invalid. Consequently, the excision of the Chagos Islands violated the international law which governs the process of decolonization.

Third, in relation to question (b) we provide two possible solutions dependent upon the outcome with respect to question (a). If the Court follows our reasoning and finds that the process of decolonization of Mauritius was not lawfully completed, the consequences laid down in the Draft Articles on Responsibility of States apply. As the excision of the Chagos Islands was carried out by way of Order in Council, which is an act of legislation in force from 1965 to this very day, the continued violation of international law should be remedied by cessation and appropriate reparation. On the other hand, if under question (a) the ICJ holds that the process of decolonization was lawfully completed, there are nevertheless several legal consequences of the continued administration of the Chagos Islands by the UK. Firstly, the UK has to honour its Chapter XI obligations since BIOT constitutes a non-self-governing territory. The UK cannot rely on the absence of permanent population on the territory of BIOT as this is a consequence of its own illegal conduct– the expulsion of the Chagossian people in violation of their right to self-determination which had the status of customary international law in the 1970s when the Chagossians were expelled. Secondly, the UK is bound by ICCPR and by ICESC in relation to BIOT.

To conclude, since there are no straight-forward solutions, the ICJ will not have an easy task in answering all the issues described above. In order to contribute to the resolution of the complicated situation in the Indian Ocean, we aimed to provide an objective account of what the outcome of the proceedings could and arguably should be. However, the judicial decisions are often hard to predict, especially in international law. Therefore, as always, the time will show the true value of our work.

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