STUDY GUIDE

ICJ

15-17 FEBRUARY 2019

NANYANG TECHNOLOGICAL UNIVERSITY MODEL UNITED NATIONS

NANYANG TECHNOLOGICAL UNIVERSITY SINGAPORE

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Welcome Note from the Board of Dais

Dear Delegates,

We are extremely excited to have you in committee this year at the 13th edition of the NTU Model United Nations Conference. The agenda at hand is often discussed by legal scholars in various moots, and still holds relevance in the international forum. Hence, finding substantive information about the agenda itself is perhaps the smallest of the challenges that a simulation of the ICJ presents. The ICJ is a slightly varied, and perhaps more restrictive platform as opposed to any other simulation that you may have experienced, due to the number of rules associated with deliberation in the ICJ , most of which will be explained in this background guide. That being said, knowledge of the rules of procedure and the jurisdictional capabilities of the court can also be seen as a method of moulding discussion to your favor, and hence the same rules can also be viewed as a strength, and an opportunity to fortify your points. It is important to recognize that there is only so much that the ICJ can address, and keeping your discussions pragmatic is going to play a key role in determining your performance in committee.

However, this background guide is designed merely to point you to the right direction in terms of research topics and jurisprudence. Do not worry if you are not a student of law. The nature of deliberation that is expected from this committee may involve debate on a bunch of statutes, but as you will notice in this background guide, revolves around a singular principle, the interpretation of which does not require any prior legal knowledge. The dais will not assume or expect prior legal knowledge outside the scope of the agenda. At the same time, a simulation of the ICJ can teach you things that

conventional moots may not. Hence, irrespective of whether or not you possess knowledge about the law, it is important to realize that there's always new things you can try, precedent to exploit, and unprecedented inferences to make (no matter how experienced the EB is, it is very common for delegates in an ICJ to surprise the EB with something they've never heard of).

Dais

NTUMUN 2019 ICJ

Executive Board Biographies

Akshat Bhatia

Over 60% of Akshat's MUN career, both as a delegate and as a chair has been in simulations of the ICJ. Since his participation in NTUMUN '18, Akshat has been unbeaten in the global circuit with a 18 Best delegate awards within the year, in 5 different countries. His experience as a chairperson also has no geographical boundaries, and extends to Asian as well as European circuits.

Having completed previous academic courses in International Law from the likes of Harvard University, Yale University and SOAS London, Akshat is also an author of several research papers on common areas of international law and will be commencing his LLB at University College London this September.

Joanelle Toh

Joanelle is a third year student in NUS Law. She has been involved in the MUN community in various capacities - delegate, chair, and secretariat member - since 2013. She keeps saying she'll quit, but somehow inevitably ends up at another conference. She swears this will be her last conference.

Arkadeep Pal

With over 24 MUNs under his belt, Arkadeep Pal is a renowned MUNer both in the national and international circuit. An avid debater, a passionate feminist, and budding lawyer, Arkadeep specialises primarily in General Assemblies and in the International Press. With NTUMUN 2019 being his first MUN in Singapore and first ICJ overall, Arkadeep hopes for extensive debate on the complexities of International law, coupled with the drama of a courtroom!

Sean Woon

To anyone who has watched an episode of Yes Prime Minister, that perfectly embodies who Sean aspires to be. From being called an insufferable oaf for using an inordinate amount of words with latinate origins, to actually enjoying the process of writing and drafting report after report, Sean thoroughly loves the academic challenge of every Model UN conference, and is excited to be serving as an assistant chair of the ICJ.

It is also this diplomacy and wit that the above mentioned fictional civil servant embodies that Sean finds uniquely addictive of conferences, and is repeatedly drawn back to them. Apart from pop culture, of which Sean has an absolute paucity of knowledge on, he enjoys any discussion - if and only if it does not contain a Kant pun!

Sophie Ang

Sophie is a current Year 3 student at a local university. She has been involved in Model UN since her high school days and retirement has been calling her name for a while. As a law student, she often jokes about how she will end up unemployed as she finds areas like human rights law, and constitutional law more interesting than commercial matters. She hopes that all delegates will have a fruitful experience at this simulation of the ICJ.

Lai Shueh Chien

Some people are experienced with MUN. Some people are very experienced with MUN. Then there are dinosaurs. Shueh Chien falls into that category (he has been doing this since 2010) having lost count a few years back. One really wonders what an artefact like him is still doing hanging around. He is currently a second year student at the NUS Faculty of Law. He has served as Head Chair at Singapore MUN 2017 in SOCHUM and Assistant Chair 2018 in UNSC, Assistant Chair at NTUMUN 2017 and 2018, Head Chair at Global Indian International School MUN 2016. Outside conferences, he also works part-time as a MUN and debate trainer whenever such opportunities arise.

Despite an initial reluctance to step forward, he remembers how enriching MUN has been for his life and wishing to at least for one more conference, contribute to the experiences of others. While he may appear a bit stern, he assures all delegates that it is merely a matter of being born with a perpetually scowling facial expression. He wishes delegates all the

best as they head into an admittedly complex area of international relations, alongside the very different Rules of Procedure established for this committee.

Introduction to Committee

Permanent Court of International Justice

The Permanent Court of International Justice (PCJ) was the international community's first attempt at forming a tribunal for affairs concerning international jurisdiction. In February 1918, the council of the League of Nations appointed a special advisory commission in order to instigate deliberation and efforts on drafting a document that will call upon the establishment of a court for international jurisdictional matters. Although the draft, as well as the subsequent final statute of the Permanent Court of Justice was an independent document, its structural composition was such that it was in complete adherence to the principles of the Covenant of the League of Nations, and was meant to be interpreted with the covenant, in accordance with Article 14 of the Covenant.

The fact that the ICJ is a successor to the PCJ is also evident in the statute of the ICJ as well as the Charter of the United Nations. In the former, Article 36 Paragraph 5 carries out succession of the declaration signed by states for the PCJ, to the ICJ. In the latter, Article 92 explicitly states that the International Court of Justice is meant to be a successor to the Permanent Court. It is also interesting to know that the geographical location of both courts is exactly the same (the peace palace in Hague).

The most significant difference between the two statutes is the dependence of the appointment of judges in the ICJ on the Security Council and the General Assembly, both of which did not exist while the PCJ Statute was brought into force. Moreover, the ICJ has the capacity to form chambers, which the PCJ did not.

Composition of the ICJ

The ICJ consists of a total of **15 judges** (in some cases, ad hoc judges can be appointed), two of which cannot be nationals of the same state. The court establishes a list of individuals capable of the role, members that are capable of being a part of the highest judicial positions in their nations, followed by which the General Assembly and the Security Council[1] engages in a vote in order to determine the list of final judges.

Hence, in the case of ad hoc judges, as seen in the *Pakistan v India* case on the 21st of June 2000, you usually find judges making decisions for the nation they belong to, since they do not take such an oath.

However, **permanent judges of the ICJ are ideally expected to not do so**. Moreover, the ICJ also makes sure there is equal representation from all regions of the world, which is why three judges are elected from Africa, two judges are elected from Latin America, three judges are elected from Asia, five judges from Eastern Europe, the Oceanic and North America, and two from Western Europe.

President of the Court

At NTUMUN 2019, the positions of President and Vice-President will be occupied by the dais.

[1] In accordance with Article 8 of the Statute.

ICJ RULES OF PROCEDURE

REQUIRED DOCUMENTATION

All submissions can be made via the official Position Paper site here.

The purpose of preliminary documentation is to set the ground for your arguments.

Surprise evidence in the courtroom will not be encouraged, and it is always better to introduce your evidence and set its foundation weeks before the deliberation in any court. For the this simulation, you can submit the following documentation:

REQUIRED DOCUMENTS FROM ADVOCATES

All advocate teams must submit two documents, in order to ease the burden of research.

1) *Evidence Package*

- *Establishing evidence in this simulation will be a relatively simple process.*

- *Previous statements by the ICJ and any other organization that is mentioned in the Statute of the ICJ can be presented as evidence without the complete cycle of foundation (these documents must be dated before the freeze date).*
- *However, should you wish to present evidence from alternate sources, you must lay its foundation in terms of applicability, reliability and relevance to the case in the form of an evidence package.*
- *The Dais will analyze your documentation in terms of relevance and admissibility and revert to the advocates with regard to the decision.* ***These packages must be sent to the Executive Board by the 7th of February, 2019. Advocates can consider this evidence package as their position paper.***

2) *Initial Statement / Position Paper*

Each advocate ***team*** *must submit an Initial Statement on the case, detailing the delegation of duties (to be determine by the advocate team as it sees fit), their argument, and history. In addition, the initial statement should be written as a non-legal appeal on the case.* ***Unlike normal position papers, advocates must submit this as a team. The initial statement is limited to three pages. Apart from this exception, delegates must adhere to the rules set down in the study guide.***

Delegates are reminded of NTUMUN 2019's Equity Policy and the severity of plagiarism.

Pursuant to Nanyang Technological University's Academic Integrity Policy, plagiarism is defined as:

"Plagiarism is 'to use or pass off as one's own, writings or ideas of another, without acknowledging or crediting the source from which the ideas are taken'. This includes:

The use of words, images, diagrams, graphs or ideas derived from books, journals, magazines, visual media, and the internet without proper acknowledgement;

Copying of work from the internet or any other sources and presenting as one's own; and submitting the same piece of work for different courses or to different journals and publications."

Additionally, plagiarism is defined as ***intention, conspiracy, action, transmission of a document or documents*** *with a plagiarised content submitted before or during NTUMUN 2019.*

Copying of any statement, clause, or paragraph without any citation or reference communicated in the same document.

Conspiracy to commit plagiarism.

In addition, delegates are liable to reprimand for failure to report knowledge of participants committing plagiarism.

The reprimand for plagiarism during the conference may include but is not limited to: expulsion from the Conference, a Written Statement issued to Representatives of the Delegation, disqualification from awards, verbal reprimand from the Provosts.

OPTIONAL ADVOCATES SUBMISSIONS

To present a more nuance picture of their case, advocates are encouraged to submit the following documents

3) *Witness List*

- *Witnesses at ICJs can be simulated only in case it is extremely crucial for the judgement.*
- *Only if you believe that a witness will significantly impact committee, must you send a request to the court for introduction of a witness.*
- *Although this request usually has a format, the EB will not be requiring one in this simulation due to the complex nature of the format.*
- *Delegates must indicate the individual they wish to call or provide citations or links to this individual*
- *If a witness request is approved, actor witnesses who are well versed with the policies of the real witness will be presented in committee, during the time of presentation of the team of advocates who requested the witness, and the delegate may choose to question the witness (in a preferably concise line of questioning).* ***The deadline for the submission of a witness list is the 7th of February, 2019***

4) *Principles supporting evidence*

- *It is preferable that the delegates send in a list of principles and statutes that they intend to use in their arguments, and more importantly, the source of interpretation they use.*
- *The ICJs previous interpretation of principles is the only source that can be used when there is a conflict in interpretation of a certain principle/statute.*

- *We seek your understanding in allowing us to look up these ICJ interpretations in case of a specific statute you intend to introduce, we urge you to send in this document as well.* ***The deadline for this document is the 7th of February, 2019***

5) *Prelim Objections*

- *Objections to the content of any document or written comment presented by the opposing team of advocates (all preliminary documentation will be made available to delegates by the 10th of February) can be made by a team of advocates.*
- ***The deadline for these objections is the 14th of February, and its credibility will be adjudicated by the panel of judges during the conference***

6) *Written Pleadings*

- *In some cases, nations may present a pleading for contention on an alternative topic that is a result of deliberation of this case.*
- *Although there is a high chance it may not make it to a 3 day conference, the ICJ may choose to have an Article 3 deliberation (a short deliberation) on whether or not the court can establish jurisdiction over that request, in case a resolution settlement is formed before the conference is scheduled to end.*

REQUIRED SUBMISSION FOR JUDGES

Judges are required to submit the following documents individually.

1) *Preliminary Paper on the Matter / Position Paper*

- *All Judges are required to submit a Preliminary Paper on the Matter which is expected to adhere to Position Paper.*
- *The PP will be one page and is expected to touch upon your opinions on the case (after reading the study guide and researching), your country's non-legal stance towards the issue, and possible measures taken to induce a settlement.*
- *The deadline for this document is 7th February 2019, for more details please refer to the Position Paper Guideline.*

2) *Written notes*

- Judges can use this link to see the written comments made by their countries. The judges will have to submit similar notes on the basis of the hearings in the simulation, by the first session in day 3.

3) Review note for evidence package and other preliminary documentation

- *The whole set of preliminary documentation by delegates will be uploaded in a Google Drive folder accessible by all judges by the 8th of February, and the judges are required to submit their review of all evidence packages and other pleadings/objections (if any) by both teams of advocates by the 13th of February.*
- *The review note is limited to* ***1 page*** *and must adhere to NTUMUN 2019'S Position Paper Guidelines. This review note can contain objections to a piece of evidence, as well as reinforcement a piece of potential evidence.*

Section II - Nature of Proceedings

This simulation of the ICJ will have what is perhaps the toughest of tasks for the ICJ. Your role in committee is, as Judge Bedjaoui puts it, to "read, write, listen, deliberate, and decide". All times provided are ***merely an estimate*** *and it is not required for the council to adhere to these time blocs. Turning 15 or more distinguished voices of legal scholars into one coherent decision is your deliverable at the end of the day. This simulation will be divided into 3 stages, in the following structure:*

Stage I

- *Each team of advocates will be given 20 minutes to present their evidence.*
- *Advocates are requested to lay the foundation of their evidence in terms or credibility, relevance and applicability.*
- *If a witness request by the advocates is accepted by the president prior to the conference, the team of advocates will have 25 minutes in total to present evidence as well as examine witnesses*

What am I supposed to do as a Judge?

For Judges, you are expected to listen and take notes on the points. Consider what questions you will ask the advocates or any points you wish to highlight after the speech.

What am I supposed to do as an Advocate?

All advocates must prepare their stance before the session. You can use a variety of methods to justify why your client legally owns the islands, this includes PowerPoints or any reasonable method to argue your case.

Moreover, this is where delegates will present evidence of their case and witnesses to the court.

Stage II

- *This stage will be a round of statements by the judges, each given 5 minutes, wherein the judges will present their questions and objections to the advocates.*
- *In case the judges complete their statements in less than 4 minutes, they can yield the remainder of their time to the advocates to reply to any objections made by the judges, or choose to cross examine the witnesses or evidence.*

What am I supposed to do as a Judge?

Prepare a speech questioning the case presented by advocates, attempting to find the best

What am I supposed to do as an Advocate?

Advocates must weight before being questioned by a judge.

Stage III

- *In this stage, both judges as well as advocates will make statements, with the judges allotted 5 minutes each and each team of advocates allotted 20 minutes. Discussion will revolve around the possibility and terms of a settlement on the basis of the evidence provided in the first round.*
- *This stage will start with statements by the advocates presenting their terms, which will be further reviewed by the judges.*
- *In case both parties agree to each other's terms and wish to settle, the ICJ shall move into a* ***commission of settlement.*** *In case there is a conflict in the requirements of both parties, the ICJ shall move into a drafting committee by judges*

The Commission of Settlement

In the case of a settlement, the following procedure will be followed:

1) *A* ***provisional Speakers list****, with the same time allotted as in Stage II will be held where the judges express any concerns with the terms of the settlement, or make a statement intending to influence the settlement*

2) *While the advocates draft the **Resolution of Settlement**, the judges have a round table discussion establishing whether or not the ICJ must exercise its right to present an advisory opinion on the implementation of the settlement*

3) *After the RoS is drafted, each judge submits a written note presenting their view on the final settlement document.*

An article 3 deliberation is a round of statements in which the advocates make initial pleadings as to why the judges must rule in their favour, followed by the judges making statements that direct advocates to alter their terms to their interest.

4) *Following this deliberation, the judges will be given 30 minutes to present a preliminary draft of the decision (all opinions by all judges will be thrown in this draft and any conflict will be addressed only in the next stage), in this format, followed by which the judges will read out the prelim draft to the advocates. The advocates will present written notes with regard to their objections to the contents of the decision, and attempt to convince judges to alter their judgement.*

5) *An amendment session will take place in which any conflict in judgements by two individual judges will be voted upon by the panel of judges, followed by which the ICJ will move into a final vote of judgement*

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The Drafting Committee

The Drafting Committee is the alternative outcome of the ICJ, judges will hear the closing debates and begin questioning advocates to clarify their position. Finally, the judges will draft an advisory opinion regarding the questions put forth toward the court.

This is done through the advisory document, which follows the same format as annex 1, NTUMUN 2019 ROP.

SECTION III

The changes between the stages will be called by the President and automatically passes. Delegates who believe the committee should remain in a certain stage. The President will announce to the council that the committee has moved on to the next stage.

All delegates must speak in third person. There are no moderated caucuses in stage 1. The process of proposing unmoderated caucuses is the same process as NTUMUN 2019 ROP. The Resolution of Settlement will follow the same procedure as NTUMUN 2019.

Delegates are reminded that the Rules of Procedure of NTUMUN 2019 and the ROP of NTUMUN 2019 ICJ is the only governing document of the committee.

Access to the International Court of Justice

States

In accordance with Article 34 of the Statute of the International Court of Justice, only states may be parties to the court. There is a lot of criticism associated with this provision as the article does not imply that the state has to possess territorial sovereignty and independence in order to be a party to the court, which may increase powerful countries' impact on the court. India and San-Marino are examples of state parties that were a party to the court before being independent.

International Organizations

Any international organization, including the United Nations, does **not** have access to the court. However, on the basis of recommendations by multiple international scholars, President Anzilotti of the ICJ expressed his intention to amend the provision, stating that if organizations fulfill the condition of possession of international personality, they will be permitted to **'appear in front of the court'**. *However, presently, International Organizations, including the United Nations, are only allowed to appear in front of the court in cases concerning the advisory jurisdiction of the court.*

Individuals

Neither the statute of the ICJ or the Charter of the United Nations has any provision that allows for individual access to the ICJ.

Jurisdiction of the Court

The court will 'decide' the dispute in case it is legal in nature and may present an advisory opinion in case the dispute is predominantly political in nature.

In other words, the court cannot concern itself with any amount of political motivation of incentive, as that conflicts with the primary motive of the court.

Law applied by the Court

The law applied by the court is specified under Article 38 of the Statute of the International Court of Justice. **In simple words, the court is allowed to apply principles that are "in accordance with International Law".** This section relates to advocates and lawyers, and which treaties delegates may call upon.

a) **International Conventions**, irrespective of their general or particular nation, under the condition that they are accepted by **both** contesting states

b) Customary international law (*jus cogens)*, or general practice accepted as law

c) Customary principles of law recognized by civilized nations

d) Opinions and decisions by the highest judicial authorities of contesting states

Judgement of the Court

The court formally recognized its obligation to 'give the fullest decision it may under the circumstances of the case'[2] in 1984 in the Libya/Malta case[3] (Permission to intervene case). The decision of the court, however, is not an authoritative statement that carries on to further cases involving litigators. The decision is binding only on the involved state parties[4] as it is made on the basis of the circumstances of the case. If the judgement made by the International Court of Justice is not unanimous (which is particularly prevalent in the case of *ad hoc* judges being appointed), the court makes a judgement on the basis of majority[5].

In case the votes are equal, the president of the International Court of Justice exercises a casting vote[6] (which is why the president belonging to one of the state parties is not permitted). Following the decision made by the court, the only procedural provision[7] for a party can be requesting a report on interpretation of the judgment under Article 98(2) of the Statute of the ICJ, followed by which the court indicated precisely the nature of the decision. Precedence as to the utilization of this provision was established in 1984 when Tunisia applied for 'revision' of the court's decision of the case between Tunisia and Libya[8].

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[2] The commonly used quote to justify this, however, is Judge Weeramantry's dissenting opinion in the East Timor case, available in the ICJ reports (1955) page no. 158

[3] ICJ reports (1984) , page 25

[4] In accordance with Article 59 of the statute

[5] Under the provisions mentioned in Article 55 Paragraph 1 of the statute

[6] Under the provisions mentioned in Article 55 Paragraph 2 of the statute

[7] Under Article 61 of the statute

[8] Continental Shelf case (*Tunisia v. Libya)* , ICJ reports 1985, Page no. 192

Enforcement

Article 94 paragraph 1 of the Charter of the United Nations states that all parties must comply with the decisions by the International Court of Justice.

The aforementioned provision has received a lot of criticism in the recent part by scholars of International Law. The Security Council can make recommendations on the basis of Article 41 and 42 of the Charter. Furthermore, under some circumstances[9], action under Chapter VII of the charter can be taken.

Conclusio

The General Assembly and other bodies of the United Nations are constantly encouraging states to submit their disputes to the ICJ, which can be exemplified by the formal encouragement provided by the General Assembly in 1974.

The primary reasons that this hesitation exists in the first place is firstly because, the court has not always been impartial. Criticism exists as to how the court is in 'the hands of powerful nations', since every election of judges has judges from the US, the UK and other powerful nations.

[9] Action under Chapter VII can ideally be taken if 'international peace and security is at stake'

Secondly, states have recognized the time consuming and expensive nature of procedure of the ICJ. Contentious cases can take about 2-3 years of time, depending on the specifics of the case. In the case of an advisory opinion, 2 years is usually the amount of time that the ICJ takes. Moreover, a state requires 5-6 million dollars to take a case to the ICJ, particularly cases involving maritime territories, since experts on oceanography need to be hired.

Lastly, the enforcement of ICJ decisions by the Security Council make it such that the controversy regarding the partiality of the Security Council also extends to the ICJ.

Mauritius v the United Kingdom of Great Britain and Northern Ireland

Overview

The Chagos Islands were detached from Mauritius 3 years before the process of decolonization. Britain went on to gradually force the population of the Island of Diego Garcia out. Britain's ulterior motive was to lease out the Diego Garcia island, as it is today, to the United States of America, who uses this for military purposes. The island played an important role for the United States of America's intelligence during their bombing campaigns of Iraq and Afghanistan, and also seems to have contributed to other operations by the Central Intelligence Agency.

The last 30 years have seen legal battles, both in British as well as American courts, since the Chagossians have sued both governments and officials involved in the process of decolonization. Although the courts of the United states, and it's obvious why, do not consider this deportation illegal, some courts in the Great Britain have acknowledged officially that this deportation can be deemed illicit.

However, after the 11th of September 2001, the United States' continued use of the Diego Garcia islands was more important than ever. Hence, the British government proceeded to overrule the decisions of the court through an executive order "on the grounds of feasibility, defense and security interests, and cost to the British taxpayer."

The Role of The United Nations and the ICJ

Deliberations on the Chagos Islands dispute have been going on for a while at the International Court of Justice. Their commencement was due to Resolution 71-292. The statute of the International Court of Justice allows it to present an advisory opinion given it is requested by an international organization to do so (in this case, the United Nations) . It is advised that delegates go through precisely what the resolution asks for through this link .

Relief Sought by Mauritius

The request by Mauritius to the Permanent Court of Arbitration primarily revolved under provisions of the United Nations Convention on the Law of the Sea 1982. However, Mauritius also requested the court to identify any general norms of international law that are violated in this convention . The issues raised included the Marine Protected area allegedly being incompatible with the UNCLOS, the classification of the United Kingdom as a coastal state in accordance with the definition in the CLOS, and the fact that Mauritius, in accordance with the principle of uti possidetis, coupled with Part 5 of the CLOS, is entitled to declare an exclusive economic zone, which relates to the declaration of a marine protection area within the former

Mauritius' Stance On The Issues As Presented By The Court

On Jurisdiction

Article 65 of the Statute of the International Court of Justice says that the court is allowed to present an advisory opinion provided there is a legal question and that it is requested by an organization that is recognized by the Charter of the Untied Nations (which is indisputable here, since the General Assembly requested it). Furthermore, Article 96(1) of the Charter also provides for the General Assembly to request an advisory opinion. Mauritius believes that "there is no 'compelling reason' for the Court to decline to exercise the advisory jurisdiction"

On The Process Of Decolonization

The Vienna Convention on the Succession of State in Respect of Treaties says that the process of decolonization must non involve treaties signed under duress, and that is exactly what Mauritius claims happened, as they claim that their independence was conditioned on the Diego Garcia clause, hence making the entire process of decolonization fraudulent

The United Kingdom's Stance On The Issues Raised

On Jurisdiction

The United Kingdom's argument is two fold. The two parts of this argument are :

The United Kingdom states that this territorial dispute is bilateral in nature and hence the involvement of the court is what they consider “unnecessary interference”, and hence the United Kingdom wants the ICJ to exercise the court’s discretion to decline a request for an advisory opinion under the grounds mentioned by the Untied Kingdom. The United Kingdom also makes implicit references in their documentation that, as United Al Jazeera suggests, “remind the ICJ that the P5 nations back UK’s argument”, which legal scholars believe will impact the court’s final judgement

The second phase of the argument presented by the United Kingdom is about consent. The United kingdom cites an advisory opinion by the court itself to argue that the ICJ’s acceptance of the request for an advisory opinion will equate to the violation of the principle that disputes between states must be submitted to judicial settlement only with prior consent

On The Process Of Decolonization

The United Kingdom stands firm on its stance that the process of decolonization was not fraudulent and that the islands were not detached under the duress, hence arguing for the legal effect of the agreement between the UK and Mauritius. With regard to Mauritius’ claims about its declaration of economic zones and of the applicability of uti possidetis, the United Kingdom claims that the principle of self-determination was not established in international law back in 1975. The UK also uses its abstention from Resolution 1514 to argue against the ‘obligations’ that Mauritius claims the United Kingdom have. Moreover, the United Kingdom also added that Mauritius called for the process of decolonization to be completed immediately, while timing is a policy consideration.

Historical Timeline

The development of Mauritius is one created purely out of colonization. Prior to the 1638 settlement of the Dutch in Mauritius, the islands of present-day Mauritius were effectively uninhabited.[10] However, the first influx of people to the islands was in 1715 – after the Dutch settlement had failed – when the French East India company laid claim to Mauritius, renaming it Isle de France.[11] As part of the colony, coconut plantations were set up in Diego Garcia, and slaves brought from Africa to work. The descendants of the slaves were later free men, and they proceeded to inhabit the Chagos archipelago, forming their own language of Chagossian Creole (based upon French but incorporating words with African origin), as well as forming a common culture known as *Ilois*.[12]

In the interim, the British, who had fleets operating in the Indian Ocean that were being harassed by the French, invaded Cap Malheureux, a village in the north of mainland Mauritius, taking the French by surprise and defeating them. The British formally gained the title of Mauritius through the Treaty of Paris,[13] signed in 1814, which was part of a set of

[10] BBC, 'Mauritius Profile - Timeline', *BBC News*, 12 April 2018, sec. Africa, https://www.bbc.com/news/world-africa-13882731.

[11] Satyendra Peerthum and David Vine, 'Origins & History of the Chagossians', *lexpress.mu*, 11 November 2003, https://www.lexpress.mu/article/origins-history-chagossians.

[12] A French Creole word that means islanders.

[13] Treaty of Paris, his Britannic majesty and his most Christian majesty Louis XVIII, May 30, 1814, History Of The Wars Of The French Revolution, From The Breaking Out Of The War, In 1792, To The Restoration Of A General Peace, In 1815: Comprehending The Civil History Of Great Britain And France, During That Period; Volume 3 Of History Of The Wars Of The French Revolution, Edward Baines

treaties ending the Napoleonic Wars. As part of the treaty, Tobago, St. Lucia, Mauritius, and the Seychelles were ceded to British control. While the Chagos Islands were not expressly mentioned in the treaty, both sides assumed it was a part of Mauritius, and thus sovereignty of the Chagos archipelago had *de facto* passed to the United Kingdom (UK).[14] In the subsequent century, the British would abolish slavery, and begin a policy of indentured labour, while bringing in thousands of workers from British India – which later formed the main demographic of Mauritian citizens.

The Legislative Assembly was created in 1947 as the first step towards self-governance, mirroring the trend in British colonies around the world that sought increased autonomy.[15] In 1959, Sir Seewoosagur Ramgoolam won the first election which had universal suffrage – as part of the Mauritian Labour Party (MLP). The 1967 election in Mauritius was again won by the MLP, but as part of a coalition with the Muslim Committee of Action and the Independent Forward Bloc against the Mauritian Social Democratic Party (PMSD). This election was also seen as a referendum on independence – as the PMSD campaigned on a promise to have a referendum on constitutional reform and free association with the UK.[16]

[14] Julien Durup, 'The Chagos. A Short History and Its Legal Identity', *Études Océan Indien*, no. 49–50 (1 July 2013), https://doi.org/10.4000/oceanindien.2003.

[15] 'Republic of Mauritius- History', Republic of Mauritius, accessed 15 January 2019, http://www.govmu.org/English/ExploreMauritius/Pages/History.aspx.

[16] 'Mauritius: The Road to Independence (1945-1968)', in *African Democracy Encyclopaedia Project*, September 2009, https://www.eisa.org.za/wep/mauoverview7.htm.

International Covenant on Civil and Political rights

In 1976, the UK government ratified the International Covenants on Human Rights (which went into effect the very same year.

This defence, in itself, is a clear offence to this universality of the covenant's application under Article 2(1) which states that Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Secondly, the UK government led the Committee to believe that, as the Chagossian people were not in occupation of the territory when the covenant went into force, the U.K could not be responsible for the acts of involuntary displacement that were carried out between 1965 and 1973.

Nevertheless, Article 14(2) of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts 2001 anticipates that the maintenance of any legislative measures violative of the Covenant would attract responsibility because it would be evidence of the continuing character of a breach of an international legal obligation[17]

United States' Interest in a Military Base

[17] 'Draft Articles On Responsibility Of States For Internationally Wrongful Acts, With Commentaries' (*Legal.un.org*, 2018) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>

The impetus to build a military base in Diego Garcia came from the United States' desire to 'off-shore' its military might, by getting access to military bases across the world.[18] The US has traditionally endeavored to find sparsely populated islands that it could depopulate for the purposes of military use – such as Kwajalein Atoll or Bikini Atoll. The UK response to this strategy was one of acceptance; it was thought that US involvement in the Indian Ocean would help to shoulder the burden of "defending the free world".

There was therefore a joint survey conducted between the UK and the US of the islands of the Seychelles and Mauritius, with the British government expressing support for the excision of the required islands to put them directly under British control. This was a sentiment echoed by the US government – that the islands should be under their 'exclusive control'.[19] This was premised upon independent islands allowing increased freedom of maneuverer without hindrance or political movements by the locals. It was therefore agreed that the affected prospective-states would get a large sum in compensation, and to secure their agreement. In April 1965, it was agreed that the island of Diego Garcia in the Chagos Archipelago would be the ideal location for a US communication facility.[20]

However, it is notable that throughout this process, the governments of the US and UK were extremely interested in preventing elected representatives – either in the UK Parliament or in the US Congress – from learning of this plan. *Ergo,* part of the cost of the

[18] David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (Princeton University Press, 2011).

[19] CCP Heathcote-Smith, PRO FCO 32/484/1: *Chronology of Events Leading to Establishment of BIOT*, 13 December 1968.

[20] '"Defence Facilities in the Indian Ocean": Joint Memorandum by Mr Stewart and Mr Healey for Cabinet Defence and Overseas Policy Committee', in *East of Suez and the Commonwealth 1964–1971: Part III Dependent Territories, Africa, Economics, Race*, vol. 5, 5 vols, British Documents on the End of Empire, A (The Stationery Office, 1965), 236–40.

creation of the BIOT was paid for by the US government through giving discounts on the Polaris nuclear missile programme, rather than expressly paying the UK government.[21]

The question then emerged of what mechanisms – legal or otherwise – the British government should employ in gaining sovereignty over the Chagos Islands. In consultation with the Mauritian Council, it was concluded that the Mauritians were averse to relinquishing sovereignty over the Chagos Islands. Instead, they wanted to lease the land to the UK government, while retaining rights to natural resources like fishing and mineral resources.[22] Furthermore, there was a strong interest by Sir Ramgoolam in securing a internal and external defence treaty between the UK and the Mauritian government – owed primarily to the inter-ethnic violence in 1964, and the possibility of a *coup d'etat* by the PMSD.[23]

The ensuing debate exposes inter-departmental conflict within the British civil service. The Colonial Office was operating on the backdrop of the United Nations (UN) steadily increasing pressure on former colonial powers to recognise the independence of their colonies – to the extent that Resolution 1514 was passed in 1960 in the General Assembly (GA).[24] One of the perambulatory clauses states:

> "*Solemnly Proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations"

[21] Jocelyn Chan Low, 'The Making Of The Chagos Affair: Myths And Reality', *Eviction from the Chagos Islands*, 1 January 2011, 61–79.

[22] See Heathcote-Smith.

[23] Ibid.

[24] General Assembly resolution 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples,* A/Res/1514 (XV) (14 December, 1960), available from undocs.org/ A/Res/1514(XV)

To that end, Secretary of State Anthony Greenwood was resolute in maintaining that consent had to be obtained from the Mauritian leaders. Additionally, this would increase support and put the UK in a stronger position during the Constitutional Conference in 1965.[25]

On the other hand, the Ministry of Defence and the Foreign Office were extremely unwelcome to the suggestion that new responsibilities would be placed upon that contravene British foreign policy doctrine of non-involvement, but also the possibility of British soldiers being embroiled in inter-ethnic strife abroad. It was proposed, by the Secretary of State for the Foreign Office, Michael Stewart, that unilateral excision could still happen through an Order in Council – as Mauritius was still under UK's sovereignty and jurisdiction.[26]

The final decision that was made involved strong persuasion by both Ramgoolam and the Colonial Office that a peaceful and safe Mauritius was politically better for both sides. This therefore led to the agreement and undertakings at the Lancaster House in London where the 1965 Mauritian Constitutional Conference took place.

Lancaster House Proceedings

[25] Stephen Allen, 'Detaching the Chagos Islands from Mauritius: The 1965 Mauritian Constitutional Lancaster House Agreement', in *The Chagos Islanders and International Law* (Bloomsbury Publishing, 2014), 176–78.

[26] An Order in Council refers to an Order made in the name of the Queen with the advice and consent of the Privy Council – comprised mainly of senior politicians. Importantly, there is no democratic check on such Orders, because they are not voted upon insofar as the few members of the Privy Council agree to it.

The conference was convened on 7 September 1965, and constituted members of five Mauritian parties and the Colonial Secretary.[27] This was the last attempt for certain political parties – like the PMSD, to persuade the British that a constitutional referendum should happen, and it should be an option for the Mauritius people to choose to freely associate with the UK. On the other hand, Mauritius Premier Sir Ramgoolam was very much pro-independence.[28]

While the formal negotiations took place, there were two separate meetings that occurred. The first is at the Colonial Office on 20 September 1965, where all parties except the PMSD attended,[29] and the subject of Diego Garcia was once again raised. Ramgoolam proposed two solutions: first, a lease; second, for independence to first be granted, followed by subsequent negotiations with UK and the US on the status of the island. A private meeting was further arranged with Ramgoolam and UK Prime Minister, Harold Wilson. In this meeting, Ramgoolam was confronted with the prospect that the UK was prepared to use the Order in Council to unilaterally remove the Chagos Islands. Furthermore, Ramgoolam could also face the prospect of returning to Mauritius without independence, something clearly politically disadvantages to him. Ramgoolam therefore assented to the excision of Diego Garcia and noted that it was only a 'matter of detail', not on of principle.[30]

[27] Jean Houbert, 'Mauritius: Independence and Dependence', *The Journal of Modern African Studies* 19, no. 1 (1981): 75–105.

[28] Sandra Evers and Marry Kooy, *Eviction from the Chagos Islands: Displacement and Struggle for Identity Against Two World Powers* (BRILL, 2011).

[29] The PMSD delegation felt thtat they did not have the mandate of the people to commence talks on the excision of the island, having been voted in on the premise of lobbying for the free association of Mauritius to the UK.

[30] UK Foreign Office, Record of a Conversation between the Prime Minister and the Premier of Mauritius,

It was noted the next day that the Conference took on a markedly different tone – the Colonial Secretary was now firmly in favour of independence for Mauritius. The PMSD hence withdrew from the Conference, to leave the remaining delegates debating about the terms of the transfer of sovereignty. These terms formed the Lancaster House Agreement. For clarity, they are reproduced in full below:

(i) "Negotiations for a defence agreement between Britain and Mauritius;

(ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;

(iii) compensation totalling up to £3 [million] should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;

(iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concession over sugar imports and the supply of wheat and other commodities;

(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;

Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 A.M. on Thursday, September 23, 1965, FO 371/184528 (23 Sept. 1965)

(vi) the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:

a. Navigational and Meteorological facilities;

b. Fishing Rights;

c. Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers.

(vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius;

(viii) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government."[31]

The Creation of the British Indian Ocean Territory

Following the Conference, it was also concluded that the British would use the Order in Council to 'detach the islands', and it was done through the creation of the BIOT through such and Order on 8 November 1965. In fact, this legal mechanism has already been formalized in the 1895 Colonial Boundaries Act that altered the boundaries of colonies as follows:

"Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order

[31] Mauritius. Legislative Assembly. Select Committee on the Excision of the Chagos Archipelago, 'Report of the Select Committee on the Excision of the Chagos Archipelago' (Port Louis, Mauritius, June 1983).

> *in Council or letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony."*[32]

The creation of the BIOT was also announced in parliament to the House of Commons on 10 November 1965. The £3 million was credited to the Mauritian government's capital revenue account in the financial year 1965/66. Furthermore, Ramgoolam gave a speech after the decision was made that:

> "*We were consulted, we agreed to give away Diego Garcia and the British government paid three million pounds compensation. After its detachment, Diego Garcia became part of what is known as the British Indian Ocean Territory, and Great Britain has sovereignty over it."*[33]

This signals a form of acquiescence to the status quo that Mauritius engaged in, and by accepting the money from the UK, has also accepted the terms that go along with it – the fact that Chagos will be administered, and is a part, of the UK.

This is significant as it interacts with a principle of treaty law – estoppel – and will be dealt with in a later chapter.

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[32] 'Colonial Boundaries Act 1895, c. 34' (1895), http://www.legislation.gov.uk/ukpga/Vict/58-59/34/contents.

[33] United Kingdom, Parliament, Select Committee on Foreign Affairs, 'Submission from Richard Gifford, Legal Representative, Chagos Refugees Group' (UK Parliament Publications, 31 January 2008), https://publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/147we94.htm.

Expulsion of the Chagossians

While the transfer of title to the UK is rather clear, far more contentious is the expulsion of all the islanders on Diego Garcia. By 1968, it was agreed between the UK and the US that all inhabitants of the Chagos Islands must be removed. This was done through a legal instrument: the Immigration Ordinance 1971 enacted by the BIOT Commissioner under BIOT legislature.[34] The Ordinance made it illegal for anyone to return to the island without a permit.

However, between 1968 to 1971, the islanders were removed forcibly and covertly. This was achieved through buying out the company owning the coconut plantations in Diego Garcia, Chagos-Agalega, for £660, 000.[35] This was also in line with BIOT Ordinance Two, titled the Acquisition of Land for Public Purposes (Private Treaty) Ordinance.[36] This enabled the BIOT administration to legally own the land on Diego Garcia. The BIOT administration then proceeded to steadily decrease the supplies the island could receive, such as food, medicine, and capital to maintain the plantations. It was hoped that economic deprivation would cause the islanders to leave voluntarily.

Further action began in March 1967, when ships carrying islanders between Mauritius and Diego Garcia began prohibiting any passengers to board the return trip to Diego Garcia, effectively stranding them in Mauritius. By leaving them homeless and jobless, they were unable to contact their relatives in Diego Garcia, causing them to leave Chagos in search of their loved ones, only to be unable to return.

[34] United Kingdom, British Indian Ocean Territory, 'The Immigration Ordinance 1971' (n.d.).

[35] See Evers and Kooy

[36] United Kingdom, British Indian Ocean Territory, 'The Acquisition of Land for Public Purposes 1967' (n.d.).

In 1971, the last year of the deportations, US and UK troops used raw meat to lure the pet dogs of all the Chagossians into a copper shed and gassed and burned them in front of their owners. The rest of the year was spend herding up the remaining Chagossians and deporting them either to the Seychelles or to Mauritius.[37] By the end of 1971, the deportation was complete, and work began on the US communication facility – which has now expanded into one of the most important US foreign bases in the world

Developments Regarding Decolonisation Pertaining To The Current Claim

The nature of international law's progress towards the end of decolonisation has been one characterised by overlapping claims of different rights – notably the right to self-determination and the rights of indigenous peoples. These shall be dealt with in two separate paragraphs, outlining the relevant developments and documents that have been published, in order to apply them to the Chagos Island case.

Decolonisation and the Right to Self-Determination

Background of the Development of the Right to Self-Determination

The only time decolonisation was directly and explicitly addressed by the UN was in Resolution 1514. Its preambles addressed the overwhelming sentiment of the global population towards colonialism, reflected by the extremely strong wording asserting that "the peoples of the world ardently desire the end of colonialism in all its manifestations" and that "an end must be put to colonialism and all practices of segregation" in order "to avoid serious

[37] John Pilger, 'John Pilger: Paradise Cleansed', *The Guardian*, 1 October 2004, sec. Politics, https://www.theguardian.com/politics/2004/oct/02/foreignpolicy.comment.

crises". This is further supported by the fact that while there were abstentions – significant states like the UK and US did not disagree in principles; in fact they were quick to point out how they fulfilled their obligations according to the Charter of the UN, but questioned the details of the resolution. It is also notable that while this was merely a GA resolution, and therefore is not binding but only an aspirational goal for states, it has given useful commentary into the intents and practices of states, and therefore may be referred to when examining if *opinio juris*[38] exists in the practice of decolonisation – and whether subsequent state practice for the past 58 years has been increasingly in line with the resolution.[39]

The Resolution also has had the effect of catalysing the creation of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1962; otherwise known as the Committee of 24 (C-24).[40]

The Committee comprises of both newly independent countries and regional or global superpowers like India and Russia. This Committee was in charge of creating lists of non-self-governing territories (NSGT) and generate recommendations, which would be submitted to the GA. This was the Committee that the UK Colonial Secretary was wary of when suggesting against unilateral excision of the Chagos Archipelago.

[38] The belief that an action was carried out as a result of a legal obligation.

[39] Edward A Laing, 'The Norm of Self-Determination, 1941-1991', 1991, 100.

[40] 'The United Nations and Decolonization', accessed 15 January 2019, http://www.un.org/en/decolonization/specialcommittee.shtml.

However, more often decolonisation is tackled in the UN through enshrining a peoples' right to self-determination. This principle is given very heavy weightage when it is featured in Article 1(2) of the Charter of the United Nations stating that:

> *Article 1*
>
> *"The Purposes of the United Nations are: (…)*
>
> *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;"*[41]

The legal significance of the Charter of the UN is given by its status as a treaty amongst all member states, and therefore states are legally bound by its constituent articles, under existing international conventional – or treaty – law. Hence, the practical corollary of the right to self-determination includes imposing obligations on states which administer NSGTs. Such obligations which feature in the UN Charter are legally significant, including Article 73(b):

> *Article 73*
>
> *"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories*

[41] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html

> *are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: (…)*

> *b. to 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 concept of self-determination itself, however, was never fully articulated until Resolution 1514, in which Article 2 mentions:

> *"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."*

The exact same sentence has been adopted in subsequent documents which bolster this principle as a fundamental part of international law; such documents include the 1966 International Covenant for Civil and Political Rights,[42] and the 1993 United Nations Vienna

[42] International Covenant on Civil and Political Rights, (*adopted and opened for signature, ratification and accession* by General Assembly resolution 2200A (XXI) of 16 December 196, *entry into force* 23 March 1976), *United Nations Treaty Series,* vol. 999, no. 14668, p. 171, available from https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf

Declaration and Programme of Action.[43] The fact that this principle has been universally agreed upon as being a foundational idea of the UN, and that states all agree upon its use in practice – be it in terms of decolonisation or granting of autonomy to discrete ethnic groups – and that it has appeared in both binding legal instruments and declarations of state opinion, mean that the principle has transcended being an aspirational goal in the UN Charter, but instead possessing the status of customary international law.

Self-determination and Jus Cogens

It is, however, insufficient for the right to self-determination to be a justification to override any and all agreements between Mauritius and the US simply because it is a part of customary international law. After all, the doctrine of intertemporal law rebuts this application of a customary norm and has significant legal precedent. This doctrine was established in the *Island of Palmas* arbitration in the International Court of Justice (ICJ) by Judge Huber:

> *"… a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."*

Therefore, the only possibility to apply the right to self-determination retroactively – even if it conflicts with a previously legally binding treaty – is for the law to be of superior nature. Such norms are *jus cogens* norms and has been accepted by the community of states as a norm

[43] United Nations, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/48/121 (25 June 1993), available from https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf

from which no derogation is permitted. This is also consistent with the 1969 Vienna Convention on the Law of Treaties (VCLT), Article 64:

> *Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")*
>
> *If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.*[44]

One of the only few legal mechanisms to retroactively act upon the legality of the Lancaster House Undertakings is to prove that the right to self-determination is a *jus cogens* rule, and that it has been infringed upon.

Unfortunately, scholarly and international consensus on the hierarchy of the right to self-determination as being universally superior is still divided.[45] Given that *jus cogens* is seen as a second order custom – and therefore requiring the norm to be part of customary international law first anyway – the question then arises if it can be proven through state practice that no derogation is permitted, and that the right is superior that is unable to be signed away through contract.

Some academics cite the fact that an explicit document in support as well as elucidating the right to self-determination only appears in Resolution 1514 – in itself neither

[44] The United Nations, 'Vienna Convention on the Law of Treaties', *Treaty Series* 1155 (May 1969): 331.

[45] Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges', *Asian Journal of International Law* 5, no. 01 (January 2015): 26–54, https://doi.org/10.1017/S2044251314000058.

a binding resolution nor with unanimous support – the resolution is merely recommendatory in nature and does not possess the ability to elevate the right to *jus cogens* status.[46] The fact that at least up until the 2000s many countries were still struggling with the right to independence and the fight to break away from colonial masters mean that universal state practice was hardly even achievable, much less the ability to establish the right to self-determination as being one that all states believes no derogation is permitted from – many states derogated from it anyway.

Conversely, the argument that the consensus by the 21st century that all forms of political oppression are unacceptable, and the Vienna Conference on the Law of Treaties producing an agreement that *jus cogens* norms are to sanction the principles of the UN (of which the right to self-determination is included), the right to self-determination is a form of *jus cogens*.[47] If anything, the right to self-determination still requires a convincing legal argument and precedence in the court to be counted solidified in its status as a *jus cogens* rule given its relatively novel nature, but would have the possibility of invalidating treaties even if they were signed before the existence of the right.

Self-determination and Peoples

As mentioned in the previous section, the only way by which the right to self-determination can be used as a valid legal argument to challenge the status quo is if it can be proved that the standards of self determination have been breached. It must be proved the "peoples have

[46] Marion Mushkatt, 'The Process of Decolonization International Legal Aspects', n.d., 20.

[47] Andrew K. Coleman, *Resolving Claims to Self-Determination: Is There a Role for the International Court of Justice* (Oxon; England: Routledge, 2013).

not yet attained a full measure of self-government",[48] and this is dependent on the definition of "peoples".

This paragraph first highlights the existence of a "people". The implication of self-determination is that they must apply to a group identifying themselves as part of a similar social grouping – through ethnic, religious, territorial or other similarities. Thus, any arguments for (or against) the existence of the right to self-determination begins with characterising a group of people as a unified social group. In the deportation of the Chagossians in the early years of 1970, a term the British opted to use the term "belonger" to address the Chagossians, rather than being permanent inhabitants.[49] This was with the express purpose of giving the British government "a defensible position to take up in the Committee of 24".

The fact that there were also contract workers on Diego Garcia made it easier for the British to deliberately undercount the number of Ilois, and show that no unified people existed – hence the right to self-determination also did not exist. In the end, the BIOT report in 1968 only stated 354 Chagossians as "third generation 'belongers'". With this basis, it was possible to maintain the fiction that the BIOT was legally allowed to clear non-inhabitants from the island.

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[48] General Assembly resolution 648, *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, A/RES/648* (10 December, 1952), available from https://www.refworld.org/docid/3b00f1ebc.html

[49] Stephanie Jones, 'Colonial to Postcolonial Ethics', *Interventions* 11, no. 2 (1 July 2009): 212–34, https://doi.org/10.1080/13698010903053287.

Manifestations of the Right

The only area where the nature of self-determination is set out is in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, that proclaims the following as methods of exercising this right:

> *"The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."*[50]

The above paragraph in the Declaration shows that this right can be exercised in two main ways. The first is internal self-determination: the creation of a political status that allows a particular grouping of individuals to express their political views apart from other peoples. This often takes the form of autonomous regions, where separate and socio-cultural specific legislation that takes into account the common historical experience of a discrete group is applied to that group while still being part of a larger nation-state. The second type of possible self-determination is the creation of a new state, that allows the political ambitions of the people to be realized by engaging in sovereign relations with other states – therefore removing any people from the control of others through the principle of non-interference in

[50] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), available at: https://www.refworld.org/docid/3dda1f104.html [accessed 15 January 2019]

domestic affairs of other states.[51] The distinction between internal and external forms of self-determination is based upon the historical contexts in which these claims are made. Internal claims to self-determination are largely supported by historical precedent through the decolonization process – even if this norm was not fully present in the 1960s – and this commitment was made by previous colonizers within the Declaration Regarding Non-Self-Governing Territories, otherwise known as Article 73 within the UN Charter.

Applied to the Chagos Island, self-determination should be in light of what the Chagossians want; a subject never discussed in legal discourse between Mauritius and the UK. Instead, the claims made by either side involve titular transfer of territory between either claimants. Hence, it is imperative to note that even though Mauritian claims are often backed up with reference to Resolution 1514, the logical corollary of full self-determination – assuming the Chagossians are a discrete socio-political grouping – is to gon in accordance to the wishes of the Chagossians.[52]

Resolution 1514 and Territorial Integrity

As mentioned previously, the right to self-determination was never fully realised in writing until Resolution 1514. Instead, Resolution 71/292 adopted by the GA in June 2017 – which was also the resolution requesting for an advisory opinion by the Court – included in its preambles:

[51] Father Robert Araujo, 'Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law', n.d., 58.

[52] Maureen Tong, 'Self-Determination in the Post-Colonial Era: Prospects for the Chagossians', in *Eviction from the Chagos Islands: Displacement and Struggle for Identity Against Two World Powers* (BRILL, 2011).

> *"Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in its resolution 1514 (XV) of 14 December 1960, and in particular paragraph 6 thereof, which states that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations,"*[53]

This means that the intent of the Mauritian claim is not entirely based on self-determination, but by the obligations of decolonization to maintain territorial integrity as stated in clause 6 of Resolution 1514:

> "*6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."*

As previously proved, legal obligations arising from decolonization are often phrased in the form of the self-determination argument, or as actions states must take to give peoples of NSGTs autonomy.[54] Territorial integrity as a legal obligation has never before existed, and the fact that it is espoused within a GA resolution with recommendatory character calls into question the legal validity of this right. Even if it is argued that Resolution 1514 serves as a

[53] United Nations General Assembly, *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, 22 June 2017, A/RES/71/292, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/292 [accessed 15 January 2019]

[54] Such as in the UN Charter Chapter XI, where the obligations for states that administer NSGTs are explicity stated.

record of *opinio juris*, that eventually can become customary international law with state practice since, the right of states and NSGTs to territorial integrity could not have been a legal right in 1965, the date of separation of the Chagos Archipelago from Mauritius.[55] Therefore, the corollary that the right to self-determination can now be used as a reason to invalidate the actions in 1965 under article 65 of the VCLT requires tremendous obstacles in legal reasoning to be overcome.

It is, however, not unreasonable to argue that the UK had violated Resolution 1514 when it excised the Chagos Islands from Mauritius, and even if the resolution had recommendatory character at that point in time, it would help to credit *opinio juris* to the principle of territorial integrity. However, the lack of persistent objection, until 1983 when the Report on the Exicision of the Chagos Islands was commissioned by the Mauritian government, meant that the Mauritian claim is limited by a general principle of law known as estoppel.

Estoppel and the Difficulty of Applying Law Retroactively

The doctrine of estoppel is a form of attaching significance to states acting in good faith to each other – a concept often invoked in conventional law[56] – by way of ensuring that states act in a fashion consistent with their legal claims to entitle them to make those claims.[57]

[55] The doctrine of intertemporal law again applies here.

[56] Otherwise known as treaty law

[57] I. C. MacGibbon, 'Estoppel in International Law', *The International and Comparative Law Quarterly* 7, no. 3 (1958): 468–513.

Judge Lauterpacht, in commenting on the VCLT while Special Rapporteur to the International Law Commission, stated:

> "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous."[58]

More formally, there are three criterion that must be fulfilled for a statement to create estoppel.

The first is that the statement creating the estoppel must be clear and unambiguous; the second that the statement must be voluntary, unconditional and unauthorised; third that there must be good faith reliance upon the representation of one party by another, which leads to the detriment of the relying party or is in the advantage of the party making the representation.

Most literature claims that estoppel is also an extension of the principle of *pacta sund servanda* espoused in Article 26 of the VCLT, and therefore not a new concept, but an old one which encourages states to use legal processes in a fair fashion – promoting trust and cooperation with behaviour consistent with representations. This concept is applicable to the Chagos Island case because of the £3 million previously accepted by the Mauritius government would be a clear statement by the Mauritians that they accepted the terms of the treaty and had even profited from the monetary benefits made available by signing the

[58] H. Lauterpatch, 'Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur', Yearbook of the International Law Commission, Vol. II, 24 March 1953.

treaty. The Court would be violating a general principle of law if entertains the Mauritian claim short of using *jus cogens* to invalidate the original agreement.

Developments of the Rights of the Chagossians under Domestic and Regional Law

Obligations Under British Law

By all standards, the Chagossians are British citizens, since the Chagos Islands have never left British sovereignty – first being a Crown Colony, next being part of the BIOT. Hence, Chagossians were first British citizens under the British Nationality Act 1948, and then became British Dependent Territories citizens. Hence, the forced relocation of the Chagossians have once been contested in British courts.

Bancoult 1

Oliver Bancoult was a Chagossian born in 1964, and launched a judicial review of the BIOT Ordinance on 1971 banning the return to the island.[59] The case *Regina V Secretary Of State For The Foreign And Commonwealth Office And Another, Ex Parte Bancoult* was heard in the Divisional Courts, and it was found that the Order in Council granting the BIOT legislative power over the Chagos Islands only empowered the BIOT Commissioner to legislate for BIOT's "peace, order and good government", and did not include preventing inhabitants from returning to their place of abode. Therefore, the Courts arrived at the conclusion that section 4 of the Ordinance was *ultra vires*.[60] This led to the Secretary of State accepting the judgement and replacing the 1971 BIOT Ordinance with the 2000 BIOT Ordinance allowing Chagossians to return to the BIOT (except Diego Garcia) without permits.

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[59] Regina v Secretary of State for the Foreign and Commonwealth Office and Another, ex parte Bancoult, 413 EWHC Admin (EWHC 2000).

[60] *Ultra vires* refers to being beyond one's legal power or authority.

Bancoult 2

After feasibility studies conducted between 2000 and 2004 were conducted, the British government asserted that the cost of resettling people "would be highly precarious and would involve expensive underwriting by the UK Government for an open-ended period—probably permanently", and hence the UK government enacted BIOT Constitution Order in Council 2004 and BIOT Immigration Order in Council 2004, essentially removing the citizens' previous right to return to the Chagos Islands. It has been alleged that the UK government's actions were not only based upon economic concerns, but also political concerns from the US, whose military base was situated in Diego Garcia. The case *Bancoult, Regina (On The Application Of) V Secretary Of State For Foreign And Commonwealth Affairs (No 2)* – otherwise known as *Bancoult 2* – was therefore brought before the Divisional Court. Notably, at this point, the legislature being challenged was no longer subsidiary legislature – answerable to the original BIOT Order in Council – but primary legislature. The new Orders in Council meant that the courts would be challenging the executive power of the Queen in Council; and by extension, her sovereign legislative authority. The Secretary of State appealed to the Court of Appeal – which held the decision reached by the Divisional Court that the 2004 Orders in Council were *ultra vires* – but further appealed to the Judicial Committee of the House of Lords.[61] The Law Lords were in essence asked to articulate their standpoint on the constitutional values – with the Appellant (the Secretary of State) – pushing for a view that legislative authority existed since ancient times unless authority to the contrary emerged. The Law Lords agreed that while judicial review was not an illegitimate tool given the

[61] At the time, this was the highest appeallate court in Britain.

development of fundamental rights, the majority preferred deferring to legislative authority, noting that it was for Parliament to remedy any legislative shortcomings in colonial governance.[62]

It must be noted, however, that some of the Law Lords – such as Lord Hoffmann – were cognisant of the fact that Article 73 of the UN Charter did state obligations to governments administering NSGTs, and that the UK government was "subject to a sacred trust" to that Article.[63] Therefore, while the UN Charter is unenforceable in British Courts, Article 73 is directly connected to the public law right to abode; which therefore proves that the BIOT Orders in Council in 2004 were reasonable.

The *Bancoult 2* case proves that the case of the Chagossians have moved beyond traditional human rights claim to one challenging the sovereign authority of Britian – and would require a far higher standard of claim to be able to override the existing normative position that legislative processes should correct for legal shortcomings, instead of courts acting in place of constitutional authority. Hence, perhaps only *jus cogens* rules could change the outcome of the legal claim.

Regional Responses for Legal Recourse

The Chagossians did not stop at *Bancoult 2*; they went on to bring the case before the European Court of Human Rights (ECHR), under *Chagos Islanders v United Kingdom*. The

[62] Bancoult, Regina (on the Application of) v Secretary of State for Foreign and Commonwealth Affairs (No 2), 61 UKHL (HL 2008).

[63] Stephen Allen, 'Responsibility and Redress: The Chagossian Litigation in the English Courts', in *Eviction from the Chagos Islands: Displacement and Struggle for Identity Against Two World Powers* (BRILL, 2011).

case was deemed inadmissible by the ECHR as the Chagos Islanders have indeed received a further £4 million by the British government in compensation, through a trust fund created as a result of the *Ventacassen* litigation in 1975.[64] The ECHR determined that because the Chagossians did not opt for litigation to determine if their rights had been breached, instead opting for compensation and settlement, their rights to further compensation had since been lost – a variant of the principle of estoppel. To that end, the Court found that no new evidence had emerged since domestic courts took on the case, and therefore the Court found no reason to pursue litigation.

Hence, the regional and domestic consensus concerning this case seems to be uniform – that the Chagossians need to prove a breach of their rights that invalidates any prior agreement, or compensation, that they have entered into.

Relevant International Law

The right to freedom of entry and exit of one's country, as well as freedom of movement within it is also part of international law; specifically, it is enshrined in the International Covenant for Civil and Political Rights (ICCPR), and this coheres with the British courts' ruling that the 1971 BIOT Immigration Ordinance was illegal. While having different explanations for the illegality of the act – one being *ultra vires*, the other due to abrogating a fundamental right of a legally binding treaty that the UK has signed and ratified – the result is that denial of entry to one's own country is illegal both under domestic and international law. The relevant article in the ICCPR is as follows:

[64] European Court of Human Rights, 'Chagos Islanders' Case Inadmissible Because They Accepted Compensation and Waived the Right to Bring Any Further Claims before the UK National Courts' (Registrar of the Court, 20 December 2012).

Article 12.

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Hence, while the British courts may not be able to rule on executive Orders in Council, there may be possible recourse through established conventional law.

Development of the Rights of Indigenous Peoples Pertaining to the Current Claim

There are several legal mechanisms and principles that can – to varying extents – legitimise the challenge to UK treatment of the Chagos Island. One of them involves looking at the Chagos Islands not from a decolonisation perspective, but from an indigenous rights perspective. Regardless of whether British sovereignty over the islands are legitimate, it is possible to question whether the rights of the Chagossians have been properly fulfilled in accordance to international law on the rights of indigenous people.

The standard by which indigenous rights is somewhat different to ordinary rights. While indigenous rights are premised upon universal human rights, they heavily emphasise socio-culturla development of the indigenous culture and are premised upon recognising indigenous peoples as having a separate social identification as an autonomous body; they typically differ from the rest of the population in terms of race, language, and culture.[65] Therefore, the development of indigenous rights includes a push away from colonial-era conceptions of indigenous groups as being uncivilised and therefore unimportant, to having privileged access to land, space to practice their beliefs etc, as many of these are sacrosanct to the indigenous person.

Practically speaking, this manifested in international law breaking down assumptions of sovereignty over indigenous peoples by states, and reocgnising that indigenous actors should also be considered as being a non-state actor – but an actor nonetheless. The decolonisation process provided a good platform to engage in such discourse, but the fear of secession of indigenous groups led states to preclude them from NSGTs, and thus the

[65] Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Hants; England: Ashgate Publishing Limited, 2004).

only legal instruments we have to deal with indigenous rights are the 2007 United Nations Declaration on the Rights of Indigenous Peoples[66] (UNDRIP) adopted by the GA, and the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples, Convention No 169[67] in 1989.

Development of the UNDRIP

The UNDRIP was developed on the backdrop of the work of the UN Economic and Social Council's (ECOSOC) Working Group on Indigenous Populations (WGIP) which started drafting a declaration of indigenous rights in 1985.[68] The result after many years of negotiations with countries afraid that a greater emphasis on indigenous rights would interfere with their sovereignty was the UNDRIP. Even when UNDRIP was voted upon, the four countries with the largest indigenous populations voted against – the United States, Canada, Australia, and New Zealand. This was largely due to a fear of indigenous populations being accorded special rights that were incompatible with their existing state systems – these four states felt that their domestic laws distributed land title and rights in a way contradictory to the UNDRIP, and therefore addressed indigenous rights in a different fashion.

[66] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: *resolution adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html [accessed 15 January 2019]

[67] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, C169, available at: https://www.refworld.org/docid/3ddb6d514.html [accessed 15 January 2019]

[68] Ronald Kakungulu, 'The United Nations Declaration on the Rights of Indigenous Peoples: A New Dawn for Indigenous Peoples Rights?', n.d., 14.

Nonetheless, all four countries have come to consensus that they would accept the agreement and work on making it compatible with their domestic legislation.

The UNDRIP is significant because it is the first text that contains such a wide array of indigenous rights, and was created in consultation with indigenous populations. It is designed as a framework for rights-based dialogue between states, while holding no legal authority.

UNDRIP is relevant to the Chagossians making a claim to their right to abode, as it maintains some fundamental rights, such as in the following articles:

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

> *3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*

The notion that indigenous peoples have a right to their land is especially important due to the fact that traditional lands should be respected or restored, as a means to their physical, cultural and spiritual survival.[69] It is conceivable that the Chagossians could get access to their land on the grounds of it having been violated under customary international law with regards to indigenous rights. The fact that the inhabitants of Diego Garcia and the rest of the archipelago have bene significantly underestimated – but total over 1,700 in 1971 – mean that they have the requisite numbers to be considered indigenous to the Chagos Islands since the 18th century.

Unfortunately, the major obstacle to using the UNDRIP as justification for Chagossian return to the islands is its legal standing. While this is an aspirational statement, a similar document of the ILO Convention 169 has been developed – which is binding – and many state courts and regional courts have also subscribed to, and used, the rights outlined in the UNDRIP.[70]

ILO Convention 169

[69] Geir Ulfstein, 'Indigenous Peoples' Right to Land', *Max Planck Yearbook of United Nations Law Online* 8, no. 1 (1 January 2004): 1–47, https://doi.org/10.1163/138946304775159774.

[70] Sarah Nykolaishen, 'Customary International Law and the Declaration on the Rights of Indigenous Peoples', *Appeal: Review of Current Law and Law Reform* 17, no. 1 (2012): 111–28.

The ILO Convention 169 was the replacement to Convention 109 in 1957, as a means of updating the old convention while removing the ethnocentric tone in the old one. It is a legally binding treaty but is dependent on states signing and ratifying it. This is a struggle, as only 22 states have done so, the majority in Latin America. The UK, US, and Mauritius are all not party to this Convention. The major hurdle to get support for Convention 169 is the inclusion of self-determination principles within it. Nonetheless, it is useful both as a conventional and customary international law.

As it pertains to the Chagossians, Articles 13 and 14 are relevant due to their focus on land rights:

Article 13

"*1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.*

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."

Article 14

"*1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be*

recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."

These articles recognise that titular transfer is not the point in securing indigenous land rights, and instead accords them access rights to the land. The UK government has indeed limited the access rights of the Chagossians, which is enough to constitute a breach of Article 14.

Legal Status of aforementioned Rights

The meta-debate that persists within the Courts through the analysis of the Chagos Islanders' ability to make a claim based on indigenous rights is premised upon whether the UNDRIP or the ILO Convention has made enough of an impact on customary international law to be enforceable by the ICJ.

Grotius and Pufendorf makes no distinction between *jus natural* and *jus gentium* – or natural law and the law of nations – and denies that there is any positive law amongst nations. The Grotian tradition still persists in international law today, and it is obvious that natural rights make up a big part of universal rights. Therefore, indigenous rights are very much in line with the international law project – if it can be normatively described. If international law is about balancing natural rights for various segments of humanity, it would stand to reason that the natural rights of indigenous peoples ought to be defended by international law, based upon general principles of law.[71]

The greater question to consider is whether indigenous rights have been subjected to rigorous and consistent state practice – as well as whether *opinion juris* can be assigned to foundational documents like UNDRIP or Convention 169.

To that end, the Office of Legal Affairs held that there is a distinction to be made between 'declarations' and 'recommendations'; that:

> *"In United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected"*[72]

It could be inferred that the UNDRIP was intended to carry with it some legal weight – even if that was in the long run through continuous state practice.

[71] Karen Engle, 'Indigenous Rights Claims in International Law: Self-Determination, Culture and Development', in *Routledge Handbook of International Law* (Oxon; England: Routledge, 2009), 331–43.

[72] Economic and Social Council, Report of the Commission on Human Rights (E/3616/Rev. l), para. 105, 18th session, 19 March – 14 April 1962.

There have also been past precedence of domestic and regional courts adhering to the standards of UNDRIP.[73] In the US, the emergence of tribal sovereigns in the 20th century was evidence of a state which opposed the UNDRIP actively furthering indigenous rights in accordance to the Declaration. Furthermore, changes to domestic law have been made in Guatemala, where a peace treaty was brokered with indigenous groups; constitutional changes in Brazil; and modifications of common law in Australia. The case of *Cal V Attorney General* in Belize, 2007, further cemented this point when Chief Justice Conteh remarked:

> "*Treaty obligations aside, it is my considered view that both customary international law and general international law would require that Belize respect the rights of its indigenous people to their lands and resources*"[74]

The fact that a domestic court acknowledges the development of customary international law pertaining to indigenous rights furthers the acceptance of *opinio juris* with regards to the fulfilment of indigenous rights.

Finally, the landmark case of the Inter-American Court of Human Rights (IACHR), in its celebrated judgement on the *Awas Tingini v Nicaragua* case, noted that:

> "*Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the*

[73] Sarah Nykolaishen, 'Customary International Law and the Declaration on the Rights of Indigenous Peoples', *Appeal: Review of Current Law and Law Reform* 17, no. 1 (2012): 111–28.

[74] Aurelio Cal v Attorney General of Belize, 18 October 2007, Supreme Court of Belize, Judgement para 127, accessed via www.elaw.org/node/1620

> *fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."*[75]

The IACHR also proceeded to reinterpret the right to property in the Inter-American Convention as applying to indigenous groups as well, adding to international consensus that indigenous groups deserve rights politically and culturally relevant to them, including the ability to be protected by existing laws in a region.[76]

If the argument can be made that indigenous rights now constitute customary international law, there could be a glimmer of hope for the Chagossians, even though it would still have to be weighed against the weight of the intertemporal doctrine.

[75] Birgitte Feiring, 'Indigenous Peoples' Rights to Lands, Territories, and Resources', *International Land Coalition*, n.d., 94.

[76] Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', *European Journal of International Law* 22, no. 1 (1 February 2011): 121–40, https://doi.org/10.1093/ejil/chr007.

CONCLUSION

The history of the Chagos Island case is marked by struggles complicated by political manoeuvring and the existing geopolitical landscape of decolonisation. There are limits to the law, and there are gaps in the law as it was nearly fifty years ago. The goal, therefore, is to navigate these oft-competing principles, to achieve the outcome necessary – and in doing so engage the larger debate of how these principles of self-determination, territorial integrity, and indigenous rights interact with each other; even amongst doctrines of intertemporality and *jus cogens.*